



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

CIVIL CASE NO. 605 OF 2010

ANNE NJERI MWANGI.....PLAINTIFF

-VERSUS-

NJOMAITHA INVESTMENTS LTD.....DEFENDANT

RULING

1. This is a Ruling on the Chamber Summons Application dated **13th June 2012** and filed in Court on **14th June 2012**. It is brought under Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules as well as Sections 3A and 63 (e) of the Civil Procedure Act. The Application seeks the following orders:-
 1. **Spent**
 2. **This Honourable Court be pleased to set aside the ex-parte proceedings of 23rd May 2012 and order the defendant's application dated 30th January 2012 and the Plaintiff's application dated 8th February 2012 to be fixed for hearing simultaneously on a priority basis.**
 3. **The defendant be denied audience of Court until they comply with the order to deposit Kshs. 50 million in a joint interest earning account as security for this suit.**
 4. **Costs of this application be in the course.**
2. The application is founded on the various grounds as stated on the face of the application and is supported by the affidavits of the Plaintiff and one **PETER MUGO** both sworn on **13th June 2012**.
3. The application is opposed vide the Replying affidavit of **SAMUEL KARIUKI**, an Advocate of the High Court of Kenya, sworn on **22nd June 2012** and filed in Court on even date.
4. The brief facts of this application are that the Plaintiff's application dated 30th January 2012 came up for hearing on 23rd May 2012 and was heard in the absence of the Plaintiff's advocates. Thereafter a ruling was reserved for 11th July 2012. It is these ex-parte proceedings that the Plaintiff seeks to set aside.
5. The Plaintiff's case is that the non-attendance on their part was not intentional but out of an

- innocent mistake by their clerk in the aftermath to a fire incident. In his supporting affidavit, Peter Mugo, the Plaintiff's advocates' clerk averred that he was served with the hearing notice within the defendant's advocates firm. He acknowledged service and carried a copy of the Notice with him. However, the clerk avers that he mistakenly filed the hearing notice together with a letter without diarizing the same in the advocate's diary or recording it in the incoming mail register.
6. The Plaintiff's advocate also attributes the non-appearance of 6th May 2012 and 23rd May 2012 to the fire incidence that burnt down their former offices in Kimathi House as it caused them to lose files, diaries, records and continuity in record keeping.
 7. In opposing the application, it is contended on behalf of the Defendant that the Plaintiff's advocates were aware of the hearing date of 23rd May 2012. The Defendant's advocate avers that he talked to the Plaintiff's advocate, one Mr. Simiyu, on phone and he duly informed him that the Defendant's application dated 30th January 2012 was set to be heard on 23rd May 2012. He further avers that he prepared a Hearing Notice dated 4th May 2012 addressed to the Plaintiff's advocates informing them that the defendant's application was scheduled for hearing on 23rd May 2012. The hearing notice was later served upon the Plaintiff's clerk in the Defendant's offices on 8th May 2012.
 8. It is also averred by the Defendant's advocate that after arguing their application on 23rd May 2012 he received a call from the Plaintiff's advocate seeking to know what had transpired in the matter. He informed the Plaintiff's advocate that the Defendant's application had been heard and the ruling was to be delivered on 11th July 2012. It is therefore the Defendant's case that the Plaintiff's advocate was aware that the matter was coming up for hearing on the material day. It is also the Defendant's case that the hearing notice as appertains to their application was duly served and there is therefore no basis of setting aside the said ex-parte proceedings.
 9. The application herein was prosecuted by way of written submissions.
 10. I have considered the application, the affidavits both in support and opposition as well as the submissions of counsel. Having done so, I take the following view of the matter.
 11. The only issue for determination in this matter is whether this Court should set aside the ex-parte proceedings of 23rd May 2012. The Principles of setting aside are well settled as stated in the often cited case of **Shah Vs Mbogo & Another [1967] E.A.**
 12. The Plaintiff's case is that the non-attendance on their part was not intentional but out of an innocent mistake by their clerk in the aftermath to the fire incident. I will not delve into the issue of the fire incident because the same is not a convincing excuse for non-attendance. The Plaintiff's advocates have not indicated that the operations at their offices came to a halt as a result of the said fire.
 13. It is trite law that the mistake of counsel should not be visited upon the client. In this case the mistake was on the part of the clerk who failed to diarise the hearing notice duly served upon him. I am of the view that the failure to diarise was an act of carelessness and negligence on the part of the clerk. That notwithstanding, the said mistake should not be visited upon the Plaintiff.
 14. However, there are allegations against the plaintiff's advocate to the effect that he was aware of the hearing of the defendant's application scheduled for hearing on 23rd May 2012. The defendant's advocate averred that he spoke to the Plaintiff's advocate on phone regarding the same. It is of great concern that the plaintiff's advocate took the said allegations lightly by not responding to the same at all. This casts a shadow of doubt as to the truthfulness of the Plaintiff's advocate.

15. Be that as it may, I am of the view that the Plaintiff deserves a chance to be heard and that the Defendant will not suffer any prejudice if the said ex-parte proceedings are set aside. I therefore grant prayer No. 2 of the Plaintiff's application.

16. I will not grant prayer No. 3 of the application for to do so will amount to averting justice. This Court has not lost sight of the fact that the defendant has to date not complied with its orders. However, this is not the proper forum to delve into the issue.

17. In the upshot, the Plaintiff's Chamber Summons Application dated **13th June 2012** is hereby allowed in terms of prayer No. 2 only. The costs of this application shall be for the Defendant.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 28th DAY OF JANUARY 2013

E.K.O OGOLA

JUDGE

Present

Simiyu for the Plaintiff/Applicant

Kariuki for the Defendant/Respondent

Teresia – court clerk