



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**Civil Suit 282 of 2011**

**WAKI KENYA LIMITED.....PLAINTIFF**

**-VERSUS-**

**KITAYAMA CONSTRUCTION LIMITED.....1<sup>ST</sup> DEFENDANT**

**MARWA KAMERO KAISORI.....2<sup>ND</sup> DEFENDANT**

**JENIFFER AKOMO MAISORI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application before the Court is a Notice of Motion dated 28<sup>th</sup> May 2012. It is brought under Section 3A of the Civil Procedure Act, Order 22 and Order 51 Rules 1, 3 and 15 of the Civil Procedure Rules. The application seeks the following main orders:-

- 1) That this honourable court does hereby set aside its *ex- parte* order of 22<sup>nd</sup> May 2012.
- 2) That the defendants application dated 13<sup>th</sup> March 2012 be heard urgently on its merits.
- 3) That in the alternative and without prejudice to the foregoing the defendants/respondents be and are hereby granted leave to file replying affidavits and/or grounds of opposition in reply to the plaintiff's application dated 16<sup>th</sup> May 2012.
- 4) That the costs of this application be provided for.

2. The application is supported by the affidavit of FESTUS MWITI KINOTI sworn on 28<sup>th</sup> May 2012. The application is based on the grounds enumerated on the face of the application.

3. The application is opposed vide a replying affidavit of GETRUDE MATATA sworn on 25<sup>th</sup> June 2012.

4. The brief history of the application is that on 22<sup>nd</sup> May 2012, the Court allowed the plaintiff's application dated 16<sup>th</sup> May 2012 with costs to the plaintiff. The said orders were *ex parte* since the

defendant's advocate did not attend court. As a result, the defendants' counsel has filed the instant application seeking to set aside the said orders.

5. The defendants case is that, on 16<sup>th</sup> May 2012 they were served with an application by the plaintiff dated the same day and coming up for hearing on 22<sup>nd</sup> May 2012. The defendant submits that the said application was received under protest and it was indicated on the hearing notice served, that the date was not convenient. The defendant also submitted that the hearing notice was too short as it gave the defendants 5 clear days within which to put in their reply contrary to **order 51 rule 13 (3)** which provides that:-

**“The application shall be served on respondent together with list of authorities if any, not less than seven days before the date of hearing.”**

6. The defendant further submits that, on 22<sup>nd</sup> May 2012 when the plaintiff's application dated 16<sup>th</sup> May 2012 came up for hearing, the defendant's counsel was unable to attend the hearing as he was engaged in another matter in Machakos. The defendant indicates that, he sent another counsel to hold his brief but the said counsel arrived late only to find that the plaintiff's counsel had proceeded with the application *ex-parte* and the application had been granted.

7. The defendant also argues that their application dated 13<sup>th</sup> March 2012 should be heard on merits and that if the said *ex-parte* order is allowed to stand, it would cause the defendants immense hardship and grave injustice. Counsel for the defendants cited a number of authorities in support of their application among them, **SHAH vs MBOGO & ANOTHER (1967) E.A 116**.

8. The plaintiff/respondent in their submissions state that they rely on the affidavit in reply and on the record of the court regarding the general conduct of the plaintiff's case ever since the current firm came on record. The plaintiff also urges the court to consider this application as an abuse of court process. The plaintiff's submissions essentially condemn the defendants' conduct in the said matter since they came on record. The plaintiff also claims that the instant application has not been brought with clean hands.

9. Having carefully considered the application herein, the affidavits and submissions both in support and opposition of the application, the issue for determination by this court is whether the defendants have established a case to entitle this court to set aside the *ex-parte* order.

10. I am aware of the principles of setting aside *ex-parte* judgment as stated in the case of **SHAH vs MBOGO & ANOTHER (1967) E.A 116**. I am also aware of the principle that the mistake of counsel should not be visited upon the client.

11. From the evidence on record, it is clear that the plaintiff's application dated 16<sup>th</sup> May 2012 and served on the defendants on the same day was received under protest for the reason that the hearing date was not convenient for the defendants' counsel. The defendants' counsel also states that he was unable to attend court on the material day as he had another matter at Machakos. I am inclined to give the applicant/defendants the benefit of doubt. The application was also made in time, being that the *ex-parte* order was entered on 22<sup>nd</sup> May 2012.

12. This court has unfettered discretion to set aside the *ex-parte* judgment, provided that in so doing, no injustice is occasioned to the opposing party. In the case of **MUTHAIGA ROAD TRUST COMPANY LIMITED –VS- FIVE CONTINENTS STATIONERS LIMITED & 2 OTHERS, CA NO. 298 OF 2001**, the learned judges said:-

**“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.”**

In addition, 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 damages. In view of the

foregoing and in the interests of justice I allow this application under overriding objective of this court.  
There will be no order as to costs of this application.

IT IS SO ORDERED.

**DATED, DELIVERED AND SIGNED THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2012**

**J.M MUTAVA**

**JUDGE**