REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

H.C.C.A NO. 12 OF 2014

UGAS SHEIKH MOHAMMED………………………..PLAINTIFF/RESPONDENT

VERSUS

ABDULLAH SAID SALAT……………….1ST DEFENDANT/1ST RESPONDENT

PLUTO PETROLEUM CO.LTD…………2ND DEFENDANT/1ST RESPONDENT

SAMWEL KAUMBUTHU M'AJOGI………3RD DEFENDANT/3RD RESPONDENT

R U L I N G

1. The defendants/applicants through an application dated 12th June, 2014 brought pursuant to Order 40 Rule 7 of the Civil Procedure Rules and Section 1A and 1b,3,3A and 63(e) of the Civil Procedure Act sought inter alia:- that there be stay of the Honorable court orders of 11th June, 2014 pending the hearing and determination of this application, that the court do discharge or set aside the orders of temporary injunction of 11/6/2014 in the interest of justice and fairness and that the application dated 5th June, 2014 be set down for hearing and determination interpartes on its merits.

2. The application is based on the grounds on the face of the application and affidavit in support deponed upon by 1st and 3rd applicants/defendants on their behalf and of 2nd co-applicants. The application is opposed. The respondent/plaintiff filed a replying affidavit in opposing the application dated 17th June, 2014.

3. On 13th June, 2014 the court certified the application urgent and declined to grant orders of stay of the orders of 11/06/2014 pending interpartes hearing and set the application for hearing on 18/6/2014.

4. On 18th June, 2014 Mr. Mwanzia learned advocate appeared for applicants/defendants whereas Mr. Kahiga, learned advocate appeared for the respondent/plaintiff. Mr. Mwanzia learned advocate for applicants/defendants urged that the applicants were duly served with application dated 5th June, 2014. That notice of appearance for defendants was filed on 6/6/2014. Mr. Mwanzia averred that on 11/6/2014 he visited court registry and noted this matter was not cause listed and referred to supportive affidavit referring to annexed cause list of 11th June, 2014. He submitted he learnt later that the matter was called later and exparte orders of injunction confirmed. He urged that the application is in the best interest of the parties and referred to Order

40 Rule 7 of the Civil Procedure and urged applicants were not heard on their own fault and after discovering the court's order they promptly moved the court for appropriate orders and pray the matter be determined on merits. He urged the replying affidavit confirm that the matter was not listed and that justice dictates their be fair play.

5. Mr. Kahiga learned Advocate for the respondent/plaintiff on the other hand opposed the application and stated inter alia, that he was relying on the replying affidavit dated 17th June, 2014 urging the applicants were properly served with the application of 5th June, 2014 but refused to attend court on 11th June, 2014. That the applicants knew the matter was for hearing on 11/6/2014 but failed to attend court though the matter was not listed for hearing; it was prudent for counsel to confirm with the registry and court whether the file was available for hearing on the material date; that the applicants are hiding behind the cause list having failed to attend the hearing, that the respondent did not respond to the application having been served and as such he urged the application should be dismissed for lack of merits.

6. I have carefully perused the application, the affidavits in support and affidavit in opposition as well as the counsel submissions. The issue for consideration is whether the applicants have established sufficient reasons to enable court exercise its discretion in their favour.

7. The respondent/plaintiff filed this suit on 5th June, 2014 together with the Notice of Motion over the issue of partnership between the plaintiff and the defendants/applicants the defendants are yet to file their defence to the plaint and reply to the respondent/plaintiff application. The applicants/defendants thus having appointed an advocate they were not required to attend hearing on 11/6/2014 but there advocate who did not attend court as the matter was not cause listed as shown in the cause list of 11/6/2014 and which fact is not denied by the respondent's counsel. The applicant's counsel having been served with the application was under duty to check with the registry and court whether the matter was to be heard but only checked with the registry. I think in this case the counsel was not diligent enough by failing to find out with the relevant court whether the matter had been placed before court for hearing as the date had been given by court and the matter was under certificate of urgency.

8. The applicants relied on Order 40 Rule 7 of the Civil Procedure Rules which provides:-

"40(7). Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

In the case of **GEORGE MURAYA V ZADOCK A. M. ENANE(2006) EKLR** Hon Kariuki,J, as he then was held:-

"The court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if it does not serve the ends of justice. it must be borne in mind that an injunction order is a discretionary remedy issued to protect legal and equitable rights and where it is issued at an interlocutory stage, it is meant to preserve the subject matter or to maintain the status quo."

Further in the case of **JULIANA CHEPNGENO V ROBERT MUTUIRI THIONGO CIVIL SUIT NO.140/2011** Hon. Lady Justice Omondi quoting from Apaloo J.A(as he then was) in the case of **Phillip Chemwoto & Another V Augustine Kubede(1982-88) KAR 103** noted the judge had posted:-

"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.

The right to fair hearing is a protected right in our Constitution and is a cornerstone of the rule of law. This is why courts inherent jurisdiction should be exercised in a manner that would ensure protection of rights and protection of integrity of the court's process from abuse that would amount to injustice. The court will not on the other hand allow a party to suffer the penalty of not having this case heard and determined on merits due to blunder or mistake of his advocate as after all an advocate is not a party in any case he represents and is not personally affected by the outcome of any case he represents. After all there is no justice in exparte matters where a party who seeks to be heard on his part is denied audience on a technicality.

9. In the **MUHURU BAY FISHERMEN CO-OP UNION SOCIETY LIMITED V CO-OPERATIVE BANK OF KENYA AND ANOTHER CIVIL APPLICATION NO.NAI 205 OF 2012 E. O. O'Kubasu** (as he then was), referred to **MURAI V MURAI NO.4 1982 KLR 38** in which Madan, J.A(as he then was) said at Pp 47-48

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it was committed by senior counsel though in the case of Junior Counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify if it the interests of justice so dictate."

10. Having considered the application, the submissions and the law I am satisfied that a mistake was made by the counsel by failing to ascertain whether the court was ready to proceed with the matter, however as pointed out mistakes will be made, even by angels and an advocate is not even an angel, and as such mistakes should not be used as a gate to shut out the litigants from the corridors of justice. Serious mistakes should not be used as a basis to deny interest of doing justice to parties should always be courts priority number one for failure to do justice breeds contempt and erodes public confidence with court.

11. Having regard to all the circumstances of this matter, I consider that this is a fit and proper case for exercise of my discretion in favour of the applicants. Accordingly, the application is allowed, I order the order dated 11/6/2014 be and is hereby discharged and that the application dated 5th June, 2014 be forthwith set down for inter partes haring on priority basis and determination on merits. The respondents is awarded costs of this application at any event to be taxed or be agreed on conclusion of this matter

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF JUNE, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. MR. Mwanzia for applicants/defendants
2. Mr. Kahiga for the respondents/plaintiffs.

J. A. MAKAU

JUDGE