REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 282 of 2011

WAKI KENYA LIMITED ..... PLAINTIFF

V

KITAYAMA CONSTRUCTION LIMITED ..... 1ST DEFENDANT

MARWA KEMERO MAISORI .....2ND DEFENDANT

JENIFFER AKOMO MAISORI ..... 3RD DEFENDANT

R U L I N G

1. The application before court is dated **13th March 2012** and seeks the following orders:-

1) *That this application be certified urgent.*

2) *That service of this application be dispensed*

3) *That there be a stay of execution of the Judgement and decree and consequential orders entered against the Defendants in suit pending the inter-partes hearing of this application.*

4) *That there be a stay of execution of the judgement and decree and all consequential orders entered against the Defendants in this suit pending the hearing and determination of this suit.*

5) *That the Judgement and decree and all consequential orders entered against the 3rd Defendants in this suit be set aside forthwith and the Defendants be granted leave to amend their defence in terms of the amended defences attached.*

6) *That costs of this application be provided for.*

2. The application is premised on the grounds set out therein and is supported by affidavit of **JENIFER AKOMO MAISORI** dated **13th March 2012** and that of **MARWA KEMERO MAISORI** of the same date.

3. The application is opposed by a Replying Affidavit sworn by **MICHAEL WAMAE MAINA** dated **26th March 2012**.

4. The brief history of the application is that a Judgement was entered for the Plaintiff in this matter on 27th November 2011 in the sum of Kshs.12,409,070/= plus costs and interests against the Defendants jointly and severally. The Defendants allege that they were never aware of the proceedings and were astonished to learn that judgement had been entered against them. This allegation is made in spite of the fact that the Defendants were represented in court when the application for summary judgement was argued subsequent to which the said judgement was rendered.

5. There have been more than two other applications by both parties including the one dated 16th May 2012 by the Plaintiff and the one dated 28th May 2012 by the Defendants which successfully sought to set aside the *ex-parte* orders issued to the Plaintiff on their aforesaid application dated 16th May 2012. I do not wish to go into the details of these applications as they are on record.

6. For the current application it is submitted for the Defendants/Applicants that at the time of the aforesaid Judgement the Defendants had instructed the firm of Akoto & Akoto Advocates to act for them in the suit, and that the Defendants were shocked to learn that the firm of B. N. Mbuthia on record purportedly represents the 1st Defendant and the firm of Oriaro & Co. Advocates on record purportedly represents the 2nd and 3rd Defendant. They claim further that the Defendants were unaware of the proceedings and are entitled to the orders sought.

7. The Plaintiff/Respondent has denied the Defendants' allegations and has submitted that M/s Akoto & Akoto Advocates were properly on record and ought to have taken care of their client's interests.

8. I have carefully considered the submissions of the parties. The Defendant/Applicants both in their supporting affidavits and in paragraph one of their written submissions dated 22nd March 2013 have admitted that they had an advocate on record by the name of Akoto & Akoto Advocates. That being so, it is not convincingly stated why then their advocates did not carry out their instructions. I am satisfied that having instructed a firm of Advocates, the Applicants interests were deemed to be taken care of.

9. Apparently, however, this was not the case. The issue which I now have to consider is to what extent a party can be punished for the mistakes of its counsel?

10. In the case of **RHINO SAFARIS – VS – NJUGUNA NAIROBI CIVIL APPEAL NO. 320 OF 2005** the court held that the bare allegations by affidavit that the two law firms that acted in the matter had no instructions were not enough. There was no evidence that a complaint had been filed against the firms.

11. However under **Order 51 Rule 15** of the **Civil Procedure Rules** this court has the powers to set aside an order made *ex-parte*. The principles upon which the court exercises this power and discretion were well articulated by the High Court in the case of **PETER LOLWE OMBEE – VS – DALMAS OKATCH [2011] eKLR** where the court observed *inter-a-alia* that the said discretion to set aside the *ex-parte* Judgement is considered to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistakes or errors, but not to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

12. The Judgement sought to be set aside herein is substantial. It is over Kshs.12,000,000/=. The main allegations are against the Defendant's own advocates, and that they were not properly instructed by the Defendants. I have considered the proceedings leading to the said Judgement. They are on the face of it comprehensive. Each party was adequately represented and, in my view, the submissions that the Defendant's advocate was not properly notified are not believable, although it is possible that the Defendants and their counsel may have fallen out. That may have been so, but the court proceedings remain intact.

13. The Judgement the Applicants are seeking to set aside is a regular judgement of the court. It arose out of an application for summary judgement which was opposed by the Defendants. It is a Judgement on merits. I will therefore allow the application on condition that the entire sum now due under the said judgement be deposited in interest earning account in the joint names of the parties' advocates. That account should be opened, and the deposit made within **30 (thirty) days** from the date of this Ruling. The costs of this application shall be for the Plaintiff/Respondent and shall be paid jointly and severally by the Defendants.

These are the orders of the court.

DATED, READ AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Thuo holding brief for Matata for the Plaintiff/Respondent

No appearance for the Defendants

Teresia – Court Clerk