



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1521 of 2000

KENYA ELECTRICITY GENERATING CO. LTD. t/a KENGEN1ST
PLAINTIFF

MAJOR (R) J.R. RUGUT.....2ND
PLAINTIFF

VERSUS

KINGSWAY MOTORS (K) LTD.....1ST DEFENDANT

MANISH SHAH2ND DEFENDANT

RULING

Application dated 20/8/2009 brought under Orders IXB Rules 3 and 8, Order XXI Rule 22 Civil Procedure Code and Section 3A of Civil Procedure Act. The prayer sought:-

“That the ex parte proceedings of 20/1/2009 and all consequential orders including judgment and decree against the defendants be set aside and that the defendants be granted unconditional leave to defend this suit.”

The application is based on the grounds written on the application as set out. The counsel for defendants seized of this matter was engaged in High Court for a part-heard criminal case Republic vs. Christopher Muraya and that the defendants were not given a chance to be heard. The supporting affidavit is sworn by Joel Kyatha Mbaluka, advocate having personal conduct of this suit. He swears that on 20/1/2009 he was conducting a criminal case in the court of Hon. Mutungi, J. and that he appointed advocate M/s Wakio to hold his brief in this case to apply for adjournment.

The record shows that upon application this court rejected adjournment and ordered the hearing to proceed at 2.30 p.m. At 2.45 p.m. the defendants did not appear but Mr. Kipkorir for plaintiff appeared and proceeded to lead evidence for the plaintiffs. Therefore, the matters sworn under paragraph 4 of supporting affidavit are not true.

It is also sworn that the amount of judgment is a colossal amount of Kshs.8,834,006/70 and that the defendants will suffer loss without being heard on merits. Before this application was heard the defendants changed their advocate from Mbaluka to Andabwa. Parties made oral submissions in court. The defendants reported that Mbaluka was in Criminal case before Mutungi, J. The first defendant was ready to pay thrown-away costs.

The second defendant submitted that he had a defence on merit and the circumstances that led to non appearance is excusable. In response to the applicant's submissions Mr. Kipkorir for plaintiff submitted that there was a defence on the record and neither Ms. Wakio or Mr. Mbaluka appeared at 2.30 p.m. when the hearing was scheduled.

Order 9B judgment can be set aside by law. Order to set aside must be to avoid injustice on either side in case of excusable, inadvertence or mistake but court cannot assist a party that intends to obstruct justice. On the hearing date 20/1/09 Mr. Mbaluka was represented by advocate M/s Wakio. They said they were not aware but they knew in January and April when decree was sent to them for approval. That the decree was much is not relevant.

In reply the applicants said do not condemn the party for mistakes of the advocate. The parties have filed authorities and Order IXB Civil Procedure Code is relevant. The suit was scheduled for hearing on 20/1/2009. Rule 3 provides for the situation when only the plaintiff attends. The court may proceed with the hearing ex parte. In this case both parties were represented when the hearing was allocated time to 2.30 p.m. At 2.45 p.m. only plaintiff appeared and court allowed plaintiff to proceed ex parte.

The plaintiff called evidence and judgment was entered for plaintiff after the court dismissed statement of defence and the counter claim. The authorities relied upon by the plaintiff are listed namely; Shah vs. Mbogo & another [1967] EA 116 in which it was held that:-

“applying the principle that the courts discretion to set aside an ex parte 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 has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

An applicant who does not justify the said principle does not deserve orders. In this case the defendants were aware of hearing date and in fact attended the morning session when the time was allocated in the afternoon session. The application was dismissed.

In the case of Joseph Eric Owino vs. Dr. Japheth Ogendo Owuor application to set aside order, the same principle was cited but the reasons for non appearance were not accepted. Again, the ruling in Naciti Engineers vs. Kenya Commercial Bank Ltd. & another the suit was dismissed for non appearance. Counsel argued that the suit involves millions of shillings and there were substantial issues raised. There the court said:-

“The court must be satisfied that the failure to attend hearing has been satisfactorily explained.”

In this case the failure to appear at 2.30 p.m. is not explained at all and the explanation given is not truthful. Plaintiff also relies on the case of Madison Insurance Co. vs. Samuel Ndemo Makori – Kisumu HC Appeal No. 10 of 2003 where the prerequisite factors governing the exercise of judicial discretion to set aside ex parte judgment obtained in default of either party's failure to attend court during the hearing of the matter are enumerated in that authority.

The defendants also filed list of authorities. The second defendant cited Ceneart Airlines Ltd. vs. Kenya Shell Ltd. [2000] 2 EA. This authority refers to summons to enter appearance. This issue was raised for the first at the hearing of this application the other parties had no opportunity to study and respond. Furthermore, the matter came under Order IXA - failure to enter appearance. Not relevant here.

The authorities relied upon by the defendants was Herman Mugachia vs. Mamisi Mwakibudu & another [1982-88] 1 KAR 666. In this case there was refusal of adjournment on the ground the medical witness was abroad. It was held by Court of Appeal that the refusal of adjournment was incorrect exercise of court's discretion and resulted in a denial of justice.

In this case an application for adjournment was made in morning session on ground that the counsel was

attending another court. The application was opposed and rejected by court. Hearing was allocated time in afternoon session 2.30 p.m.

The plaintiff counsel and his witness were present. Defendants did not appear in the afternoon session, neither his advocate. Hearing proceeded.

In the case of Joseph Njuguna Muniu vs. Medicino Giovani – in this case the hearing notice was served but defendant did not appear. Suit proceeded to hearing. The reasons given for non appearance was that counsel engaged had not entered the date in her diary.

The application to set aside orders was dismissed by Hon. Mwera, J. The court said:-

“There is no evidence before court to show that the appellant was trying to delay or obstruct the course of justice.”

We are therefore satisfied that the learned judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice. The appeal was allowed and the order of dismissal was set aside.

The last authority is Maina vs. Muruiki [1984] KLR – in this case it was held that as applicant had stated his advocate had failed to attend court, the applicant would not be punished due to his advocate’s faults. In this case the advocate was well aware of the hearing of suit but and had sent another advocate to apply for adjournment. The advocate did not swear an affidavit that she communicate the court order for hearing in the afternoon session and it is not explained why counsel did not appear in the afternoon session.

Regarding the statement of defence the court said:-

“I have examined the statement filed by defendants. It contains mere denials and does not dent the sworn evidence of the plaintiff.”

In the circumstances, I find that the defendants came to court with unclean hands. The reasons they give for non appearance are made up and are not reflected by the record. It is not explained when the advocate finished his business in the court of Hon. Mutungi, J. or whether the counsel was unable to appear in the afternoon session.

For the above reasons I am not inclined to exercise court’s discretion in favour of the applicant.

The application is dismissed with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 19th day October 2009.

JOYCE N. KHAMINWA

JUDGE