REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1590 of 1998

COMHARD LIMITED ……..PLAINTIFF

V E R S U S

SOUTH NYANZA SUGAR COMPANY ….....…...…
DEFENDANT

R U L I N G

I have perused the court record herein. This suit was filed on 17th July, 1998. The Plaintiff claimed against the Defendant the sum of KShs. 752,149/40 plus costs and interest, being the balance of the agreed price for goods sold and delivered.

The Defendant duly entered appearance and filed defence denying liability.

On 29th June, 2000 the Plaintiff served the Defendant a notice to make discovery within 14 days. The notice was not complied with, and on 1st March, 2001 the Plaintiff applied to court for orders to compel the Defendant to make discovery. On 14th May, 2001 the court ordered the Defendant to make discovery within 14 days. The Defendant did not comply, but the time within which to comply was extended by consent by 14 days from 3rd August, 2001. The Defendant still did not make discovery within the extended time or at all.

The Plaintiff subsequently applied for an order to strike out the Defendant's defence for failure to comply with the order of court to make discovery, and for judgment to be entered as prayed in the plaint. The Defendant was served with the application. It did not file any papers in response to the application.

The application was fixed for hearing for 23rd October, 2003. The Defendant was duly served with hearing notice. On the said hearing date there was no appearance for the Defendant. The application was allowed with costs. The Defendant's defence was struck out and judgment entered for the Plaintiff as prayed in the plaint.

On 7th September, 2005 the Defendant applied by chamber summons of the same date seeking the main order that the said judgment and all consequential orders be set aside. That applicant is the subject of this ruling.

The application is stated to be brought under **Order IXB, rules 1, 3 and 8 of the Civil Procedure Rules** (the Rules). The inherent power of the court is also invoked. The supporting affidavit is sworn by one **GABRIEL OTIENDE**, the acting Company Secretary of the Defendant. The grounds for the application appearing on the face thereof are:-

1. That the Defendant was not advised of any hearing date.

2. That the Defendant was never kept informed of material developments in the suit by its previous counsel on record.

3. That the failure to attend court "for the hearing of applications and/or otherwise" was not deliberate.

4. That the Defendant has a good defence to the claim.

The supporting affidavit elaborates these grounds.

The Plaintiff has opposed the application. It first filed grounds of opposition on 15th September, 2005. Those grounds include:-

1. That the application does not lie as the judgment sought to be set aside was entered after the Defendant failed to comply with an order of the court to make discovery.

2. That the application has been brought after undue delay.

3. That the application lacks merit and is otherwise an abuse of the process of the court calculated to delay further the finalization of the suit.

A replying affidavit sworn by one **HIREN PATEL**, a director of the Plaintiff, and filed on 24th July, 2008, elaborates these grounds.

The parties chose to put in written submissions. I have read and given due consideration to them together with the authorities cited.

The Defendant's defence was struck out under **Order X, rule 20** of the Rules which states:-

"**20. Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect, and an order may be made accordingly."**

So, even though the effect of striking out the Defendant's defence for non-compliance with the order to make discovery was the same as if he had not filed defence, the judgment entered against it was not entered under **Order IXA** of the Rules.

In an application under Order IXB, rule 8 an applicant will seek to explain why he did not enter appearance and/or file defence within the stipulated time. He will also seek to demonstrate why he should be allowed to defend the suit, for instance by showing that he has a good defence to the action.

But where judgment has been entered as a consequence of striking out the defence for non-compliance with an order to answer interrogatories, or for discovery or inspection, and the application for the same was heard *ex parte*, the defendant applying to set aside such judgment will seek to explain to the court why he did not oppose the application, and also why he did not comply with the order of the court. In other words, his application must of necessity be for **review** of the orders for striking out the defence and entry of judgment under **Order X, rule 20**. He cannot apply to set aside the judgment under Order IXB, rule 8. The considerations for the two applications will be entirely different. Those for an application under Order IXB, rule 8 will **not** be germane to an application to review an order made under Order, rule 20 and *vise versa*.

The application as brought under **Order IXB, rule 8** is therefore incompetent, and I so hold. I would strike it out.

Even on merit, assuming that a proper application for **review** had been brought, I would not exercise my

discretion in favour of the Defendant in the circumstances of this case. By an **order entered on 18th July, 2006** the Defendant was given an opportunity to file a further affidavit by which it would have sought to explain its failure to comply with the order to make discovery. Up to the time this application was heard the Defendant had not filed such further affidavit.

The Defendant's own papers disclose that after instructing its counsel in **September 1998** it went to sleep until **July 2005** when it learnt that judgment had been entered against it in October, 2003. Why should a litigant not follow up its matter with its advocates for 7 years? Should a litigant go to sleep just because he has instructed counsel in a matter, and for 7 years at that? I think not.

The passage of time in this matter is such that the matter ought to be allowed to rest. Re-opening it now will cause injustice to the Plaintiff. The Defendant had two opportunities to explain its failure to comply with the order for discovery. It did not take them. It is rather lame to blame its former advocates after its own 7-year slumber. I would in these circumstances refuse to exercise my discretion in its favour.

In the result the application by **chamber summons dated 7th September, 2005** is hereby dismissed with costs to the Plaintiff. Any stay of execution orders in place are hereby set aside. Those will be the orders of the court.

DATED AT NAIROBI THIS 9TH DAY OF JULY, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 10TH DAY OF JULY, 2009