



REPUBLIC OF KENYA

MAVJI DEVJI & CO. LTD PLAINTIFF

VERSUS

RUAHA CONCRETE CO. LTD

DEFENDANT

RULING

The application before me is a Chamber Summons dated 16th December, 2008 filed by the defendant. The same is supported by the affidavit of **Mr. Perminder Singh Sethi**. The Chamber Summons is brought under S.3A of the Civil Procedure Act, Order IXB rule 8, Order XXI Rule 22 and 24 of the Civil Procedure Rules.

The application is seeking orders:-

- 1. That this application be certified urgent and heard Ex-parte in the first instance.**
- 2. That this Honourable court be pleased to set aside Judgment and consequential orders therein.**
- 3. That the Judgment-Debtor be granted unconditional leave to defend the suit.**
- 4. That costs be in the cause.**

Prayer no. 1 has been taken over by events. Before the court for consideration are prayers 2.3. & 4.

The Plaintiff filed a replying affidavit, sworn by **Mr. Pravin Patel** on the 3rd January, 2009, opposing the said application.

The applicant's reasons for setting aside the Judgment are that the hearing proceeded Ex-parte as the defendant's counsel then, neither informed the defendant nor attended court. That at the material time, the defendant's director charged with the responsibility of following up the case was sick and did not closely follow the progress of the matter. That the said lawyer has since not cooperated and that the decretal sum is huge and is likely to bring down the company.

The Plaintiff' on the other hand opposed the application stating that this is the 2nd instance the defendant is seeking to have Judgment set aside. That the defendant is indolent and ought not to seek the court's indulgence. That the matter is 16 years. The plaintiff pleads that great prejudice will be suffered should the suit be set aside, and that there will be no compensation for the Plaintiff. The plaintiff further argues that, if indeed defendant's previous counsel was negligent, then recourse lies in damages being paid by the said advocate.

The Plaintiff/Respondent filed suit against the Defendant/Applicant on 28th December, 1992. The

defendant filed a defence and a counter-claim, a reply upon which a reply to the defence and counter claim was filed by the Plaintiffs. Later the suit was set down for hearing. The same proceeded for hearing in the absence of the plaintiff and an ex parte Judgment was delivered. The defendant made a successful application to set aside Judgment. Once again on the 5th December, 2006 the matter proceeded for hearing in the absence of the defendant and its counsel. Subsequently an Ex-parte Judgment was delivered. The defendant/applicant is now seeking to set aside the 2nd ex-parte Judgment.

In arriving at its decision the court has been guided by the affidavits filed by the parties, case law cited and submissions by counsel.

The court notes that, there was a defence, and counter-claim and a reply to the counter claim all that raising triable issues.

The court in considering the issues before it has been guided by provisions of Order IXB Rule 8 and case law

Order IXB Rule 8 that states

“Where under this order Judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the Judgment or order upon such terms as are just.”

There is no doubt that the above provisions of the law give wide discretion to the court in deciding whether or not to set aside an Ex-parte Judgment. However the discretion is to be exercised judicially taking into consideration all facts and circumstances surrounding the matter, including the nature of the matter and whether there is a defence or counter-claim and any hardship likely to be occasioned to the Plaintiff.”

In Patel vs. E.A Cargo handling Services Ltd (1974) E.A. 75 at page 76, Sir William Duffins P held:-

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself or fetter the wide discretion given by the rules. I agree that where it is a regular Judgment as it is the case here, the court will not usually set aside the Judgment unless it is satisfied that there is a defence on merit. In this respect defence on merit does not mean, in my view, a defence that must succeed. It means as Sheridan J put it “a triable issue” that is an issue which raises a *prima facie* defence and which should go to trial for adjudication.”

In MAINA VS. MUGIRIA (1983) KLR at page 79

The Court of Appeal set out the principles governing the exercise of Judicial discretion to set aside ex-parte Judgment obtained in default of either party to attend hearing inter alia as follows:-

“(a) Firstly, there are no limits or restrictions on the Judge’s discretion Except that it should be based on such terms as may be just because the main concerns of the court is to do justice to parties.

(b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.

(c) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically.

(d) The power to set aside does not cease to apply because a decree has been issued.

I have considered all the facts and the circumstances surrounding the case. I note that there is a defence, a counter claim and a reply to a counter-claim and that all raise “triable issue’. And that it is trite law that a party ought not be denied justice due to the mistake of his counsel. Cognizant of the age of the suit before me, and that the respondent can be compensated by way of costs for the delay, I am inclined to exercise the court’s discretion in favour of the applicant/defendant , and disallow the application and order that the Defendant/applicant do pay the sum of Kshs. **25,000/=** to the Plaintiff/respondent as costs. Defence & Counter-claim be and are hereby restored, the matter to proceed to full hearing. The same to be fixed for hearing on priority basis

Dated and delivered at Nairobi this 18th day of May, 2009.

ALI- ARONI

JUDGE