



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 103 of 2004

AVANTI COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT

R U L I N G

The application is a Notice of Motion application dated 19th March, 2008 expressed to be brought under Order L rule 1 & XLIV rule 1 of the Civil Procedure Rules, Sections 3A, 63 (e) and 80 of the Civil Procedure Act. The following orders are sought:

- 1. THAT the Order made on 29th October, 2007 be set aside and the Plaintiff's suit be reinstated for hearing.**
- 2. THAT this Honourable Court be pleased to grant such other or further order as it may deem just and expedient.**
- 3. THAT the costs of this application be in the cause.**

The grounds upon which this application is premised are on the face of the application as follows:

- (a) That the firm of M/s Rachier & Amollo Advocates ceased to act for the Plaintiff.**
- (b) That the Plaintiff was not aware or made aware that an Application dated 9th August 2007 had been filed against him.**
- (c) That the Plaintiff appointed the Firm of M/s Kamotho Maiyo & Mbatia Advocates to represent it on 7th November 2007.**
- (d) That the dismissal of the suit was discovered on 14th November 2007.**
- (e) That the wider interests of justice will best be served by the issuance of the Orders sought herein.**

The application is supported by an Affidavit sworn by the Director of the Plaintiff Company, Mr. Anthony Njenga. In that affidavit, he sets out the history of the case, and gives an explanation why the

Plaintiff was absent in court when the Plaintiff's suit was dismissed for lack of prosecution under Order XVI rule 5 of the Civil Procedure Rules. Mr. Njenga explains that the Plaintiff parted ways with its previous advocates, Messrs Rachier & Amollo Advocates on or about the 16th November, 2005. The Plaintiff took time before instructing the current Advocates, Messrs Kamotho, Mayo & Mbatia Advocates and a Notice of Change of Advocates was filed on 8th November, 2007. By then the suit had been dismissed but the Plaintiff was unaware of that fact until February 2008 when it perused the court file, long after it forwarded a draft Statement of Agreed Issues to the Defendant. Upon receipt of the Statement of Agreed Issues, the Defendant's Advocates responded through their letter dated 14th November, 2007. The Plaintiff explains that the Defendant's response prompted the Plaintiff's Advocates on record to visit the court registry and peruse the court file. It was only after that perusal that the Plaintiff was made aware that its suit had been dismissed by the court on the 29th October 2007.

This application was vehemently opposed. Mr. David Swao a Senior Legal Counsel with the Defendant's Bank has sworn a relying affidavit dated 8th October, 2008 in response to this application. In that affidavit the deponent accuses the Applicants of material non-disclosure and alleges that the Affidavit in support of the application comprises of untruths and falsehoods. It challenges the deponent for failing to produce any document to support its allegation that the Plaintiff and the firm of Rachier & Amollo advocates agreed to part ways in 2005. It is also deponed that the application and the affidavit in support are incompetent, fatally defective and an abuse of the court process, being brought under the wrong provisions of the law. It is also alleged that the application is an afterthought having been filed six months after the suit was dismissed.

Mrs. Kiama argued this application on behalf of the Applicant, while Mr. Gichuhi argued it on behalf of the Defendant. I have considered the submissions made by both counsels.

The undisputed fact in this matter is that this matter was dismissed on 29th October 2007, on application by the Defendants in an application dated 9th August, 2007. It is also not disputed that the Plaintiff was not represented at the time of the dismissal. In fact it is on record that Mr. Aruwa had sent counsel to hold his brief and to apply for an adjournment of the matter, which was not granted.

The Plaintiff has tried to demonstrate that at the time the suit was dismissed, it had fallen out with its advocates on record way back in 2005. There are documents before the court which support the Plaintiff's contention that they parted ways with their advocate long before the suit was dismissed. The Plaintiff relies on correspondences annexed in the Defendant's replying affidavit to support that contention. The Plaintiff has demonstrated that it did not appoint any advocate to represent it in the suit until November, 2007. By that time the suit had already been dismissed for lack of prosecution. The Plaintiff contends he was unaware of this dismissal until February 2008, when the court file was availed to it after being unavailable for some time. The Plaintiff contends that it was only then that it was able to peruse the court file at the court registry. The Plaintiff has blamed its previous advocate for the dismissal of the suit. It says it was unaware of the application coming up for hearing on 29th October 2007.

Mr. Gichuhi for the Respondent has urged the court not to allow the application. The Advocate has set out the history of the matter. Counsel urged the court to read the order of court on 29th October, 2007, and note that both Plaintiff's and Defendant's Advocates were heard before the suit was dismissed. Mr. Gichuhi has urged the court to note that the Plaintiff's previous advocates never indicated that they had ceased acting for the Plaintiff and neither did they inform the Respondents of that development. Mr. Gichuhi has urged that the application was delayed and that no reasons were given for the delay neither was there any evidence that there was new material discovery leading to the application being made.

The Applicant has invoked order XLIV rule 1 for orders sought. The Plaintiff seeks the setting aside of the order of the court made on the 29th October, 2007 dismissing the Plaintiff's suit. Order XLIV rule 1 can be invoked to review or set aside or vary an order of the court on several grounds. Going by grounds cited on the face of the application as the basis for the application, the Plaintiff is relying on "sufficient reason" to have the order set aside. Mr. Gichuhi for the Applicant has argued that the Applicant has not demonstrated what new material evidence had been discovered as the basis for application and further

that no reasons for the review had been disclosed.

Given the circumstances of this case, the Applicant has to satisfy the court that it has sufficient reason why the order of dismissal should be set aside. A discovery of a new and important matter is only one of the grounds upon which the application can be based and one which the Plaintiff has not relied upon. I have considered the reasons which have been advanced by the Plaintiff both in the supporting affidavit sworn by Mr. Anthony Njenga on the 20th March, 2008 and the submissions by counsel. The issue is whether the reasons advanced are sufficient cause to warrant the court to set aside the order.

This suit was filed on 23rd February, 2004. The Plaintiff is seeking special damages to the tune of Kshs.36.8 million together with other claims. From the record of the proceedings the Plaintiff was taking steps and in fact the matter had been confirmed for hearing on 7th December 2005. It did not however proceed to hearing because it was taken out on the court's own volition on the 6th December 2005, due to shortage of judges. Going by the Affidavit of Mr. Njenga, by that time the Plaintiff had fallen out with its previous Advocate.

The court's discretion to set aside orders, especially where a party has been shut out from being heard, is wide and unfettered. That discretion should be exercised in order to avoid injustice or hardship which may result especially in circumstances where it is clear party's Advocates committed an error or mistake leading directly to the hardship or injustice the subject of such an application. In this case, the Plaintiff contends that it has been caused hardship due to mistake or error of its Advocate. The Plaintiff has contended that it was unaware of the application to dismiss the suit, and was also not made aware of the date of the hearing of the application itself. It is quite clear from the circumstances of the case that the Plaintiff fell out with its previous advocates. It is no wonder that no affidavit was filed to oppose the application for the dismissal of the suit. It is therefore quite possible that the Plaintiff was unaware of the pending application which dismissed this suit.

Should the Plaintiff be left to suffer due to acts of omissions of his counsel? There are numerous authorities, which dictate that a court should not allow injustice or hardship to be suffered by an innocent litigant due to slips of his counsel, for instance in the case of **Shah vs. Mbogo & Another [1967] EA 116** where Harris J. held:

“Applying the principle that the court's discretion to set aside exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who had deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”

From the holding above, it is very clear that where an exparte order has been made, the court has power to set it aside as long as it is satisfied that the party applying was not obstructing or delaying the cause of justice and that there is an excusable mistake, accident inadvertence or error.

In the instant application, the Plaintiff has given the reasons why it did not receive proper representation at the time the suit was dismissed, and it has demonstrated that it was unaware of the pending application. The record shows that the Advocate, then on record, had not bothered to go to court for the hearing of the application but had sent another counsel to seek an adjournment of the case. It is my view that the order made by the Judge has caused hardship to the Plaintiff and that that order was as a result of mistake or slip of counsel then on record for the Plaintiff. It is an excusable mistake. I find so because, by this order having dismissed the suit, the Plaintiff has been shut out from his claim before having an opportunity of being heard. Such a move does not serve the interest of justice. The Defendants have complained that the Plaintiff has told untruths and half truths regarding its falling out with the previous Advocates and the date the current Advocates were instructed. These complaints are informed by suspicion. It is not enough to allege that a party is not telling the whole truth. There must be evidence placed before the court to support such an allegation. Without proof, such a claim remains a mere allegation. The Plaintiff cannot be shut out of the case on mere allegations without proof.

I have considered that the Plaintiff has given reasonable excuse for the dismissal of the suit. I am also

satisfied that any prejudice which the Defendant stands to suffer in this case can reasonably be compensated by an award of costs and that therefore the Defendant will not be prejudiced if the application is allowed.

In conclusion, I find that it will be to the interest of justice to allow the Plaintiff's application dated 19th March, 2008 on the following terms:

- 1. The Plaintiff's application dated 19th March, 2008 is allowed. The order made on 29th October, 2007 be and is hereby set aside and the Plaintiff's suit be re-instated.**
- 2. The Plaintiff will pay to the Defendants thrown away costs which I assess at Kshs.20,000/-**
- 3. The parties to complete Discoveries, Interrogatories, and Inspection within 60 days from the date hereof with either party having leave to apply.**
- 4. The Plaintiff should set this suit for hearing, before the end of the year 2009.**

Dated at Nairobi this 5th day of June 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mrs. Kiama for the Applicant

Karungo holding brief Mr. Gichuhi for the Respondent

LESIIT, J.

JUDGE

.