**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL CASE 180 OF 2008**

**JOYCE LIKU JANDA. …………………. PLAINTIFF/RESPONDENT**

**VERSUS**

**CARE INTERNATIONAL. …………… DEFENDANT/APPLICANT**

**R U L. I N G**

The application before the court is the Chamber Application dated 23rd June, 2008. It seeks the following orders: -

(a) That this court do set aside the Interlocutory Judgment entered against the defendant on 19th June, 2008.

(b)That leave be granted to the defendant to file its defence out of time.

(c) Costs.

Service of summons to enter appearance and defence were served upon the Defendant on 23rd May, 2008. She sought special and general damages arising out of a road motor traffic accident which had occurred on 5th February, 2004. Service of summons to enter appearance and defence were served upon the defendant on 23rd May, 2008. Immediately soon after the firm of advocates known as Mwaure & Mwaure Wahiga was instructed and accepted to act for the defendants. On 27th May, 2008 the advocates filed their appearance at Milimani High Court Registry instead of doing so at the Central Civil Registry where the suit had been filed. On 13th June, 2008, the advocates filed their defence at the same Milimani High Court Registry. Had Milimani High Court have been the correct place to file appearance and defence, the filing of their defence on 13th June, 2008 would have been out of the prescribed time by two days. That means that the appearance and defence of the defendant were not only filed in a wrong court but also out of the prescribed time.

Meanwhile the Plaintiff had on 19th June, 2008 moved to and obtained an interlocutory judgment at the Central Civil Registry since neither appearance nor defence had, as things stood, been filed by the defendant in that court.

On 23rd June, 2008 the defendant filed an application by Chamber Summons dated the same day to set

aside the interlocutory judgment entered on 19th June, 2008. Unfortunately, having entered no appearance in the file he had no locus stand to appear in the suit for any purpose. Realising the same, the Defendant's advocate proceeded to withdraw the application to set aside aforesaid but at the same time filed a similar fresh application for setting aside dated 23rd September 2008 after filing this time, a memorandum of appearance. That is the application now under consideration.

The Defendant in its supporting affidavit sworn by one Beatrice Chelangat, an advocate of the legal firm of Mwaure & Mwaure Waihiga, averred that the litany of errors was entirely those of her firm. She concedes that it was the firm's clerk who mistakenly filed the appearance and defence at Milimani High Court Registry instead of doing so at the Central Registry. She concedes also that even when her firm discovered the errors and proceeded to file the first application to set aside the interlocutory judgment on 23rd June, 2008, they even then erred in filing an application at the Central Registry without first filing a memorandum of appearance to give them legal authority to act for the defendants.

The said defendant's advocates admitted that even the purported defence filed on 13th June, 2008 was itself filed out of time by two days, even had it been filed at the correct registry at the Central Registry.

As for the application being filed three months after discovery of the errors, the said deponent, Ms Beatrice Chelagat, explained that it was because the firm had to withdraw the first similar application in order to file this one after filing their memorandum of appearance.

Otherwise the applicant/defendant urged the court to find that this application is meritorious and that the litany of errors was all a mistake of counsel which should not be assigned or be visited to counsel's clients who had done no wrong. That the defendant had a good defence with triable issues which can only go to trial if the court exercises it's wide discretion in favour of the defendant to allow it to file defence out of time. The draft defence was annexed.

There is another supporting affidavit sworn by one Zakayo Kimani Maina of the same firm of advocates representing the defendant. Its contents are similar to those in the affidavit of Beatrice Chelagat of the same firm but has more elaborate information. It is not indicated why it would not be a further supporting affidavit or whether it replaces the earlier affidavit. However, to cut the long story short the court will consider both affidavits as complementary.

It is also observed from the record that the defendant had under the withdrawn application been ordered to bear costs amounting to ?650. and Kshs.30,000/- and additional court adjournment costs which have all been fully paid to show good will on the part of the defendant as defendant puts it. The defendant accordingly avers that setting aside of the interlocutory judgment will not prejudice the plaintiff who will be compensated in costs. The defendant averred that it will be in the interest of justice to give it a chance to defend the suit.

Mr. Ramogo acting for the Plaintiff strongly opposed the application. He pointed out the litany of errors committed by the defendant's counsel and asserted that they went beyond mere mistakes. The errors, he urged, confirmed not mere negligence but serious recklessness of a counsel which should not be excused as they are not excusable. Mr. Ramogo further pointed at the defence intended to be filed and stated that it raised no triable issues at all since it contained statements merely denying the facts pleaded by the Plaintiff without proffering alternative facts which would replace those of the Plaintiff. That it fails to traverse the particulars of negligence averred in the plaint or fails to deny the specific negligence averred by the Plaintiff.

Mr. Ramogo further argued, that the statement of defence in question was itself filed not only in a wrong court but out of time and that it need not be looked at.

Mr. Ramogo further argued that the defendant approached this court to set aside the interlocutory judgment under a specific Order, Order 9B rule 8 when the correct rule should have been Order 9A rule 10 and 11 of the Civil Procedure Rules, Where a party quotes and approaches under a wrong rule he urged, the application becomes fatally defective and must be struck out.

Finally Mr. Ramogo also answered the issue of the counsel's mistakes. He stated that such is proof not of mere negligence but of serious recklessness which should not be excused.

Both counsels cited legal authorities.

I have carefully considered the application and the grounds upon which it is based. I have considered also the arguments by counsel of both parties.

I will first deal with the technical objection raised by the respondent/plaintiff that the application is fatally defective for being brought under Order 9B rule 8 instead of Order 9A rule 10 and 11. I have looked at the Chamber Summons dated 23rd September, 2008. It shows that the applicant/defendant indeed approached this court under Order IXB rule 8 and Order XLIX rule 5 of the Civil Procedure Rules.

Order IXB rule 8 states thus: -

"**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".**

The heading to the Order clearly indicate that any orders to be made under the said Order concern "**Hearing and consequences of non-attendance**." This means that a judgment entered or a dismissal made will arise from the attendance or non-attendance of either party. That in my understanding, is what rule 8 of the said Order refers to.

If, however, the issue is about failing to enter appearance and failing to file defence the judgment entered in default, then the correct provision is Order IXA which states in rule 5, 10 and 11, thus:-

"**5. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall on request… enter interlocutory judgment against the defendant, and the plaintiff shall set down the suit for assessment by the court of damages or the value of the goods and damages as the case may be**."

It is the interlocutory judgment entered as prescribed above that may be set aside under rule 10 of Order IXA. It was accordingly conceded by the defendant that in approaching this court under Order IXB rule 8, the defendant did so under a wrong order since it should have done so under Order IXA rule 10.

The very wide jurisdiction and power of court to set aside a judgment entered as a result of Non-appearance or Default of Defence under Order IXA, or Non-attendance during the hearing date under Order IXB, is now not doubtable. The discretion of the court is unfettered except that the setting aside of the judgment must be made on terms that are just, Duffus, P in the case of **Patel Vs E A Cargo Handling Services** (1974) E. A, 75, put the principal thus: -

"**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 discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that thee is a defence on merits. In this respect defence on merits 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".**

That the discretion of this court to set aside such judgments is very wide and unfettered and that this court exercises it in the interest of justice having taken into account all the circumstances of the case, was emphasized by Sheridan, J in the case of **Sebei District Administration V Gasyali** (1968) EA, 300, where he described the principle thus: -

"**The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can**

**reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of a court."**

The cited cases above in my view, confirm the fact that this court's jurisdiction to exercise its discretion to set aside such ex parte judgments is wide and unlimited. The discretion however is a judicial one. It will in my view, be exercised fairly and justly to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors. The court will not assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice, as was stated in **Shah v Mbogoh and Another**, (1967)EA 116, 123. The conduct of the applicant and his counsel will be considered in order to decide whether or not their intention is to delay the course of justice. However, having come to the conclusion, either way, the court will exercise such discretion freely and firmly, without fetters.

Despite the unfettered discretion of this court as explained above, the plaintiff argued that this court in this application cannot exercise it in favour of the defendant. Mr. Kimani, if the court understood him well, was not challenging the principle explained above. His point was that a defaulting defendant under Order IXA who wanted to set aside an ex parte interlocutory judgment under rule 10 must come to this court under the same Order and rules. Similarly, he argued, the defaulter who wishes to set aside an ex parte judgment entered in consequence of non-attendance under Order IXB rule 3(a) can only apply to set it aside under rule 8 thereof, and not under Order IXA rule 10.

In the case of **Joel K Yegon & 4 ors V John Rotich & 4 ors** Nairobi, Miscellaneous Application No. 995 of 2003, Nyamu, J (as he then was) was faced with the above issue. He stated at page 3 of the Ruling as follows: -

"**While our procedural law does not permit the court o deny relief to a party for not citing the law or provision under which an application is brought where a party quotes the wrong provisions and does not apply to amend, such applications are incompetent and ought to be struck out. I agree with the learned counsel for the respondent Mr. Arusei that the failure to demonstrate that the application has been properly brought under Rule 1 and Section 48 of the Advocates Act is fatal."**

The judge's decision as I understand it, was that the statutory provision under which the applicant approached court by quoting it, invoked that court's jurisdiction. If the jurisdiction of the court was accordingly not properly invoked, it made the application incompetent. He concluded that the known inherent powers of the court was not properly invoked in that a case.

In the case of **John Karuri and others V P Investment Private Ltd**, HCCC No. 1575 of 1991 Bosire, J (as he then was) was faced with a related issue. In the case before him the applicant had omitted to state the statutory provisions under which or by virtue of which the application was brought. Making reference to the circumstances to which Order L Rule 12 might be invoked, he stated:-

"**Order L Rule 12, to may mind deals with omissions to state statutory provisions under which or by virtue of which an application is brought. However, to my mind it does not cover a situation where a wrong or incorrect provision of the law is stated. Where such is the case a party has the liberty to seek the leave of court to amend the application in that regard."**

What I understand from the above two authorities is that a party who wishes to invoke the jurisdiction of the court as provided under a specific provision of the law can only do so through the specific or the provided statutory provision. This to me means that a specific power or jurisdiction is inherent only in the specific statutory provision of the law as was intended by the legislature or the Rules Committee. If a party under an application to the court, invokes a wrong or a different jurisdiction or power and invites the court to exercise such incorrect jurisdiction to grant a different relief not invoked in the application, such party should not in my view, expect the court to do anything but outright reject such invitation. This is because such specific jurisdiction or discretion, unless stated otherwise, is by the clear intention of the legislature or the Rules Committee, reposed found only in the specific statutory provisions.

In the case of **David Njeru Njogu Vs Njagi Kanyunguti alias Karingi Kanyunguti and 4 others**, Nairobi HCCC NO. 2101 of 1986, an ex parte judgment had been entered in favour of the Plaintiff. Shields J, (as he then was) refused to set aside the judgment entered under Order IXB. The application to set aside had been brought under Order IXA rule 10 and Order XXI rule 25 of the Civil Procedure Rules while the correct provision under which the Defendants should have applied to set aside a default judgment for non-attendance during the hearing date would have been Order IXB Rule 8.

On appeal to the court of Appeal under Civil Appeal No. 181 of 1994, the court stated: -

"**The power to set aside a judgment entered pursuant to an ex parte hearing of a suit is donated by O. IXB rule 8 of the Civil Procedure Rules. It is therefore, obvious that the application was brought under an incorrect provision of the law. Although the principles, upon which the court acts in an application under O. IXA rule 10 and O.IXB rule 8 of the Civil Procedure Rules respectively, are the same, we do not consider that the both provisions are interchangeable. If the Rules Committee had so intended, there would have been no necessity for having the both provisions; and it would have expressly said so. We, therefore, are of the view and so hold that the application was incurably defective."**

In this application before me as earlier pointed out, the applicant brought the application under Order IXB rule 8 instead of Order IXA rule 10. Its attempt to invoke the jurisdiction to set aside the ex parte judgment entered under Order IXB is therefore, futile as the application itself is fatally incompetent and incurably defective as per the decisions of this court and the Court of Appeal afore quoted.

I have also considered the other grounds upon which the application is brought. I find no merit in any of them.

No valid explanation was given as to why the Defendant filed its appearance and defence in Milimani High Court instead of this court. The Counsel for the Defendant submitted that the mistake was that of their office clerk who filed the documents at Milimani High Court instead of the Central Registry. While that is possible and possibly a mere inadvertence, no explanation is given for filing the statement of defence out of time.

The court also observed the fact that the application to set aside was filed three months after the time to enter judgment was due. Counsel for the defendant tried to explain it by stating that this was a second application after a first similar one was withdrawn for being incompetent after it was filed before the counsel was properly on the record of court. This confirms the notorious conduct of the defendant's counsel's litany of errors which exhibited not mere negligence but recklessness. Such conduct is not in the circumstances of this case excusable. While the court accepts the principle that as much as possible the mistakes of counsel should not be allowed to cause injustice to the client, in this case the court rules that this is not excusable mere negligence on the part of counsel. It amounts to recklessness which would give the client a possible right to sue counsel on negligence.

Finally, I have also examined the possible defence which the Defendant advanced to defend, the Plaintiff's claim. The purported "**defence**" consists of mere denials of each paragraph of the plaint. This claim is for damages, both special and general, arising from a road motor accident. The plaint describes in detail the facts forming the claim. It also pleads particulars of negligence in details. But the "**defence**" does not traverse the particulars pleaded. It simply denies generally, the particulars without even suggesting the alternative facts that would provide defences. It is the view of the court that the defence raises no issues that would go to trial. The defence even if it were to be allowed to be filed, would in my view be liable to striking out.

For the above grounds the application dated 23rd September, 2008 is not only ordered struck out for being incurably defective but is also dismissed with costs for the reasons stated above. Orders accordingly.

Dated and delivered at Nairobi this 27th day of July, 2009.

**D A ONYANCHA**

**JUDGE**