REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1394 of 1998

YUSUF GITAU ABDALLAH.....PLAINTIFF

VERSUS

THE BUILDING CENTRE (K) LTD….....1ST DEFENDANT

UBM OVERSEAS LTD.....2ND DEFENDANT

ALIBHAI SHARIFF & SONS LTD.....3RD DEFENDANT

RAFIQ SHARIFF.....4TH DEFENDANT

NOOR SHARIFF.....5TH DEFENDANT

RULING

By a Notice of Motion dated 22nd March 2012 expressed to be brought under the provisions of Section 1A, 3A of the Civil Procedure Act, Order 51, and Order 12 rule 7 of the Civil Procedure Rules, Cap 21 Laws of Kenya and all enabling provisions of the law the Defendants/Applicants seek the orders that:

1. **This application be certified urgent and be heard *exparte* in the first instance.**

2. **There be an interim stay of execution of the judgement and/or decree and/or further proceedings based upon the judgment entered on 23rd February 2012 pending the *interpartes* hearing and determination of this application.**

3. **The *exparte* proceedings held on 17th January 2012 together with all consequential orders herein including the judgement delivered on 23rd February 2012 be set aside and/or vacated.**

4. **In addition to 3 above, the Defendants be given an opportunity to cross examine the Plaintiff on the evidence tendered in court and to adduce their evidence in support of the Defence.**

5. **Costs of this application be in the cause.**

The application is grounded on the fact that the failure by counsel for the Defendants to attend court on 17th January 2012 was inadvertent and occasioned by a clerk in the law firm; that counsel for the Defendants has never failed to attend court on any other occasion that the suit has been in court for hearing; that the failure by the Defendants to attend court was due to the fact that no communication had

been made to them that the hearing was scheduled on 17th January 2012; that the Defendants have a good defence on merits; and that it is interest of justice that the Defendants be accorded an opportunity to be heard on their defence so that a fair determination is made.

The application is supported by affidavits sworn by **Fredrick Ngatia**, **Joel Ndunda Mutala** and **Sabina Agatha Wanjala** on 22nd March 2012.

From the said affidavits the reasons advanced for failure to attend the Court when the matter was fixed for hearing is that there is a procedure in the defendants' advocate's whereby on receipt of a hearing notice the same is to be acknowledged by two persons and minuted in the advocate's diary and the relevant filed brought up for the purposes of communication with the client. In this case the notice was received by one **Sabina Agatha Wanjala** who, however failed to inform the advocate or any other person of the receipt of the said notice. As a result of this omission the law firm neither informed the client that the matter was due for hearing on 17th January 2012 nor was appearance made on behalf of the applicants when the matter came up for hearing. The applicants' advocates only came to learn that the matter had proceeded on being served with a notice of judgement on 20th March 2012. The applicants' firm is, however prepared to pay such thrown away costs as the Court may direct as a condition for setting aside the *ex parte* proceedings. The omission to attend the Court, it is contended ought not to be visited on the client who has in the past attended Court even at short notice and who have cogent defences to the Plaintiff's claims. In a supplementary affidavit sworn by **Mr Ngatia** on 13th April 2012, it is deposed that the correct forum for determination of the issues in this suit is the Industrial Court as statutorily directed by the Employment Act and Labour Institutions Act.

In opposition to the application, the plaintiff swore an affidavit on 4th April 2012 in which he deposed that since he was not aware of the law firm's policy he ought not to be inconvenienced by the firm's internal affairs. According to him the defendants failed to appear for taking a date even after being notified by telephone. In his view the failure to attend the hearing by the advocates was either deliberate or calculated and a gross professional negligence on their part hence inexcusable. According to him the defendants have in the past failed to appear when the matter is fixed for hearing and this is just another excuse meant at subverting and delaying justice. To him, the issue of existence of a defence holds no water as the plaintiff was dismissed without any cause. Further the defendants have consistently failed to furnish list of their witnesses and statements. The averments in the supporting affidavit, it is deposed are offensive and scandalous against his character and the defendants' past conduct has been disrespectful to the Court and meant to subvert justice. To allow the application, according to the plaintiff, would amount to him being further frustrated as it has taken at least 12 years to finally get a hearing and judgement hence the application ought not to be allowed. In his reply to the supplementary affidavit the plaintiff deposes that this Court has jurisdiction to hear and determine the dispute herein.

In his submissions, **Mr Nganga**, learned counsel for the applicants stated there was one aspect of the case that was not brought to the attention of the Judge and this was the fact that at the time the suit was filed in 1998 the Court had jurisdiction to hear the matter but after the New Constitution the jurisdiction of the High Court to entertain the suit was taken away under Article 165(b) as well as section 4 of the Industrial Court Act, 2011. The jurisdiction in matters of employment, it is submitted is vested exclusively in the Industrial Court and that if that issue had been brought to the attention of the Court the learned Judge would have appreciated the fact that the matter ought to have been transferred to the Industrial Court. According to learned counsel, it follows that the proceedings and the judgement therefrom are a nullity and reliance is placed on **Desai vs. Warsama [1967] 1 EA 351**. Purely on this issue of jurisdiction, it is submitted the ex parte judgement ought to be set aside on the authority of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd SCCA No. 2 of 2011**. Without jurisdiction, it is submitted the High Court had no power and the decision in **Jane Francis Anglia vs. Masinde Muliro Eldoret HCCC No. 15 of 2009** is cited in support of this submission. While reiterating the contents of the supporting affidavit counsel submitted that the Court ought not to penalise the applicant on the administrative lapse of counsel moreso as costs can ameliorate the default. Citing **Pithon Waweru Maina vs. Thuku Mugiria 1 KAR 178**, it is submitted that in this case it was not negligence but inadvertence and that counsel would have appeared in Court if the notice had been brought to his

attention. Accordingly, counsel prayed that the application be allowed and the suit be transferred to the Industrial Court.

The respondent on his part submitted that the defendants' advocates having admitted that the fault was theirs the other side ought not suffer as a result thereof. He further submitted that the Judge was fair and that despite having sought for witness statements the same have never been availed. In his view the defendants have been elusive while he keeps suffering. According to him the application has no merit and ought to be dismissed with costs.

Having considered the foregoing the question is whether in the circumstances of this case the Court ought to set aside the *ex parte* judgement. As was held by the Court of Appeal in **CMC Holdings Ltd vs. Nzioki [2004] KLR 173**:

"**In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously…... In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial 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 would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input..... What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed".**

That the decision whether or not to set aside *ex parte* judgement is discretionary is not in doubt. The discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately

sought whether by evasion or otherwise to obstruct or delay the course of justice. See **Shah vs. Mbogo & Another [1967] EA 116**.

In **Remco Limited vs. Mistry Jadva Parbat & Co. Ltd. & 2 Others Nairobi (Milimani) HCCC No. 171 of 2001 [2002] 1 EA 233** the Court set out the principles guiding setting aside *ex parte* judgements as follows:

(i). if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside *ex debito justitiae* (as a matter of right) on the application by the defendant and such a Judgement is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.

(ii). if the default judgement is a regular one, the Court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order 9A rule 10 [now Order 10 Rule 11] of the Civil Procedure Rules.

That the judgement that was entered herein was regular cannot be in doubt. However, in considering whether or not to set aside the default judgement a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie*defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is *prima facie* defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the *ex parte* judgement. See **Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647.**

In this case the defendant's failure to appear in court is attributed to the defendants' legal counsel. That the said counsel adopted an unusual mode of receiving hearing notices is, of course, none of the plaintiff's business. The Court however recognises that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. The broad approach 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 imposing discipline and that a defence on merits does not mean a defence, which, must succeed, but one, which discloses *bona fide* triable issue for adjudication at the trial.

In this case the failure to attend is attributed to the failure to diarise the date and bring the matter to the attention of the advocate. In **Kalemera vs. Salaama Estates Ltd [1971] EA 284** a matter that has striking similarities to the present case, the Court expressed itself as follows:

"the failure to attend at the hearing was due to the fact that the applicant's advocate wrongly diarised the date and immediately he became aware of the error he filed the present application. To treat such mistake as an indication of negligence would be to take an extreme view of the

circumstances. The court prefers to treat the circumstances as arising out of honest mistake...The test to be applied under section 101 which speaks of "the ends of justice" is wider in its terms and permits a greater discretion. Poverty of the excuse is not the sole matter which must be considered, the defence, if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally it should always remembered that to deny the subject a hearing should be the last resort of a court.. In this suit, the plaintiff's claim is for damages for wrongful dismissal. The defendant contends that the dismissal was justified under the terms of the written contract between the parties. Clearly, the circumstances require that the defence be heard on its merits. The defendant is here and is anxious to be put in a position to defend. Looking at the matter from the plaintiff's side, the court does not think that he will be prejudiced or suffer hardship if he can be adequately compensated by costs...The circumstances of this case are such that "ends of justice" require that a rehearing should take place. To avoid any misunderstanding about this conclusion, the court has riveted its attention to the circumstances of the error in this particular case, and not attempted to prescribe a general rule for dealing with all errors because there can be errors and errors involving circumstances of infinite variety."

Accordingly, the reason given for the failure to attend the Court on the hearing date is not altogether unheard of. The second issue is whether the defendants' defence is arguable. The issue whether or not the Court had the powers to hear and determine the case in light of the provisions of Article 162(2) as read with 165(5) of the Constitution cannot at this stage be brushed aside. Article 165(5) provides:

The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

Article 162(2) on the other hand provides:

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

From the foregoing provisions, once Parliament established the two courts, the High Court ceased to have jurisdiction to deal with the two types of cases mentioned hereinabove. Dealing with the issue of jurisdiction the Supreme Court in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Limited and 2 others Supreme Court Application No. 2 of 2011** expressed itself as follows:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. The issue as to whether a Court of law has jurisdiction to entertain in a matter before it is not one of mere procedural technicality; it goes to very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law."

The Court however recognised that:

"A Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately accrued before the commencement of the Constitution."

Therefore the mere fact that this Court has since the promulgation of the Constitution ceased to have jurisdiction to entertain the said two types of cases does not make the cases which were filed in the High Court of the same subject matters a nullity. The Court, however, may direct that such cases be heard by the designated courts.

The question for the purposes of this kind of application is not whether the defences raised by the applicants will succeed but whether they are arguable. In other words the issue cannot, at this stage, be determined to be sham defences. Yes the setting aside of the judgement will inevitably lead to some delay but it is my view that the delay that is likely to be occasioned thereby must be weighed against the denial of an opportunity to the defendant to put forward its case on merits. In considering the exercise of discretion, the Court must consider the risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant and having considered that to opt for the lower rather than the higher risk of injustice. This is the principle of proportionality under the overriding objective. That delay as rightly submitted, may be compensated by an award of costs. It has been said that seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

Taking into account all the circumstances of this case I am satisfied that the justice of the case mandates that the defendant be given an opportunity of being heard. A court of justice, it has been held, has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

I have said enough to show that I find merit in the Notice of Motion dated 4th June 2012. Accordingly, the ex parte judgement entered herein is hereby set aside and this suit is hereby transferred to the Industrial Court for hearing and determination.

In setting aside, the Court is however, required to do so on terms that are just. The terms in question must not only be just to the defendant but to the plaintiff as well. The condition that commends itself to me is that the defendant pays thrown away costs assessed in the sum of Kshs. 15,000.00 within 15 days from the date hereof and in default execution to issue.

Dated at Nairobi this 22nd day of January 2013

G V ODUNGA
JUDGE

Delivered in the presence of

Miss Nyagah for Mr Ngatia for the Defendants/Applicants

Plaintiff/Respondent in person