



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 3260 of 1990

BIRDS DRIVING SCHOOL ::: PLAINTIFF

VERSUS

GANJEE GLASS MART ::: DEFENDANT

RULING

The Plaintiff/Applicant came to Court vide its suit against the defendant dated 20th April, 1990 and filed the same date. The defendant after receiving summons, entered appearance, which is undated but signed and filed on 30th October 1990. There after a defence was filed dated 5th November 1990 and filed on 8th November, 1990. A perusal of the record reveals that no issues were agreed upon by the parties or filed by either party separately after the defence was filed. Also no discovery was made.

On 20th February, 1997 vide a chamber summons dated 6th February, 1997 Counsel for the Plaintiff applied that RMCCC NO.EJ 279/1988 **BIRDS DRIVING SCHOOL VERSUS GANJEE GLASSMART CO. LTD** filed in Sheria House be transferred to the High Court and be consolidated with the current suit and be tried as one and that costs be provided for. A perusal of the Court record reveals that the application was never disposed off on merit.

On 26th August, 2003 the Defendant filed a notice of motion dated 12th of June 2003. It was brought under Order XVII Rule 5, Section 3A and Order L Rule 1 of the Civil Procedure Rules seeking orders that the plaintiff's suit be dismissed for want of prosecution. The grounds in support are set out in the body of the Application, Supporting Affidavit and oral submissions in Court. This application before it was heard it was followed by a series of other intervening applications and since they have a bearing to the current application subject of this ruling, it is better to set them out here for purposes of the record.

On 19th November, 2003 the defence Counsel filed an application dated 17th November, 2003 brought by way of chamber summons brought under Order V rule 17, Order XLVII rules 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking Orders that:-

- (1) The Plaintiff be and is hereby granted leave to serve M/S Mugambi & Co. Advocates, the Notice of Motion application dated 12th June 2002 as well as any other future pleadings by registered post using their last known postal address which is P.O. Box 52072 Nairobi.
- (2) That the costs of this application be provided for.

On 4th October, 2004 the defence Counsel filed an application dated 27th September, 2004 exparte,

brought under Order III Rule 11 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking an order that the firm of M/S Mugambi & Co. Advocates be and is hereby deemed to have ceased acting on behalf of the plaintiff.

(b) That upon grant of prayer 1 above the defendant be and is hereby granted leave to serve the Plaintiff directly with the Notice of Motion dated 12th June 2002 as well as any other future pleadings and that costs of the application be proved for.

There is an affidavit of service by one Methu Mwangi sworn on 6th January 2005 and filed on 11th January 2005 to the effect that he had on 29th December 2004 received instructions from the defence Counsel to effect upon the Plaintiff the application dated 27th September, 2004 together with a Hearing Notice dated 17th December, 2004 indicating that the application was fixed for hearing on 28th January, 2005. The service was by way of registered post. Annexed to the R/S is a copy of the Registration Certificate with a date stamp reading 29.12.04.

There is also an R/S by Methu Mwangi sworn on 25th February, 2005 and filed on 2nd March 2005 to the effect that he had received a hearing notice dated 16.2.05 and had effected the same on Birds Driving School as instructed by Counsel for the defence. That the said notice had been served upon a Mr. Rashid a Director of the Plaintiff on 21.2.05 who acknowledged the same by signing on the front. The Court observes that there is an acknowledgement on the front of the copy of the application showing received on 21/2/05 at 10.30 a.m. and signed but no rubber stamp affixed.

Turning to the hand written notes of the record the following entries are relevant to the ruling:-

1. On 28.1.05 the application dated 27.9.04 which sought to deem counsel then appearing to be deemed to have ceased acting for the plaintiff and that the defendant be granted leave to serve the plaintiff directly.
2. On 25.4.2005 the following entry is recorded:-

“25/4/2005

Coram Ransley J.

Maina c/c

Mr. Gachuhi for the applicant

No app. For respondent

App. Served no app

Order. In terms of prayer 1 of n/m of 12/6/2003. Costs of suit to applicant.

Signed

Ransley J.”

Against the foregoing background is an application dated 9th day of July 2007 and filed on 10th July 2007. It is brought by way of Notice of Motion under Order XLIV rule 1(i) (a) 4 and Order L rule 1 Civil Procedure Rules Section 3A Civil Procedure Act Cap.21 Laws of Kenya. It seeks the following orders:

- (1)** This Honourable Court do review the Order of the Honourable Justice Ransley issued on the 25th April 2005 dismissing the plaintiffs suit with costs to the defendant.

- (2) That the Honourable Court do set aside the order dismissing the Plaintiffs suit.
- (3) That costs be provided for.

The Respondent has opposed the application on the following grounds:-

(1) The applicant has not brought himself within the ambit of the provisions of order XLIV Rule 1(i) of Civil Procedure Rules because neither in the Supporting Affidavit or skeleton arguments has the applicant brought the ingredients for review namely:-

- (i) That there is some mistake or error apparent on the face of the record or
 - (ii) For any other sufficient reason. On that account the Court was urged to make findings that there is no basis for review.
- (2) The Supporting Affidavit deponed by Hassan Kamal has no probative value as it has been deponed by a person who has no relationship with the Plaintiff and so it should be disregarded.
 - (3) As at the time the application for dismissal was heard, the Plaintiffs Counsel were no longer on record. They had been removed from the record.
 - (4) The address through which the application was served through registered post is the same address that the deponent has used. It therefore followed that if he had an interest in pursuing the matter he could have intervened in time.
 - (5) The application for dismissal was served on the Plaintiff but they ignored to attend the hearing and so they do not deserve the courts discretion.

On the Courts assessment of the facts herein, the court agrees with the submission of the defence that prayer 1 has not been argued before this Court and no facts have been advanced to support them. The prayer seems to be misplaced and the same is dismissed.

As for the second prayer the same is appropriate as it is evidence and it is common ground that the orders were exparte. The law on setting aside orders has now crystallized as set out in the famous case of **SHAH VERSUS MBOGO (1967) E.A.116**. It is to the effect that setting aside is meant to aid a party who through a genuine mistake, error, or through inadvertence failed to take a procedural step leading to the exparte orders being entered against him. It is never exercised in favour of a party who has chosen deliberately to delay or obstruct the course of justice.

In addition to the above the court is also to take note of the following principles.

- (1). Denying a party wishing to be heard a right or chance to be heard should be a last resort.
- (2). Mistakes of Counsel should not be visited on a litigant.
- (3). Each case depends on its own facts and should be treated as such.
- (4). The tools a Court uses to shut a litigant from the seat of justice are the same tools it uses to reopen the door that leads to the seat of justice a second time.
- (5). The Court has an unfettered discretion to set aside with the only fetter being that it has to be exercised judicially.
- (6). The said discretion is not automatic it has to be exercised with reason.

Applying the above principles to the facts herein it is clear that supporting affidavit is rather confusing as

it is deponed by a person who alleges to have sold the business long before the case was filed and who was not served, the person then owning the business and who allegedly was the served the mix up is a mistake by Counsel and this should not be visited on the litigants. A further consideration is that the record shows that indeed Counsel then appearing on the record for the Plaintiff disappeared without notice to them. The Court is of the view that had this not happened the Plaintiff could have kept track of his case. They are desirous of being heard and it is only proper that they be given a chance to be heard. Failure to take action is attributable to Counsels on record with the first one disappearing without notice, and the second one fielding a wrong deponent although the deponent appears to still be having interest in the matter as he has stated he is desirous of pursuing the matter.

Indeed it is appreciated that the defendant's interest too needs to be taken into consideration. This court has done so and finds that in the circumstances of this case it is better to shorten the process by allowing the Plaintiff a second chance to pursue his rights; instead of prolonging the litigation by creating an avenue for an appeal to the Court of Appeal. The defendant will be compensated for by way of costs.

For the reasons given the Court makes the following orders:-

1. Prayer 1 of the Application dated 9th July 2007 is dismissed as the same is displaced and was not agitated and the same is dismissed.
2. Prayer 2 is allowed for the reasons given. This Court's Orders of 25.4.05 be and are hereby set aside.
3. The Plaintiff's suit is restored.
4. The defendant will have costs of the application.
5. There after parties are at liberty to process the suit for speedy disposal on priority basis.

DATED, READ AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2008.

R.N. NAMBUYE

JUDGE