



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURT)**  
**CIVIL CASE 72 OF 2008**

**JOHN M. GAIKO trading as GAIKONSULT QUANTITY SURVEYORS.....PLAINTIFF**

**VERSUS**

**TRIPPLE EIGHT CONSTRUCTION (KENYA) LIMITED.....DEFENDANT**

**R U L I N G**

1. The application that is before me is the Chamber Summons dated 4/06/2008, brought under Order 9A Rules 10 and 11 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking **ORDERS** –

1. *That this application be certified urgent and the same be heard ex-parte in the first instance due to its urgency.*
2. *That there be a stay of execution of this court's judgment and Decree pending the hearing and determination of this application inter partes.*
3. *That the ex-parte judgment entered herein and all consequential orders be set aside.*
4. *That the defendant be granted leave to enter appearance and defend this suit in terms of the draft defence annexed hereto.*
5. *That the costs of this application be in the cause.*

The application is premised on the grounds that

1. *That failure by the defendant to file appearance and defence to the suit was occasioned by unforeseeable circumstances inadvertence (sic).*
2. *That the defendant has a good defence to the plaintiff's claim as demonstrated by the draft defence annexed hereto.*
3. *That the defendant has brought this application without undue or inordinate delay.*
4. *That the defendant is ready to abide by any reasonable conditions that may be set by this Honourable Court.*

and is also supported by the affidavit of **SIMON WABURI** sworn on 4/06/2008. He says that after he

received summons on 14/03/2008, he instructed his Secretary, one Judy Wambui to forward the same to the Defendant's Chairman and that about 15/03/2008, he fell ill and had to take two weeks leave to recuperate. The deponent has not annexed evidence of such illness but goes on to say that when he resumed duty on 2/04/2008, his Chairman, one Nderitu Gachugua had returned the summons to the deponent to deal with on the 25/03/2008 but that the said summons could not be traced until about 16/05/2008, hence this application. The deponent says that the Defendant's failure to enter appearance and file defence was not deliberate. He says that it would thus be in the interests of justice to allow the Defendant to defend this suit.

2. The application is opposed. The affidavit in reply is sworn by John Gaiko, who says that the explanation given for the failure to enter appearance or file defence on the part of the Defendant is not genuine and that the application is an afterthought. Mr. Gaiko also says that the Defendant does not have a good defence to the Plaintiff's claim in the face of the two contracts executed between the Plaintiff and the Defendant dated 10/07/2006 and 14/09/2007 respectively.

3. At the hearing of the application Mr. Riunga Raiji appeared for the Plaintiff/Respondent while Mr. Musundi appeared for the Defendant/Applicant. Mr. Musundi reiterated the grounds on the face of the application and the averments of the affidavit in support and urged the court to exercise its unfettered discretion in favour of the Applicant. Mr. Musundi also submitted that already about Kshs.1.6m had been deposited in court which amount the Applicant says is the admitted amount of the claim. Mr. Musundi said that this amount can be released to the Plaintiff.

4. Mr. Riunga Raiji for the Plaintiff/Respondent also reiterated the contents of the Replying Affidavit and urged the court to find and to hold that the alleged sickness on the part of Mr. Waburi is unsupported by medical evidence. Mr. Raiji said the Defendant only woke up from its slumber after the Plaintiff took out execution proceedings and that all the reasons given for the delay in responding to the Plaintiff's claim were excuses which had no basis. Mr. Raiji also contended that the draft defence does not raise any triable issue worth defending and that the same is a mere sham. He also submitted that the Defendant is trying to take shelter in the arbitration clause appearing in the contract but such shelter is not available since the parties are already before the court. Mr. Raiji submitted that if the court is willing to grant the orders sought, then it ought to grant the orders on such terms as would secure the interest of the Plaintiff who has a lawfully obtained judgment.

5. Order 9A Rule 10 of the Civil Procedure Rules allows for the setting aside of judgment upon such terms as are just. The Plaintiff has asked this court to order the Defendant to deposit the entire decretal sum into court in a joint interest earning account in exchange for the orders sought. The Defendant on the other hand contends that such a requirement would be punitive of the Defendant and unbeneficial to the Plaintiff since neither party will benefit from it.

6. The principles to be followed by the court in considering applications such as the instant application were set out in the case of **Maina –vs- Migiria [1983] EA 78**

and these principles are as follows:-

(i) There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ---. 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 wide discretion given to it by the rules. (See Duffus P in **Patel v E.A. Cargo Handling Services [1974] EA 75 at p. 76**.)

(ii) This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice" (See **Harris J in Shah –vs- Mbogo [1967] EA 16 at 123B**).

(iii) --- a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result

has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice (see **Newbold P in Mbogo –vs- Shah [1968] EA 93 at 96 (A)**).

7. In a nutshell, I shall be guided only by the principle that the decision I make in this case will do justice to the parties. The above principles have been restated in many other cases, both before and after the decision in the **Maina case**. In the case of **Shabir Din v Ram Parkash Anand (1955) 22 EACA 48** Briggs JA said the following at page 51:

***“I consider that under Order IX rule 20 the discretion of the court is perfectly free and the only question is whether upon the facts of any particular case, it should be exercised. In particular, mistake or misunderstanding of the appellant’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.”***

8. In the instant case, the Plaintiff filed suit by way of plaint on 10/03/2008, claiming a liquidated sum of Kshs.8,222,535/= which amount is said to be professional fees due from the Defendant to the Plaintiff on account of professional consultancy services rendered by the Plaintiff to the Defendant under two contracts dated 10/07/2006 and 14/09/2007 respectively. The Plaintiff also claims interest on the said sum at court rates from the date of filing suit until payment in full and interest thereon, and such other relief as this court may deem it fit to grant.

9. It is not in dispute that summons to enter appearance together with copy of the plaint were served upon the Defendants on the 14/03/2008. Mr. Simon Waburi, the Managing Director of the Defendant and upon whom the service was effected says that he passed the papers, to the Chairman, one Mr. Nderitu Gachagua seeking advice on how to proceed with the matter. As it transpired no action was taken on the matter and that it was not until the 16/05/2008 that Mr. Waburi was able to find the Plaintiffs papers still unanswered. Mr. Waburi says that between 15/03/2005 and 2/04/2008, he was away on sick leave, hence the delay in responding to the Plaintiff’s claim.

10. The Plaintiff says that the reasons advanced by the Defendant are not genuine; that the Defendant has no good defence to the Plaintiff’s claim and that the orders which the Defendant now seeks are a mere afterthought. In my view, I think that Mr. Waburi was negligent in the manner he handled the summons after the same were served upon him on 14/03/2008. But should a single officer’s negligence be visited upon the Defendant by denying the Defendant an opportunity to be heard? My view is that it should not be so. As was held in the case of **Shabir Din** (above) I am persuaded to accept ***“as a proper ground for granting relief”***. Mr. Waburi’s negligence in this whole matter.

11. I have also looked at the draft defence and I find that the same raises triable issues which can only be determined at a full hearing. The Defendant admits that the Plaintiff is only entitled to the sum of Kshs.1,453,553/95 and is ready and willing to have the said amount released to the Plaintiff. I am also persuaded that this application was brought within reasonable time after the Defendant realized its folly, though as the Plaintiff says, it was after execution had been done.

12. In the circumstances, I would allow the application and make the following orders:-

- (i) That the exparte judgment entered herein and all consequential orders be and are hereby set aside.
- (ii) That the Defendant be and is hereby granted leave to enter appearance and defend this suit in terms of the draft defence annexed to the application.
- (iii) That the said annexed draft defence shall be filed and served upon the Plaintiff within the next seven (7) days from the date of this ruling.
- (iv) That the Defendant shall release or cause to be released to the Plaintiff the admitted sum of

Kshs.1,453,553/95 within seven (7) days from today.

(v) That the Defendant/Applicant shall pay to the Plaintiff the throw-away costs of the suit, the amount to be agreed or taxed.

(vi) That costs of this application shall be borne by the Applicant.

(vii) That in default of (iii) and (iv) above, the leave granted herein shall lapse.

It is so ordered.

**Dated and delivered at Nairobi this 17<sup>th</sup> day of October 2008.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:

Mr. Kiura holding brief for Raiji for the Plaintiff/Respondent

No appearance for the Defendant