



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 717 OF 2012**

NICHOLAS MBUGUA WAINAINA ..... PLAINTIFF

VERSUS

SUSAN WANGARI NDUNGU ..... 1<sup>ST</sup> DEFENDANT

MONICA NJERI NDUNGU ..... 2<sup>ND</sup> DEFENDANT

BINS MANAGEMENT SERVICES LTD. .... 3<sup>RD</sup> DEFENDANT

**R U L I N G**

1. The Defendants filed the instant application on 23<sup>rd</sup> August, 2013. It is brought under the provisions of **Order 10 Rule 11, Order 22 Rule 25 and Order 51** of the *Civil Procedure Rules* and **Sections 1A, 1B, 1C and 3A** of the *Civil Procedure Act*. The Applicants seek the following prayers *inter alia*:

**“1. THAT this matter be certified as urgent and heard ex-parte in the 1<sup>st</sup> instance;**

**2. THAT pending the hearing of this application there be and is hereby issued a stay of execution of the decree given on 30<sup>th</sup> July, 2013;**

**3. THAT the interlocutory judgment given on 30<sup>th</sup> July, 2013 be set aside;**

**4. THAT costs be provided for.”**

2. The application is predicated upon the grounds that the Plaintiff requested for judgment on 29<sup>th</sup> July, 2013 and was issued with a Decree on 30<sup>th</sup> July, 2013 despite and notwithstanding that the Respondents had filed and served their Statement of Defence on 7<sup>th</sup> August, 2013 as per Order 7 Rule 1 of the Civil Procedure Rules. It was also contended that they had filed their Memorandum of Appearance on 3<sup>rd</sup> July, 2013 and therefore seek to set aside what they maintain is an unlawful Interlocutory Judgement and subsequent Decree.

3. The application is supported by the Affidavit of John W. Wanjohi sworn on even date. It is contended that the Advocate took over the matter on 2<sup>nd</sup> July, 2013 and filed a Memorandum of Appearance on 3<sup>rd</sup> July, 2013. It is further contended that due to the exigencies of handling two election Petitions, namely *High Court Election Appeal No. 2 of 2013* and *High Court Election*

*Appeal No. 3 of 2013*, the advocate for the Defendant only filed the Defence on 26<sup>th</sup> July, 2013 and served it upon the Plaintiff on 7<sup>th</sup> August, 2013. That notwithstanding, it is averred that the request for judgment in default was made on 29<sup>th</sup> July, 2013, by which date the Defendants' Defence had already been filed. The Plaintiff should thus be restrained from pursuing the execution and await the hearing of the suit on its merits. It is the Defendants' further contention that the Interlocutory Judgment entered herein was unlawful and should be set aside.

4. In response to the application, the Plaintiff/Respondent filed his Replying Affidavit sworn on 7<sup>th</sup> December, 2013. The Respondent contends that the Plaintiff claiming as against the Defendants was filed on 16<sup>th</sup> November, 2012 with summons being served upon the Defendants on 20<sup>th</sup> December, 2012. He contended that the Defendants only filed their Memorandum of Appearance on 3<sup>rd</sup> July, 2013 with the Defence filed on 26<sup>th</sup> July, 2013 which was beyond the prescribed time allowed within which to enter appearance and/or file a Defence. The Respondent further contended that the Defence was belatedly filed without leave or extension by the Court, and therefore the same is not only contemptuous but procedurally irregular, and had been actuated in bad faith aimed at denying the Respondent the fruits of his judgment.
5. In their application to set aside, the Defendants relied on a number of authorities including **H.C.C.C No. 290 of 2005 Hasstings Samuel Otieno Okonja & Another v Stephen Owino & Another**, **H.C.C.C No. 250 of 1999 Joshua Okeyo Ngani v Lion Motor Dealers & Others**, **H.C.C.C No. 426 of 2003 Joyce Wanjeri Gachiri v Dorita L. Macaharia** and **H.C.C.C No. 1109 of 2001 Interconsult Engineers Ltd v Gabriel Mungai & Another**. In these matters, it was determined that the Court's jurisdiction is unfettered, and subject only to the dictates of justice, (see **Hasstings Samuel Otieno Okonja & Another v Stephen Owino & Another**) the Court will not lightly shut out a litigant whose right to defend is fundamental (see **Joshua Okeyo Ngani v Lion Motor Dealers & Another**). However these may be distinguished from the present suit; the first instance refers to filing while the latter refers to service of summons. Both these issues were dealt with in the Ruling on 5<sup>th</sup> July, 2013 of this Court when it was directed thus:

**“The Defendant will file their Defence to the Plaintiff's Plaint within 14 days from today. There will be no need to further mention this matter as it can proceed in the normal way. Costs in the cause.”**

6. Under **Order 10 Rule 11** of the *Civil Procedure Rules*, the Courts have a wide discretion to set aside or vary an ex-parte judgment. In the case of **Patel v E.A Cargo Handling Services [1974] E.A 75** referred to in the decision of Emukule, J in **Joyce Wanjeri Gachiri v Dorita L. Macaharia** (supra), it was reiterated, on appeal, that before the Court sets aside a default judgment, it must be satisfied that there is a good defence and that there was just cause in the delay for appearing and filing defence. **Harris, J.** (as he then was) in **Kimani v McConnel [1966] E.A 547** referred to in the leading decision of **Sir. William Duffus (Patel v E.A Cargo Handling Services)** which further referred to the decision by **Newbold, J.** in **Mbogo v Shah (1968) E.A 93**, reiterated as follows:

**“I agree that where it is a regular judgment, the Court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan, J put it, a “triable issue” that is an issue which raised a prima facie defence and which should go to trial for adjudication.”**

7. The directions by the Court on 5<sup>th</sup> July, 2013 were not followed. The Defendants were accorded the opportunity to file and serve their Defence within 14 days, having entered appearance on 3<sup>rd</sup> July, 2013. As I see it, this Court was giving the Defendants an opportunity to have the issues in contention ventilated and adjudicated by the Court. However, the Defendants went on to file their Defence on 26<sup>th</sup> July, 2013, clearly outside the prescribed time and as directed by Court. In their submissions and previous affidavit in support of their application, the Applicants contended that their advocate was dealing with two Election Petitions, namely High Court Election Appeal No. 2 of 2013 and High Court Election Appeal No. 3 of 2013. This, to the Court, is not a sufficient

tangible and reasonable reason for the delay in filing the Defence as ordered by the Court on 5<sup>th</sup> July, 2013. By any reasonable inference, an advocate should be able to prepare and ensure that all his records are in order, especially as regards Court Orders. The reasons furnished by the Applicants show indolence on their advocate's part, who purported to have been too busy with other matters to deal with the instant suit. However, as was reiterated in **Shah v Mbogo** (supra), the discretion of the Court in such an application is exercised with caution, and only in instances where an injustice or inadvertence is pleaded to the satisfaction of the Court. In the case of **CMC Holdings Ltd v Nzioka (2004) 1KLR**, the Court of Appeal quoted from the High Court decision in **Shah versus Mbogo & Anor. (1967) EA 116** as follows:

**“Applying the principle that the Court’s discretion to set aside an *ex-parte* judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice, the motion should be refused.”**

8. The above was upheld by the Court of Appeal’s decision in **Mbogo & Anor. v Shah (1968) EA 93** and followed in the **CMC Holdings** authority by the Court saying:

**“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set-aside *ex-parte* orders such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such inexcusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. In the case before us, it is our view that the learned Magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant’s unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it could not appear was true or not and if true, the effect of the same on the *ex parte* judgement that was entered as a result of the nonappearance of the appellant and on the entire suit. We do not think the answer to that weighty issue was to advise the appellant of the resource open to it, as the learned Magistrate did here. In our view, in doing so, she drove the appellant out of the seat of justice empty-handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”**

9. With the above guidelines in mind, I don’t think that this court should be unduly concerned as to whether the Defendant’s advocate was late in filing the Defence herein. I do not think that the errors of the advocate should be vested upon the client even to the extent of the inadequacy of the explanation for the delay in the filing of the Defence herein. What I think is of greater import is the validity or otherwise of the Defence that is on record filed on 26th July 2013. I believe that the issues raised in the Defence are worthy of trial particularly as regards whether Mr. Ferdinand Waitatu had authority to commit the third Defendant company to transact business on its behalf especially as regards the sale of L. R. No. Nairobi/Block 127/1, Saika Estate. As a result, I allow the Defendants’ Application dated 23rd August 2013 and set aside the Interlocutory Judgement entered herein on 30th July 2013. The Defendants will also have the costs of their said Application.

**DATED and delivered at Nairobi this 19<sup>th</sup> day of June, 2014.**

**J. B. HAVELOCK**

**JUDGE**