



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2789 of 1993

CREDIT CORPORATION LIMITED.....PLAINTIFF

VERSUS

ROWLAND AND WANGIRE NDEGWA trading as

ROWLAND ASSOCIATES.....DEFENDANT

RULING OF THE COURT

1. On the 27/05/2008, this case proceeded to hearing *ex parte* after Miss Wambani for the plaintiff informed the court that the hearing date had been taken by consent of the parties. At the time the firm of Kembi Gitura & Co. Advocates were on record for the defendant. However, on the 30/10/2007 M/s Kembi Gitura & Co. Advocates were granted leave to cease from acting for the defendant. The leave to cease from acting was granted by consent on the 29/11/2007, with both parties, appearing at the registry and fixing the case for hearing on 27 and 28/05/2008.

2. On the 27/05/2008, Miss Wambani informed the court that though M/s Kembi Gitura & Co. Advocates had been granted leave to cease from acting for the defendant, they (Kembi Gitura & Co) had not extracted the order until 12/05/2008, and that would seem to explain why they appeared at the registry on 29/11/2007 and also appeared at the call-over on 29/04/2008 when the case was confirmed for hearing. It was on the basis of the above that the case proceeded to hearing on 27/05/2008.

3. Now before me is an application dated 13/06/2008 by way of Notice of Motion brought under Section 3A of the Civil Procedure Act, Order 50 Rule 17 and Order 27 Rule 12 of the Civil Procedure Rules, Section 146 of the Evidence Act and all other enabling provisions of the law seeking the following orders:-

1. *For reasons of urgency this application be certified as urgent and the same be heard ex parte in the first instance.*
2. *Pending the hearing and determination of the application herein, this honourable court be pleased to grant a stay of further proceedings in the cause herein.*
3. *An inter partes hearing dated (sic) be provided for this application.*
4. *This honourable court be pleased to set aside its ex parte orders of the 27th day of May 2008 ordering that the suit herein do proceed to hearing and that the submissions herein be made on the 16th day of June 2008.*
5. *This honourable court be pleased to recall the plaintiff's first witness JULIUS MWANIKI GIKONYO for rehearing of the suit and for cross-examination by the defendant's counsel.*
6. *Costs of this application be provided for.*

The application is also premised on the following grounds:-

- (a) *That when this honourable court directed that the matter do proceed 'ex parte' on the 27th day of May 2008,*

the defendant herein was not aware of the hearing date and was indeed out of the country.

- (b) No hearing notice whatsoever had been served on the defendant as required and/or at all.
- (c) Unless this honourable court allows the defendant to participate in the trial and cross examine the plaintiff witnesses he will be condemned unheard through no mistake of his own.
- (d) The defendant's previous advocates *Kembi-Gitura & Co. Advocates*, mistake and/or error in not informing the defendant of the hearing date herein ought not to be visited on the defendant.
- (e) No prejudice will be suffered by the defendant (*sic*) if the prayers sought are granted, instead substantial justice will be done to both parties as each will be afforded an opportunity to be heard and cross-examine their respective witnesses.
- (f) Grant of the reliefs herein sought will help obviate the need to file applications to set aside an *ex parte* judgment and/or the necessity to file an appeal which application/appeal would only serve to protract/procrastinate this fairly old matter.
- (g) It is only fair, just and in the interest of justice that the orders sought be granted.

4. There is also a sworn affidavit dated 13/06/2008 and made by Rowland Wangire Ndegwa, the defendant in the case. He says that from the date of filing suit on 31/05/2008, he had always been represented by the firm of Kembi Gitura & Company Advocates. He says that by a letter sent to him by registered post and received by him on or about 6/06/2008, he learnt from a copy of the formal court order enclosed therein that M/s Kembi Gitura had ceased from acting as his advocates on 30/10/2007. Annexed to the affidavit and marked RWN (a) (b) and (c) are the copies of the said court order, the envelope containing the said court order and the certificate of posting issued by the Postal Corporation of Kenya. According to annexure RWN (b) the letter to the defendant was registered on 28/05/2008, a day after this case was heard *ex-parte*.

5. Mr. Ndegwa further depones that until he received the letter sent to him by M/s Kembi Gitura on or about 6/06/2008, he had no idea that his former advocates had ceased to act for him. He also says that on 10/06/2008, he sought and obtained audience with Mr. Kembi Gitura, the principal partner of M/s Kembi Gitura & Co. Advocates and that Mr. Gitura confirmed the contents of the registered letter sent to the applicant on 28/05/2008. The applicant avers that his former advocates did not inform him that the case had been fixed for hearing on 27 and 28/05/2008 despite the fact that they had attended the registry for the fixing and also attended court when the suit was confirmed for hearing. The applicant says that unless the orders sought herein are granted he stands the risk of being condemned unheard. Finally, the applicant says that on 29/04/1994, the parties recorded a consent judgment and that he had satisfied part of that judgment and therefore that if he is not given a chance to be heard, he may have to suffer double jeopardy. I have seen that the annexure marked RWM-2(b) is the consent order by which judgment was entered on 29/04/1994 and that the applicant made part payment towards settlement of the same.

6. The application is opposed. The Replying Affidavit is sworn by JULIUS GIKONYO in his capacity as Credit Officer of the Plaintiff herein. He concedes that the firm of M/s Kembi Gitura & Co. Advocates ceased to act for the Defendant by an order of the court dated 30/10/2007, and that the said order was not extracted until on or about 15/05/2008 and served upon the plaintiff's advocates on 16/05/2008. He also says that on 27/05/2008, he appeared in court and testified *ex parte*. In his view, the defendant was aware of the hearing date but deliberately failed to attend court.

7. At the hearing of the application, Mr. Kahonge urged the court to allow the application after giving a brief history of the facts. He contended that the applicant stands to suffer great prejudice unless he is given a chance to be heard, and particularly in view of the earlier consent judgment that was entered into between the parties on 29/04/1994. He relied on the case of *Farnandes -vs- Noronha* [1969] EA 506. The issue that arose in that case which was then on appeal, was whether the court below should have allowed the Respondent to be recalled after both the appellant's and the respondent's cases had been closed to enable him to be further cross-examined on a statement given by him to the police. The court held, *inter alia*, that "*the discretion to recall a witness for further examination or cross-examination should be exercised in exceptional cases where an injustice might otherwise result.*"

8. It is my view that the facts in the case cited by counsel for the applicant are not quite the same as those obtaining in the instant case. What was sought in that case was the recall of a witness for further cross examination. It would appear both parties were present at the hearing. In the instant case, the defendant was not present at the time of hearing. The case for the plaintiff has closed and submissions made; all *ex parte*. The principle that Mr. Kahonge wants this case to apply, I think, is that the defendant should not be condemned unheard. He has also brought it to the attention of the court that there was a consent judgment way back on 29/04/1994 and that part of that judgment has since been satisfied by the

applicant. Mr. Kahonge says that the applicant has shown sufficient cause why this application should be allowed, namely that he only became aware of the hearing date after the event.

9. In her opposition to the application, Miss Wambani contends that the applicant's contention that he was not aware of the hearing date is far from the truth. She contends that the applicant deliberately failed to attend court, and further says that if this court's orders of 27/05/2008 are set aside, the plaintiff will be greatly prejudiced since the case may not be allocated another hearing date in the near future. She urged the court not to allow the application as it stands because the rules under which the application is made allow only for further cross-examination and not starting a case de novo.

10. After considering the facts as above given, I have made the following findings:-

- (a) *that consent judgment in this case was entered into between the parties on 29/04/1994.*
- (b) *that the original file in this case went missing.*
- (c) *That though M/s Kembi Gitura & Co. Advocates obtained leave from the court on 30/10/2007 to cease acting for the defendant herein, the order was not extracted until 15/05/2007 and same was not served upon the defendant until 6/06/2008 or thereabouts*
- (d) *That the defendant was not present at the hearing of his case on 27/05/2008*
- (e) *That an error was committed on the part of M/s Kembi Gitura & Co. Advocates who were previously acting for the defendant.*

11. After carefully considering the application and the submissions made to me by both counsel, I am persuaded that the applicant's application has merit. Although the respondent's counsel contends that the applicant was absent from court because he chose to attend his son's graduation overseas, that fact is not deponed to in the Replying Affidavit of Julius Gikonyo. What is clear to me is that it was not until 28/05/2008 that M/s Kembi Gitura & Co. Advocates dispatched a copy of the court order granting them leave to cease from acting for the applicant. By then the court had already taken the evidence of the plaintiff's witness the previous day. I am persuaded that to proceed further without hearing the defendant on this matter would be prejudicial to the defendant/applicant. I am fortified in this view by the fact that as at 27/05/2008, the court was not aware that there was a consent judgment in this case. If there was such consent judgment, and part payments of the same have been made, what would be the impact of another judgment? The plaintiffs did not disclose at their taking of evidence that such a judgment on record nor has the plaintiff disputed the applicant's contention that such judgment was on record into and that part payments were made. To refuse to hear the defendant in the matter would be draconian to say the least.

12. In the circumstances, I have reason to believe that unless the orders sought are granted on injustice might otherwise result. Accordingly, I allow the application and make the following orders:-

- (i) *that the exparte orders made by myself on 27/05/2008, allowing this case to proceed exparte be and are hereby set aside.*
- (ii) *that in exercise of the powers conferred upon me under section 3A of the Civil Procedure Act, the plaintiffs first witness JULIUS GIKONYO be recalled for the taking of his evidence afresh and for cross-examination by the defendant's counsel*
- (iii) *that the costs of this application be paid to the plaintiff in any event*
- (iv) *that fresh hearing dates be taken on priority basis.*

It is so ordered.

Dated and delivered at Nairobi this 19th day of September, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

..... **For Defendant/Applicant**

..... **For Plaintiff/Respondent**