



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 156 of 2011

SONIA KWAMBOKA RASUGUPETITIONER

AND

SANDALWOOD HOTEL & RESORT LIMITED

T/A PARADISE BEACH RESORT1ST RESPONDENT

LEON MURIITHI NDUBAI 2ND RESPONDENT

RULING

1.The general principle for setting aside judgment for failure to attend a hearing is settled. In *Shah v Mbogo and another [1967] EA 116*, the court noted that the court's discretion to set aside an ex-parte judgment is 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 cause of justice.

2.In the Notice of Motion dated 23rd November 2012, the petitioner seeks to set aside the judgment delivered on 26th October 2012 on the ground that the petitioner's advocates on record deliberately failed to serve court process on the advocates for the respondents but purported to serve the respondent in person.

3.The application is opposed on the basis that the respondents' advocates did not serve the Notice of Appointment on the petitioner's advocates hence causing the service of process to be effected directly on the respondents.

4.I have weighed the arguments on both sides and I consider the respondent's counsel to blame for failing to serve the Notice of Appointment on the petitioner's advocates. The respondent's admit that process was served on them directly yet there was no court attendance. It is therefore possible that the respondents were not aware or were lulled into a sense of belief that their appointed advocate was attending to the matter. In the circumstances the client should not be penalized for the mistake or oversight of its advocates.

5.In the circumstances, I think the proper order is to set aside the judgment on terms. I therefore make the following order;

- (1) The judgment dated 26th October 2012 be and is hereby set aside.
- (2) The respondents jointly and severally shall pay costs of Kshs.60,000/= being costs of the proceedings and application within 7 days.
- (3) The replying affidavit shall be filed and served within seven (7) days from today.
- (4) Mention on 21.03.2013 for directions and further orders as to hearing the petition.

DELIVERED and **DATED** at **NAIROBI** this 8th day of March 2013

D.S. MAJANJA

JUDGE

COURT – Ruling read and delivered in open court.

D.S. MAJANJA

JUDGE

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Ms Oduor instructed by Nungo, Oduor and Waigwa Advocates for the petitioner.

Mr Kinga instructed by Khaminwa and Khaminwa Advocates for the respondent.