



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO. 352 OF 2012

SHIVA CARRIERS LIMITED APPLICANT

V E R S U S

NOAH NJIRI OPEMBE RESPONDENT

RULING

1. The Applicant was the Defendant in the lower Court case namely **Mbsa SRMCC No. 3291 of 2009**. The applicant has approached this Court with a Notice of Motion dated 19th October 2012. It seeks two prayers one is that this Court be pleased to enlarge time within which the Applicant can file its appeal from the Judgment of the lower Court case. The second is that this Court be pleased to admit out of time the Applicant's Memorandum of Appeal.
2. Although the Applicant does not state when the lower Court judgment was delivered it does state that the lower court delivered its judgment in favour of the Respondent for Kshs. 500,000/-. The Applicant deponed further that the proceedings of the lower Court proceeded in unclear circumstances under which the applicant was not given an opportunity to defend itself. That at some stage, the lower Court file went missing and at one time there were two skeleton files existing together with the original file. That the lower Court issued a notice for delivery of its judgment on 25th January 2013 but the same was not delivered on the same date. In that regard, the Applicant deponed in its supplementary affidavit dated 21st June 2013 as follows-

“That it is clear from the facts that the primary suit after loss of the original court file was conceived, initiated, prosecuted and determined without the slightest knowledge of the Applicant/Defendant Company.”
3. When however I consider that deposition I find it has a disconnect with the documents attached to the Respondents replying affidavit dated 5th June 2013. Those documents show that the firm of Applicant's Advocates was consistently served with the Hearing Notices whenever the lower court matter was adjourned. More particularly that firm was served with a notice of the delivery of the lower Court judgment on 14th August 2012. But perhaps what is more intriguing and does not explain why the Applicant delayed in filing the present appeal is that it began through its advocates to negotiate by correspondence what the Respondents advocate had calculated as the decretal sum. This can be seen in the Applicant's advocate's letter dated 28th September and 2nd October 2012. Both letters say the same thing. Those letters are in the following terms-

“Our Ref: JMM/F/64/64/2009

Your Ref: JK/CIV/021/2008

Date: 28th September, 2012

Kanyi J. & Company

Advocates

Mombasa.

Dear Sir,

RE: SRMCC NO. 3291 OF 2009

NOAH NJIRI OPEMBE

-VS-

SHIVA CARRIERS LIMITED

The above matter refers and your judgment notice dated 25th September, 2012.

Kindly note that we dispute your inclusion of Mention fees, Commissioning, Affidavit of Service and the number of Court attendances in your tabulation of costs.

Kindly adjust your tabulation to remove the same and peg Court attendances at 6 times.

Meanwhile, kindly grant a stay of forty five (45) days to enable us advise our client on the same.

Kindly confirm.

Yours faithfully,

J. M. MAKAU & CO. ADVOCATES,

J. M. MAKAU.

4. What seems to be clear is that judgment was entered in favour of the Respondent after the Applicant for whatever reason failed to offer a Defence. The Applicants seem to have known of that judgment at least as far back as September 2012. The Applicant however delayed until 19th October 2012 to come to this Court with the present application. But much more than that and was rightly submitted by the Respondent's Counsel, the Applicant did not file an application before the lower court seeking the setting aside of its judgment and seeking to be allowed to offer its Defence. The Applicant in my view put the horse before the cart when it approached this Court. It has filed the application seeking to file an appeal against a judgment where it did not offer a Defence. What the Applicant seeks this Court to do is to set aside that judgment and to order that the lower court do permit it to offer its Defence. The question then that I would ask is did the lower court refuse such an application? The answer is No. The Applicant did not file such an application before the lower Court and the lower Court therefore was not given an opportunity to consider whether the Applicant had merit in such a prayer. What the Applicant seeks from this Court is that this Court would do what the lower Court should have done. This is even evident from the deposition of the Applicant in its Supplementary Affidavit where it stated thus-

“12. That I am informed by my Advocates which information I verily believe to be true

that:-

- i. *The Defendant Company's Statement of Defence raises triable issues which should and can only be determined during full trial.*
- ii. *It is just and fair to have this matter determined on merits and not on technicalities;*
- iii. *The Plaintiff will not suffer any prejudice."*

5. Those depositions would in my view have been suitable to an application brought before the lower Court under Order 12 rule 7 of the Civil Procedure Rules 2010. This rule provides as follows-

"Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just."

The Court mentioned in that Rule is the lower Court.

6. Judgment was entered for the Respondent after the lower Court was satisfied that the provisions of Order 12 rule 2 had been complied with. The Court must have considered Order 12 rule 2(a) which provides-

"2. If on the day fixed for hearing, after the suit

has been called on for hearing outside the Court, only the Plaintiff attends, if the Court is satisfied-

(a) That notice of hearing was duly served, i may proceed ex parte."

7. The lower Court must have satisfied itself of the above rule and having proceeded to hear the Respondent's case in the absence of the Applicant the only avenue that was open to the Applicant was to move in that very same Court for orders to set aside the judgment and for the Defence to be received by that Court. The Court that is mentioned in Order 12 Rule 7 as stated before is the lower Court in this regard. The Applicant is simply in the wrong Court.

8. It is for that reason I find there is no merit to the Applicant's application. The Notice of Motion dated 19th October 2012 is hereby dismissed with costs to the Respondent.

Dated and delivered at Mombasa this 20th day of September, 2013.

MARY KASANGO

JUDGE