



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 742 OF 2010

PETER NJOROGI MUKUNGA.....PLAINTIFF

VERSUS

FRANCIS GITHINJI WANDIA DEFENDANT

RULING

1. I have before me the defendant's notice of motion dated 8th June 2011. The defendant prays that the order of this court made on 4th April 2011 be reviewed and that there be a stay of all subsequent orders. The application is expressed to be brought under orders 12, 45 and 51 of the Civil Procedure Rules 2010 as well as section 1A, 1B and 3A of the Civil Procedure Act. There is annexed a deposition sworn by Wandugi Kiraithe on the same date.

2. On 4th April 2011, a chamber summons application by the plaintiff was heard ex parte. The defendant was not present because his counsel avers that there was confusion whether the matter was in this division or at the Central Registry of the High Court. The applicant says he had filed grounds of opposition that demonstrate his willingness to defend the chamber summons. He thus avers that the order granted on 4th April 2011 was made in error as he was condemned unheard. In particular, the applicant states that there was material non-disclosure to wit: the subordinate criminal court at Makadara had made orders to preserve the suit vehicle; and that the order requiring deposit of Kshs 830,000 was premature, harsh and oppressive.

3. The plaintiff has urged one ground of opposition in a statement dated 20th February 2012. It is submitted that the application is misconceived, incurably defective and an abuse of court process. The plaintiff submitted that no sufficient grounds were placed before the court to anchor the prayers for review. The plaintiff prayed that the motion be dismissed with costs.

4. I have heard the rival arguments. My view is as follows. The plaint was filed on 9th November 2010. The court stamp on it clearly shows it was filed at the Milimani registry of the High Court. The material chamber summons application by the plaintiff dated 14th February 2011 clearly shows it was filed in this registry.

5. For reasons that the applicant assigns to confusion, the notice of appointment of advocates (undated) and the grounds of objection dated 19th January 2011 were filed at the High Court Central Registry. It is thus fairly plausible that the defendant or his counsel were genuinely mistaken about the locus of the

hearing on 4th April 2011. The court thus proceeded to make ex-parte orders without hearing the defendant.

6. This court has wide and unfettered discretion to set aside an ex-parte order. As stated in *Shah Vs Mbogo* [1967] E.A 116, the discretion “is intended so to be exercised to avoid injustice or 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”. That decision of Harris J was sustained by the Court of Appeal in *Mbogo and another Vs Shah* [1968] E A 93. See also *Kimani Vs Mc Connell* [1966] E A 547. I am unable to say from the depositions and submissions that failure by the defendant or his counsel to appear in court on 4th April 2011 was deliberate or calculated to defeat justice. Considering that the court ordered a deposit of Kshs 830,000 in respect of the suit vehicle that was also the subject of a competing order for preservation of the vehicle by the subordinate criminal court, it is desirable that the defendant be heard.

7. In the result, I shall allow the defendant’s notice of motion dated 8th June 2011. I hereby set aside the order of court of 4th April 2011 in its entirety. I instead order that the plaintiff’s chamber summons application dated 14th February 2011 be fixed for inter-partes hearing on a date to be taken at the registry. I will however grant the plaintiff costs of this motion.

It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of April 2012

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

No appearance for the Defendant.

Collins Odhiambo – Court clerk.