



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
CIVIL SUIT NO 448OF 2009

HOLIDAY BAZAAR LIMITED.....PLAINITFF

VERSUS

COLUMBUS ADVENTURES LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated 15th October 2012 and filed on 16th October 2012 was brought under the provisions of Order 51 Rule 15 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya. Prayer No (1) was spent. It sought the following remaining orders:-
 - a. Spent.
 - b. **THAT pending the hearing and determination of this Application, this Honourable Court be pleased to stay execution of the orders made on 5th October 2012.**
 - c. **THAT this Honourable Court be pleased to set aside the orders of this Court made on 5th October 2012 and allow the Defendant's Director one Deepak Pandit to be orally examined as ordered by the Court earlier.**
 - d. **THAT the costs of this Application be in the cause.**

DEFENDANT'S CASE

2. The application was premised on the grounds that on 13th December 2011, the court ordered that the said Deepak Pandit be orally examined on oath as to the availability of any property or of other means of satisfying the decree herein. However, when the Defendant's counsel arrived in court on 2nd October 2012 after attending **HC Misc 231 of 11** he did not find the Plaintiff's counsel and assumed that the matter had been referred to the registry for the fixing of another date.
3. It was its averment that when its advocates perused the court file on 9th October 2012, it was discovered that the matter proceeded on 5th October 2012 and an order issued to commit the said Deepak Pandit to civil jail for being in contempt of the court orders.
4. It contended that the said Deepak Pandit was present in court on the said date and that the failure

of its advocate to attend court on 5th October 2012 due to misplacing of the Mention Notice by the court clerk was inadvertent and ought to be excused. It also argued that its application was filed without delay and that it was in the wider interest of justice and fairness that its application be allowed.

5. In its written submissions dated 15th May 2013 and filed on 16th May 2013, the Defendant reiterated the grounds on the face of its application and the averments in the Supporting Affidavit of Deepak Pandit.
6. It argued that the said Deepak Pandit had at all material times been ready and willing to table documents regarding its affairs and that it ought not to be condemned unheard or punished for the inadvertent error of its advocate.

PLAINTIFF'S CASE

7. In response to the said application, Anthony Ndegwa Kimani swore a Replying Affidavit on behalf of the Plaintiff on 29th November 2012. The same was filed on 30th November 2012. The Plaintiff contended that the said Deepak Pandit was called but did not respond and that the Defendant's advocate ought to have enquired from the court clerk or from the registry to what transpired in court, which it said was the standard procedure for advocates.
8. It stated that the order for contempt of court was not issued because the said Deepak Pandit was not in court when the order was issued but rather it was because the Defendant had failed to produce audited accounts, balance sheet, profit and loss, cash flow statements and bank statements as had been ordered by the court.
9. The Plaintiff reiterated the averments contained in its Replying Affidavit and emphasised that had the Defendant been willing to comply with the court's orders, it ought to have complied with the court order prior to October 2012 or during the subsistence of the application herein. It submitted that the Defendant had not come to court with clean hands and being undeserving of the protection from the court, its application ought to be dismissed. It placed reliance on the case of **Daniel Kamau Mugambi vs Housing Finance Company of Kenya Limited [2006] eKLR** to buttress its argument in this regard.

LEGAL ANALYSIS

10. It is trite law that a litigant ought not to be condemned unheard and more so because if omissions, commissions or inadvertence of its advocate. The court has power to exercise its discretion judiciously to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. This is a holding that was made by the court in the case of **Shah vs Mbogo & Another [1967]EA 116** .

11. Mutava J who was seized of this matter ordered for the committal of Deepak Pandit on 5th December 2012 and subsequently granted a stay of his orders on 16th October 2012.
12. While the Plaintiff contended that the Defendant would have tabled documents of its affairs, there was no order that required it to produce the same within a particular period. Perusal of Prayer (3) of the Plaintiff's Notice of Motion application dated 16th November 2011 and filed on 22nd November 2011 upon which the order of 13th December 2011 was predicated was not time bound.
13. The court has now moved from determining matters on technicalities. A party's right to access court and to fair hearing is now enshrined in Article 50 of the Constitution of Kenya, 2010. While excusing such inadvertence, mistake or omission so as to ensure a party is afforded a reasonable and fair opportunity to be heard, the court should consider the

prejudice that would be suffered by the party against whom the orders would be granted. It also ought to consider whether the application has been filed timeously.

14.The Defendant filed its application to set aside the said orders on 16th October 2012. That cannot be said to have been inordinate delay. The Plaintiff did not demonstrate what prejudice it would suffer that would not be compensated by an award of damages if the court were to grant the orders that had been sought by the Defendant.

15.Having considered the pleadings, the affidavit evidence and the written submissions, the court finds that this is a fit case for it to exercise its discretion to set aside the orders that had been issued by aforesaid learned judge and allow the said Deepak Pandit to be orally examined as had been earlier ordered. Indeed, Order 51 Rule 15 of the Civil Procedure Rules, 2010 is very clear that the court had powers to set aside any order made *ex parte*.

16.The Defendant cannot, however, be allowed to go scot free and must compensate the Plaintiff for the inconvenience that it has suffered for being set back from executing the decree herein. An award for costs would be adequate in the circumstances of the case herein.

DISPOSITION

20.For the foregoing reasons, the court finds that the Defendant's Notice of Motion application dated 15th October 2012 and filed on 16th October 2012/2013 was merited and the same is hereby allowed in terms of Prayer No (c) therein.

21.The Defendant is hereby ordered to pay the Plaintiff's advocates thrown away costs in the sum of Kshs 5,000/= within fourteen (14) days from the date of this ruling failing which the orders that had been granted by Mutava J on 5th October 2012 will automatically be reinstated with the Plaintiff having the liberty to proceed with execution proceedings against the Defendant but subject to fully complying with the law as far as execution proceedings is concerned.

22.It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of October 2014

J. KAMAU

JUDGE