



**REPUBLIC OF KENYA**  
**IN THE HIGH OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL CASE NO. 1749 OF 2001**

**PANATECH LIMITED ..... PLAINTIFF**

**VERSUS**

**DUBAI ELECTRONICS LIMITED ..... DEFENDANT**

**R U L I N G**

By an application by Chamber Summons dated 14<sup>th</sup> December, 2010, the Defendant applied for the following orders from the Court –

1. *That this application be certified as urgent and heard ex parte in the first instance.*
2. *That there be a temporary stay of execution pending the hearing and determination of this application.*
3. *That this Honourable Court be pleased to order that Tengo W. Madara has ceased to be the Defendant's previous advocate and is hereby replaced by A. A. Mazrui & Co. Advocates with immediate effect and the Notice of Change of Advocates herein be deemed to be duly filed.*
4. *That this Honourable Court be pleased to set aside the ex parte judgment obtained by the Plaintiff on 28<sup>th</sup> October, 2009 and the decree and all consequential proceedings and orders issued thereafter.*
5. *That the costs of this application be provided for.*

The application is brought by a Chamber Summons taken out under

**Order III Rules 9A and 11; Order IXB Rule 8; Order XXI Rule 22 of the Civil Procedure Rules; and Sections 1A and 3A of the Civil Procedure Act.** It is supported by the annexed affidavit of Munir Fauz Zubedi, the Managing Director of the Defendant Company, and is based on the grounds that –

- (a) *The Defendant's advocate was unqualified from the year 2009 to date including the time when he failed to appear for hearing of this case in October, 2009 resulting in an ex parte judgment against the Defendant.*
- (b) *Mistakes of an advocate ought not to be visited on the defendant.*
- (c) *The Defendant has a good defence to the Plaintiff's claim and should be given an opportunity to present its case before court.*
- (d) *The promissory notes tendered as exhibits are a fabrication as Dubai Electronics never give out and have never given out promissory notes.*
- (e) *No irreparable loss will be suffered by the Plaintiff as the Defendant is asking for an*

***opportunity to be heard before being condemned.***

***(f) The suit involves a substantial amount of money and should be heard on its merits.***

***(g) The Defendant faces execution proceedings pursuant to an ex parte judgment due to non-appearance of its previous advocate and a stay of execution is necessary to enable the Defendant to present its case.***

***(h) That the Defendant's inalienable right to have its case presented before a court of law has been violated due to no fault of the Defendant.***

Prayer 3 of the application was granted by this Court on 16<sup>th</sup>

December, 2010. The matters now pending are basically prayers for orders 2 and 4.

Opposing the application, the Respondent relied on a replying affidavit sworn on 23<sup>rd</sup> September, 2010 by one Suresh Nanalal Kantaria, the Plaintiff's Managing Director, in response to an earlier application by Chamber Summons dated 10<sup>th</sup> September, 2010. The main thrust of his argument is that the Defendant's Advocates were invited by the Plaintiff's Advocates to attend Court and fix a hearing date, but the former did not attend. On their non-attendance, the Plaintiffs took an *ex parte* date for hearing on 12<sup>th</sup> October, 2009 and a hearing notice in respect thereof was duly served on the Defendant's Advocates and they duly acknowledged receipt. On the hearing date, however, neither the Defendant nor its Advocates appeared. On being satisfied that the hearing notice was duly served in time for the Defendants to attend Court, but they did not do so, the Court proceeded *ex parte*.

It turned out later that the Advocate appointed by the Defendant did not have a current practising certificate. That may have been a blessing in disguise for the Plaintiff as the matter proceeded without the said Advocate. Without a current practising certificate, he was not eligible to represent a client in Court and if he had participated in Court proceedings, all such proceedings would have had to be set aside. But since he did not participate, all we are left with are *ex parte* proceedings due to no fault of either the Plaintiff or the Defendant.

The above account shows clearly that the Advocate appointed by the Defendants was solely the one at fault. The Defendant never put a foot wrong; nor was the Defendant personally at fault. The person to blame was squarely the Defendant's Advocate who accepted a brief knowing that he had no practising certificate for the year and, subsequently failing to attend Court at the hearing. In one of its grounds of application, the Applicant states that the mistakes of an Advocate ought not to be visited on the Defendant. I don't think that this is a universal tenet available to clients in all seasons. Rather, whether the mistakes of an Advocate should be visited on his client or not will depend on the nature of the matter under consideration, the gravity of the offence committed, and all the other circumstances of the case.

In a situation such as the one before this Court, is it in order for the Court to set aside the *ex parte* proceedings and judgment as requested by the Defendant in this case? I do not think it is appropriate to do so. The Plaintiff knew himself best. He was invited to take a hearing date but he neither attended the Registry, nor did he send a representative for taking that date. After the date was taken *ex parte* and hearing notice served on him, he did not inform his client. Instead, he kept the hearing notice close to his chest. In the result, he never attended at the hearing of the suit, and all this while his client was not aware that the matter was coming for hearing. The matter went on in Court as if the Defendant was non-existent.

In such circumstances, it is my considered view that the buck stops at the Advocate's door. There was nothing the Court could have done and the judgment delivered was a regular judgment. The solution to such a problem, in my opinion, does not lie in setting aside such a regular judgment. It lies in enforcing that judgment at the expense of the Advocate. The Advocate was alive to the state of this case at every stage. He knew that he had no practising certificate and that alone should have rang a warning bell reminding him either to renew his practising certificate or come clean and advise the client to instruct another Advocate altogether.

I note from the judgment delivered by Honourable Justice Kima ru in this matter on 28<sup>th</sup>

October, 2009, that he ploughed through the merits of the case before coming to this decision. His considerations included the merits of the Defendant's defence even in the latter's absence. He found that the Defendant had duly acknowledged receipt of the goods delivered by the Plaintiff. He then proceeded to say –

***“I further hold that in acknowledgment of the debt owed to the Plaintiff, the Defendant executed several promissory notes which were produced in evidence, and which the Defendant failed to honour. Although the Defendant appeared to disown the said promissory notes in its defence, having perused the same, and having evaluated the circumstances under which the said promissory notes were given by the Defendant to the Plaintiff as per the oral evidence adduced in Court, I hold that the Defendant is indeed indebted to the Plaintiff to the said sum of Kshs.5,089,460/=”***

From the above excerpt, it is manifestly clear that the judgment sought to be set aside was pronounced not merely on the basis of the non attendance of the Defendant, but the Court also took into consideration the merits of the defence case and found it wanting. In these circumstances, I don't think that it is either fit or proper to set aside the judgment. Instead I find that the author of the Defendant's misfortunes in this matter is the Defendant's Advocate himself and that the most appropriate remedy is for the Defendant to seek compensation against the Advocate. Unless an Advocate is never to be held liable for his sins of omission, this is not a proper case for declining to visit the wrongs of an Advocate on his client.

For these reasons, I dismiss the application to set aside the judgment with costs.

Orders accordingly.

**DATED and DELIVERED at NAIROBI** this 29<sup>th</sup> day of September, 2011.

**L. NJAGI**  
**JUDGE**