



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 84 OF 2012

BASH HAULIERS LTD. PLAINTIFF

VERSUS

ADRA INTERNATIONAL LTD. DEFENDANT

R U L I N G

1. The Plaintiff has moved this Court by way of Notice of Motion dated 14th December 2012 seeking to set-aside its Orders made on 7 December 2012, issued on 10 December 2012. Such Orders granted the prayers of the Defendant's Notice of Motion dated 21 of November 2012 by reason of non-attendance. The Plaintiff's Application also sought the leave of this Court to file a Replying Affidavit and/or Grounds of Opposition in reply to the said Defendant's Notice of Motion dated 21 November 2012. The Plaintiff's Application is brought under the provisions of **Order 12 Rule 7, Order 51 rule 15** of the *Civil Procedure Rules, 2010* as well as **sections 1A, 1B, 3A and 63 (e)** of the *Civil Procedure Act*.
2. The Plaintiff's Application is supported by the Affidavit of **Taib Ali Taib Bajabir** dated 14 December 2012 which basically confirmed the +Grounds of the Application as follows:

“(a) The non attendance of the Advocate for the Plaintiff was not intentional but was due to accident, inadvertence and or excusable mistakes or errors regarding the date on which the Defendant’s application dated 21st November 2012 was to be heard and determined.

(b) It is necessary to set aside the orders the subject matter of this application so as to avoid injustice and or hardship being visited upon the Plaintiff and or the counsel for the Plaintiff resulting from the accident, inadvertence and or

excusable mistakes or errors stated in (a) hereinabove.

(c) Neither the Plaintiff nor his counsel on record has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

(d) The said accident, inadvertence and or excusable mistakes or errors were purely occasioned by or on the part of the Plaintiff's advocate which accident, inadvertence and or excusable mistakes or errors and the consequences thereof should not be visited upon an innocent litigant.

(e) The Plaintiff's application is in keeping with the court's principle and main concern to do justice to the parties.

(f) The Plaintiff's application herein has been brought without any or any undue delay.

(g) No prejudice or undue prejudice will be occasioned to the defendant in the event the prayers sought are granted which cannot be compensated by an appropriate award of costs.

(h) The defendant's goods the subject matter of their application dated 21st November 2012 have been proclaimed but have not been removed nor sold and are still in the possession of the defendant.

(i) It is in the best interests of justice that this honourable court do allow the prayers sought so as to enable the defendant's application to be heard on its merits and a decision arrived at after an opportunity having been given to the Plaintiff to be heard in opposition of the same".

3. The said Supporting Affidavit by the Advocate on record for the Plaintiff added little further than what was contained in the Grounds of the Application. However, paragraphs 6 and 7 of the said Affidavit saw the tendering of the complete and unreserved apology of the said advocate both to the Court and to the Counsel for the Defendant. Further, the advocate confirmed that the honest and excusable mistake was his and his alone and that the consequences thereof should not be visited upon the Plaintiff. Thereafter, the deponent to the said Affidavit attached a draft copy of the Replying Affidavit of the Plaintiff to the Defendant's Notice of Motion dated 21 November 2012, which he intended to file in response thereto, with the leave of this Court.
4. The Application is opposed and the Defendant filed both Grounds of Opposition as well as a Replying Affidavit to the Plaintiff's Notice of Motion before Court. The Grounds of Opposition detailed that the Plaintiff's said Application was misconceived, bad in law and did not satisfy the

- requirements of **sections 1A, 1B, 3A and 63 (e)** of the *Civil Procedure Act* as well as **Order 12 Rule 7** of the *Civil Procedure Rules, 2010*. The Defendant gave various reasons as to why the Plaintiff's Application seriously prejudiced it, since payment had been made in full with the balance of the Judgement sum Shs. 996,500/- being paid on 29 November 2012. The Plaintiff had not submitted a statement of account reflecting the payments made to date. The Defendant also rejected the Plaintiff's assessment of Party/Party costs estimated at Shs. 589,596.45 and had asked the Plaintiff to tax the same. To date, no Bill of Costs had been prepared by the Plaintiff's advocates for taxation purposes. As to the non-appearance of Mr. Taib, counsel for the Plaintiff, at the hearing of the Defendant's Notice of Motion on 7 December 2012, the Defendant noted that he had enjoyed more than 14 days to file the Replying Affidavit and further, had failed to organise any advocate to hold Defendant counsel's brief. In any event, the Defendant submitted that the Plaintiff's Application had been overtaken by events and no purpose would be served to allow the Plaintiff an opportunity to file a Replying Affidavit to the Defendant's Application dated 21 November 2012, at this late stage. In any event, the Defendant maintained that the Affidavit in support of the Plaintiff's Application was defective and could not be relied upon for being in breach of the provisions of **Order 19 Rules 3 and 6** of the *Civil Procedure Rules*. In that regard, the Defendant maintained that the Affidavit was based on hearsay and there was no source of knowledge or information disclosed to support what it termed "baseless allegations" which were designed purely to waste judicial time. In the Defendant's opinion the matter had now been concluded and the Defendant would be seeking an order for Costs as against the Plaintiff's advocates by the filing of what it termed "serial misconceived and frivolous applications" herein.
5. The Replying Affidavit to the Plaintiff's Notice of Motion dated 14 December 2012 was sworn by one **Frank Kareithi** on 21 January 2013. The deponent described himself as the Human Resources and Administration Manager of the Defendant company. That Affidavit commenced by criticising the handling of the matter by Mr. Taib personally as counsel for the Plaintiff. It stated that there was absolutely no explanation given as to the whereabouts of Mr. Taib as between 23 November and 7 December 2012. The deponent maintained that Mr. Taib had offered no plausible or convincing reasons nor explanations for his not attending Court on the date of the hearing of the Defendant's said Application – 7 December 2012. He also noted that there were 3 other advocates detailed on Mr. Taib's firm's letterhead but still no one had come before Court on 7th of December 2012. The Affidavit continued in this vein as to what Mr. Taib should or should not have done as regards his attendance before this Court. The Replying Affidavit also put forward the viewpoint that there would be no merit in allowing the Plaintiff to file a Replying Affidavit to the Defendant's said Notice of Motion as the principal sum had been paid as per the consent Judgement entered herein on 17 September 2012. As to costs, the Consent Order had been clear and unambiguous to the extent that the Defendant would pay the Plaintiff's costs but if not agreed upon by the parties, the same would be filed and taxed. Thereafter, the deponent set out the Consent Order as arrived at on 17 September 2012. He also set out the details of the payment of the Judgement amount as paid by instalments by the Defendant from time to time noting the final instalment of Shs. 996,500/- paid as above 30 November 2012. The deponent also noted that on 14 November 2012 auctioneers had come to the Defendant's premises and purported to proclaim by attachment, the Defendant's/Applicant's goods. Mr. Kareithi maintained that the Proclamation Notice had been overtaken by events as the full decretal sum had been paid and all that remained was the question of the advocates' taxed costs. He also maintained that the whole process of obtaining the Decree and the Application for Execution was tainted with the illegality in that no draft Decree had been given to the advocates of the Defendant for approval. Further, **Order 21 Rule 9** had been breached as the costs had not been agreed or taxed by the Court. The Replying Affidavit concluded by detailing that the Defendant opposed the Plaintiff's Application seeking for the same to be dismissed with costs.
 6. The Plaintiff's submissions in relation to its Application set out what it was about as well as the grounds on which it was based. It referred to **Order 12 Rule 7** as well as **Order 51 Rule 15** of the *Civil Procedure Rules* under which the Application had been based. The Plaintiff then referred to the two classic authorities as to the setting aside of a Judgement or Order of this Court – **Shah v Mbogo (1967) EA 116** and **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75**. The Plaintiff maintained that the first authority laid down the principle that the Court's discretion to set aside an ex-parte Judgement or Order is intended 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 to obstruct or delay the course of justice. The latter case detailed that the discretion of the Court is unlimited and that its main concern was to do justice to the parties. The Plaintiff then referred the court to a number of authorities including Maina v Mugiria Civil Appeal No. 27 of 1982 (unreported), Diamond Trust of Kenya v Huts & Safaris & 2 others HCCC No. 3654 of 1985 (unreported), Madzayo Mrima & Co, advocates v Kenital (K) Ltd Misc. Appl. 472 of 2012 (2012) eKLR, Leonard Kariuki v Fuelex Kenya Ltd HCCC No. 610 of 2004 (2012) eKLR, Gati Kago v Stephen N. Kigoche HCCC No. 2233 of 1995 (2005)eKLR as well as Waki Kenya Ltd v. Kitayama Construction Ltd (2012)eKLR

7. The Plaintiff submitted that that there was no doubt that an Order barring it from executing the consent Judgement as against the Defendant would mean that the Plaintiff would be prevented from ever realising the fruits of its Judgement. The Plaintiff maintained that such would be an injustice against it that was triggered by an omission to attend court by its advocates, most likely arising from accident, inadvertence or excusable mistake/error. It was clear from the grounds of the Application and the supporting Affidavit that the Plaintiff did not intend to act maliciously in order to delay or obstruct the course of justice. Such was an honest mistake and an inadvertent one at that, therefore the Motion should be allowed. The Plaintiff went such on to say that there had been many nasty and false allegations made by the Defendant against it and consequently, it should be given a chance to explain each and every one of the same. In concluding its submissions, the Plaintiff sought the Orders prayed for what it called the following further reasons:

“a) The law states that the discretion of the court is unlimited and that the main concern of the court is to do justice to the parties.

b) Further, that the court will not impose conditions on itself or fetter the wide discretion given by the rules. There are no limits to a Judge’s discretion.

c) The main concern of the court is to do justice and in fact the very purpose of the said discretion and its unfettered nature is designed and intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error.

d) That at all times, a court of justice should aim at sustaining a suit or application so that it is heard and determined on merits.

e) That to deny a subject a hearing should be the last resort of a court.

f) That even the failure of the Advocate to organize his diary or to arrange for a colleague to attend on his behalf should not justify the court in visiting the Advocate’s shortcomings on the client, especially where a reasonable explanation has been offered.

g) As far as where it is practicable, the court must place parties on an equal footing by applying the overriding objective as approved by the Court of Appeal.

h) That the courts always decide to exercise their discretion in favour of the applicants, and allow him a chance to put his case, so to speak, to a judge to decide.

i) The respondent has not demonstrated that it will suffer any prejudice if the orders sought are granted or that it would suffer any loss that cannot be compensated for by way of costs”.

8. The Defendant’s ears submissions as regards the Plaintiff’s said Application dated 14 December

2012 opened by comprehensively detailing the substance of the Application, the parties, the pleadings and documents before embarking upon the Grounds of Opposition that it had put forward on 21st January 2013. It set out the grounds of Opposition as above but concentrated on the Statement of Account which, according to the advocates, it finally obtained from the Plaintiff's advocates on 1 February 2013, drawn up to 31 December 2012. The statement showed that the said advocates had forwarded the sum of Shs. 2 million to their clients on 4 March 2012 and a further Shs. 5 million on 27 December 2012. As a result, there was an alleged balance said to be due and owing of Shs. 216,500/-. It was the Defendant's advocates submissions that the advocates for the Plaintiff deliberately held on to monies that had been forwarded to them for onward transmission. The Defendant submitted that the decretal sum herein had been paid leaving a balance due as at 9 November 2012 of Shs. 996,500/-. This amount had been paid vide the said Advocates' letter dated 29 November 2012. The Defendant then dwelt upon the question of Party/Party costs and noted that the amount claimed by the Plaintiff in that regard being Shs. 589,596.45 had not been agreed by the Defendant. The Consent order entered into between the parties had detailed that in event of disagreement in relation to the amount of the costs, the same should have been taxed. The Defendant then visited its said Notice of Motion dated 22 November 2012 which was served on the same day. It maintained that the Plaintiff's advocates had had adequate notice of the hearing of the same and wondered why Mr. Taib had not instructed other advocates in his firm to attend in his place before Court. The Defendant maintained that the mistake of the advocate was not excusable and referred the court to **Thriffs Homes Ltd v Kays Investments Ltd HCCC No. 1512/98 (unreported)** as well as **Madison Insurance Company Ltd v Makori Civil Appeal No. 10 of 2003** and **Kimani v McConnell & Anor. (1996) EALR 547.**

9. I did not quite understand the reference of the Defendant as regards the Plaintiff's said Application that it did not disclose any triable issues. Such are more relevant to striking out pleadings rather than applications of this nature. The Defendant also dwelt upon the Proclamations of Attachment which it maintained were void *ab initio*. It made the point however that there was no useful purpose served by allowing the filing of the proposed Replying Affidavit as such would involve the Defendant (and indeed the Plaintiff) in additional and unnecessary costs of the litigation. However, the Defendant submitted that there was a real risk that the Plaintiff could proceed with an illegal attachment process. The Defendant went into the conduct of the Plaintiff and/or its advocates before and after 7 December 2012. I found such submissions by the Defendant both unnecessary and irrelevant. Similarly, the Defendant's critical submissions of the Supporting Affidavit did not, in my opinion, lend any assistance as to the determination of this matter. However, what was of relevance to the Application was the Defendant, setting out in its submissions, the terms of the Consent Order entered into between the parties 17 September 2012. I was somewhat surprised that having arrived at such a composite consent Order, the parties to this suit or their advocates have allowed the amicable position to deteriorate. To my mind the pertinent money paragraphs of the Consent Order detail as follows:

“c) Judgement to be entered in favour of the Plaintiff for Kshs.7,216,500.00. The Court to take notice that the defendant has paid Kshs.4,000,000.00 to date and balance due of Kshs.3,216,500.00.

d) The balance of Kshs.3,216,500.00 to be paid as follows:

- i. The Defendant will pay to the Plaintiff a sum of Kshs.1,000,000.00 on or before 30th September 2012;**
- ii. The Defendant will pay to the Plaintiff a sum of Kshs.1,000,000.00 on or before 31st October 2012;**
- iii. The Defendant will pay to the Plaintiff a sum of Kshs.1,216,500.00 on or before 30th November 2012 as full and final payment of the Decretal Sum.**

e) The Defendant to pay the Plaintiff's costs and collection charges, and if

not agreed upon by the parties, the Plaintiff to file the Bill of Costs”.

10. The other relevant submission from the Defendant was paragraph 43 as to what it had actually paid. The same reads as follows:

“43. THAT consistent with the above Consent, the Defendant/Applicant paid the following sums to liquidate the sum of Kshs.3,216,500.00.

- a. **On or about 28th September 2012, Kshs.1,000,000.00 (Kenya Shillings One Million).**
 - i. **Cheque Number 54339 post-dated 3rd October 2012 for the sum of Kenya Shillings Five Hundred and Twenty thousand Only [Kshs.520,000.00]; AND**
 - ii. **Cheque Number 54340 post-dated 3rd October 2012 for the sum of Kenya Shillings Four Hundred and Eighty Thousand Only [Kshs.480,000.00]; drawn in favour of your firm “Taib A. Taib Advocates” being Fourth Instalment towards liquidating the principal sum.**
- b. **On or about 9th November 2012, Kshs. 1,220,000.00 [Kenya Shillings One Million Two Hundred and Twenty thousand] as hereunder:**
 - i. **Cheque Number 581104 dated 12th November 2012 for the sum of Kenya Shillings six Hundred and Eighty Thousand Only [Kshs.680,000.00]; AND**
 - ii. **Cheque Number 581105 dated 12th November 2012 for the sum of Kenya Shillings Five Hundred and Forty thousand Only [Kshs.540,000.00]; drawn in favour of your firm “Taib A. Taib Advocates” being Firth Instalment towards liquidating the principal sum.**
- c. **Therefore the total payments made to-date in the total sum of Kshs. 2,220,000.00 and the balance due being Kshs. 999,500.00 as at 9th November 2012.**
- d. **The Final Instalment Kshs. 999,500.00 was due on or about 30th November 2012 as full and final payment of the Decretal Sum. The Defendant settled this Final Payment vide its advocates letter dated 29th November 2012.**

The Honourable Court is invited to consider annexure marked as “FK 3” at Pages 27 to 30 being copies of the said letter and cheques duly acknowledged as received by the Plaintiff’s Counsel on 30th November 2012”.

The remainder of the Defendant’s submissions cannot assist the Court for, in my opinion, they covered much the same ground as it had referred to Court before. It commented upon what it termed the wrongful attachment which took place on 14 November 2012 after 5 p.m. as well as the proposed Replying Affidavit annexed to the Plaintiff’s Supporting Affidavit. At page 20 of its submissions, the Defendant commented upon its authorities as listed above and distinguished the Plaintiff’s list of authorities from its own. Finally, the Defendant summed up by saying that there would be no merit in the Plaintiff being allowed to file a Replying Affidavit as the Principal sum has been paid albeit a few days delay in compliance. It noted that the balance due as at the date of the Proclamation with Shs. 996,500/- yet the auctioneers were claiming the sum of Shs. 3,808,546.45. The Defendant also applied to strike out of paragraphs 4, 5, 6 and 9 of the Supporting Affidavit of Mr. Taib Bajabir as being hearsay and consequently defective.

11. **Order 12 rule 7** reads:

“where under this Order judgement has been entered or the suit has been dismissed,

the court, on application, may set aside or vary the judgement or order upon such terms as may be just.”

As such I do not quite understand the Application of the Plaintiff for determination before this Court. I entered consent Judgement between the parties on 17 September 2012. I did not contemplate that the Plaintiff’s Application has been one for setting aside that consent Judgement. It is an Application to set aside Orders made by this Court on 7 December 2012. Consequently, I believe that the Plaintiff, by bringing it under **Order 12 Rule 7**, has come before this Court under the wrong Order of the *Civil Procedure Rules, 2010*. However, the Application is also brought under the provisions of **Order 51 Rule 15**. That Rule reads:

“The court may set aside an order made *ex parte*.”

It seems therefore that under this Rule the Plaintiff’s said Application is properly before Court. However, the cases to which the Plaintiff referred the court being **Maina v Mugiria, Diamond Trust of Kenya v Huts & Safaris, Kariuki v Fuelex Kenya Ltd, Kago v Kigochi and Woolworths Ltd v Nakumatt Holdings Ltd & 2 Ors** (all supra) involve the setting aside of default judgements and consequently, to my way of thinking, inapplicable to the matter before me. The same must necessarily be said for the case cited to me by the Defendant being **Jesse Kimani v McConnell & Anor** (supra) which also involve the setting aside of a default judgement. The other two authorities cited by the Defendant being the **Thrift Homes and Madison Insurance** cases (again supra) covered the conduct of advocates in relation to their clients’ cases which I did not consider to be particularly useful in this context. Of course, **Shah v Mbogo** as well as **Patel v East Africa Cargo Handling Services Ltd** (both supra) were cases in relation to the exercise of the discretion of this Court, such being not limited.

12. The case of **Waki Kenya Ltd** is relevant to the extent that the Orders of the Court contained therein were *ex-parte* since the defendant’s advocates did not attend court. As a result, the defendant in that suit filed an application seeking to set-aside the *ex parte* Orders obtained. My brother **Mutava J.**, in that case, found that the Court had an unfettered discretion to set aside the *ex-parte* judgement, provided that in so doing, no injustice is occasioned to the opposing party. The Judge quoted from the case of **Muthaiga Road Trust Company Ltd v Five Continents Stationers Ltd & 2 Ors, Civil Appeal No. 298 of 2001** in which the learned Judges of the Court of Appeal detailed:

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”

Over and above this observation, I received considerable assistance from the finding of my learned brother **Odunga J.** in the **Madzayo Mrima & Co., Advocates** case (also supra) as regards to which Order of the Civil Procedure Rules such an application, as presented to this court by the Plaintiff, should come under. The Judge had this to say in that connection:

“Implicit in that decision, in my view, is that a dismissal of an application for non-attendance does not fall under Order 12 rule 1 but such a dismissal was undertaken under the inherent powers of the court. Accordingly the applicant was correct in basing the present application on Order 51 rule 15 of the Civil Procedure Rules.

The court, no doubt has powers to make such orders as may be necessary for the ends of justice. In this case it is not disputed that counsel for the objector was before another court at the time the application sought to be reinstated was dismissed. The decree holder’s argument that the objector’s advocate’s diary should have been organised in such a way as to avoid appearance in two courts at the same time is not realistic. Advocates do not choose before which Judge their matters are to be fixed so that they can arrange to be before a particular Judge in respect of all their matters. It is true that where an applicant finds himself in a situation where his matters are fixed

before different courts he should get a colleague to hold his brief and inform the court of the fact. However, the mere fact that this was not done, and especially where a reasonable explanation has been offered, should not justify the court in visiting the advocate's sins on the client."

13. Although the principles as expounded in Shah v Mbogo and Patel v E. A. Cargo Handling Services cases were in relation to setting aside default judgements, the principle that a court should follow in exercising its discretion in setting aside an *ex parte* Order ought to be the same in that:

"(it) is intended 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 course of justice."

Such principle is now of course well founded in statute by the provisions of **section 3A** of the *Civil Procedure Act* which reads:

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

Whereas there is no denying such principle, the legislature sought fit to also pass **sections 1A and 1B** of the said Act as to the overriding objective of the Act as well as the handling of all matters presented before Court.

14. With these sections in mind, this Court needs to look at the objective of the Plaintiff's said Application before it. In that regard, it seeks to set aside the Orders made by Court on 7 December 2012. Those Orders were as follows:

- "1. THAT a stay of execution of the Consent Judgment entered on 17th September 2012 between the Plaintiff and the Defendant and/or a stay of the execution of the purported Decree/Warrants of Attachment and/or Proclamation by the Plaintiff/Respondent whether through attachment of the Defendant/Applicant's movable or immovable property or otherwise.**
- 2. THAT a stay of execution of the Decree/Warrants of Attachment and/or Proclamation by the Plaintiff/Respondent whether through attachment of the Defendant/Applicant's movable or immovable property herein pending the hearing and determination of the Defendant/Application's application herein be and is hereby granted.**
- 3. THAT any orders for warrants of attachment and sale of the Defendant/Applicant's movable and immovable property in execution of the said Decree and any Proclamation of the Defendant/Applicant's goods by the Plaintiff/Respondent and or any Auctioneers be and are hereby set aside.**
- 4. THAT the goods which have been seized and/or proclaimed to be attached by Messrs. Legacy Auctioneering Services, Auctioneers acting on the instructions of the Plaintiff/Respondent be and are hereby restituted forthwith to the Defendant/Applicant..**
- 5. THAT the Plaintiff/Respondent's Advocates Messrs. Taib & Taib be and is hereby personally ordered or condemned to pay for all the costs incurred by the Defendant/Respondent arising out of the illegally tainted and fraudulent instructions issued to the Auctioneers to levy attachment and execution of an otherwise defective and illegal Decree.**

6. THAT costs for the Defendant”.

I am satisfied from paragraph 12 of the Replying Affidavit of the said **Frank Kareithi** sworn on 21 January 2013 that the consent Judgement sum of Shs. 3,216,500/- has been liquidated by various payments by the time the Defendant's Notice of Motion dated 21 November 2012 came for hearing *inter-partes* on 7 December 2012. As a consequence of which I see no prejudice to the Plaintiff in allowing Orders Nos. 1, 2, 3, 4 and 6 to remain in place. It does not meet the justice of this case to allow execution Orders to remain as a result of the consent Judgement sum having been paid. However, I can see that the advocates for the Plaintiff may have some objection to Order No. 5 and accordingly I grant the Plaintiff's Application dated 14 December 2012 in that regard only. The Plaintiff will be granted leave to file and serve a Replying Affidavit and/or Grounds of Opposition as regards that one Order arising out of the Defendant's said Notice of Motion of 21 November 2012. The *inter-parties* hearing in that regard will be on 29 July 2013. In all the circumstance of the matter, I make no order as to costs of the Plaintiff's said Application.

DATED and delivered at Nairobi this 19th day of June, 2013.

J. B. HAVELOCK

JUDGE