



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 149 of 2002, 170 of 2002 & 171 of 2002 (Consolidated

STEPHEN NDICHU.....PLAINTIFF

VERSUS

MONTY’S WINES & SPIRITS LIMITED.....DEFENDANT

CONSOLIDATED WITH

CIVIL CASE NO. 170 OF 2002

LORENZO VENTURA.....PLAINTIFF

VERSUS

MONTY’S WINES & SPIRITS LIMITED.....DEFENDANT

CONSOLIDATED WITH

CIVIL CASE NO. 171 OF 2002

JACKPOT ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

MONTY’S WINES & SPIRITS LIMITED.....DEFENDANT

R U L I N G

The Defendant has by Chamber summons dated 31st July, 2008 expressed to be brought under Order XXI Rule 22(1) and Order IXB rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act sought the following order:

3. THAT the Judgment entered against the Defendant in these matters be set aside and the suits herein be reinstated for hearing.

The application is based on grounds on the face of the application namely:

(a) That the Judgment in these matters was entered due to the default by the previous Advocates for the

Defendant to appear at the hearing hereon on 7th and 8th November, 2007;

(b) The Defendant has a Meritorious Defence to the Plaintiff's claims and it is therefore in the interests of justice that the Defendant be allowed to defend the said claims which will enable this Honourable Court to effectively determine all the issue in this suit;

(c) The setting aside of the Judgment will not prejudice the Plaintiffs in any way whatsoever;

(d) If stay of execution is granted the Plaintiffs will not suffer any or any substantial and irreparable loss;

(e) The Defendant ought not to be punished for the mistakes of its Advocate.

The application is also supported by an affidavit sworn by RAJESH CHHOTALAL RANJAI, a director of the Defendant company of even date. The application is opposed. The Respondent filed a replying affidavit sworn by VISHNU SHARMA, Advocate for the Plaintiff in the instant suit dated 29th September, 2008.

I have considered the contents of the affidavits filed for the parties to this application.

There are three cases HCCC No. 149, 170 and 171 of 2000, consolidated by the parties by consent. The Defendant is the same in all cases. The Plaintiffs have sued the Defendant for the recovery of a debt owed to each of them by the Defendant. From the record of the proceedings, the instant application is not the first one of its kind. There was an earlier application which this court granted on the 12th May, 2006. In that application the Defendant successfully had a judgment entered against it set aside. The court had entered judgment against the Defendant on 20th April, 2005 after hearing the Plaintiffs *ex parte*.

The Defendant had taken hearing dates for the case by consent, but on 8th March, 2005, when the case came up for hearing, neither the Defendant's representative nor its Advocates attended court.

After the judgment was set aside, the parties set a new date for the hearing of the consolidated suits. On 8th November, 2007 when the case came up for hearing neither the Defendant's representatives nor its counsel attended court. It is this judgment that the Defendant now seeks to have set aside.

The principles governing the exercise of the court's discretion to set aside a judgement obtained *ex parte* were clearly set out by Harris, J. in the case of *Shah vs. Mbogo & Another* [1967] EA 116. At page 113 the learned judge summarized the parameters upon which the court's discretion to set aside an *ex parte* judgment as follows:

"The discretion of the Court to set aside an ex-parte judgment is wide and flexible and is exercised upon terms that are just. The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct the course of justice."

I have set out the background of the case upon which the current application is made. As counsel for the Respondent correctly observed, the Defendant failed once before to attend court for the hearing of the case in 2005. The application to set aside the judgment which followed was supported by their Advocate on record then, one RAIKUDALIA, who swore that she was involved in an accident at the time the case came up for hearing. The court set aside the judgment where upon the parties took a hearing date by consent.

The Applicant did not disclose these facts in its current application. Yet the same Advocate was on record for the Defendant when the case came up for hearing a second time. This time round, she swore no affidavit to support the application. Instead the supporting affidavit to the instant application has been sworn by the Defendant's director, Rajesh Chhotalal Ranjai. In that affidavit, he deposes that the

Defendant company was unaware of the hearing date and that it only knew of the entry of judgment after its goods were proclaimed by M/s Dolphin Auctioneers.

No affidavit has been sworn by the Advocate then on record to explain why, after taking a hearing date by consent, both the Advocate and her client failed to attend court. Furthermore, this was the second time the Defendant and its Advocate was failing to attend court for the hearing of the case after taking consent hearing dates. Yet this fact was not disclosed by the Applicant in its supporting affidavit.

Mr. Khamala for the Respondent has urged the court to find that due to non disclosure of the fact the instant application was the second of its kind, the application lacked bona fide and secondly that the application was *res judicata*.

Mr. Kibera for the Applicant on his part has urged that the failure that caused the entry of judgment was due to negligence of counsel and that the court should not visit the mistake of counsel on the Applicant.

From the onset let me say that the current application is not *res judicata* as it has not been made a second time to have the same judgment set aside. The earlier application was made to set aside a judgment entered in 2005. The current application is to set aside a judgment of 2007. Mbugu Kinyua vs. Gachini Tuti relied upon by the Respondent does not apply.

Part of the matters the court should consider in an application of this nature is whether sufficient cause has been shown for the stay of the execution as sought. I believe that the issue whether the application was brought timeously is part of that consideration. The Defendant's director in his supporting affidavit has deposed that the Defendant was unaware of the entry of judgment until 22nd July, 2008 when M/s Dolphin Auctioneers proclaimed the Defendant's goods. That cannot be true. From the record of the proceedings, the Defendant's advocate was present in court before the Deputy Registrar for the taxation of the Plaintiff's Bill of costs on 27th May, 2008. The Defendant's Advocate had duly been served. The same Defendant's Advocate applied successfully for the adjournment of the taxation to 17th June, 2008. On the 17th June, 2008 she did not attend the taxation.

The point being made is that the Defendant's advocate must have been aware of the entry of judgment by latest May 2008. Yet the instant application was not filed until 31st July, 2008. It is quite clear to this court that the Defendant has not been candid. The failure to disclose that the current application was the second such application, and the failure to disclose that its Advocate attended the taxation of the Plaintiffs' Bill of Costs, all demonstrate the Defendant's lack of clean hands. The Applicant is seeking the court to exercise a discretionary jurisdiction in its favour. It should have come to court with clean hands to benefit from the court's exercise of discretionary power.

I find that in the circumstances of this case, the instant application was not made within a reasonable time. Despite knowledge of the entry of *ex parte* judgment, latest May 2008, the applicant waited until the end of July 2008 to make this application. There is clear evidence of delay in bringing this application. The court cannot resist finding that the circumstances of the case taken in their totality reveal that the Applicant has deliberately evaded court with the sole purpose of obstructing and or delaying justice and the determination of this suit.

In case I am wrong on the issue of delay, I have considered the supporting affidavit by the Defendant/Applicant and submissions by its counsel. I am fully persuaded that the Applicant did not even attempt to make out a sufficient case on the merits to justify the setting aside of the perfectly regular judgment entered against it on the 26th November, 2007.

The Applicant made no attempt whatsoever to show that it has a good defence on the merits. All the Applicant has averred at paragraph 8 of the supporting affidavit is that the Agreements forming the basis of the Respondents' claims were null and void for lack of authority from the Defendant Company and for lack of proper execution and consideration. The learned judge in his judgment of 26th November, 2007 did consider the Defendant's defence and concluded that it had not been substantiated and nonetheless

had no merit in view of the evidence tendered by the Plaintiffs. In light of that finding, and the Defendant not having adduced evidence before me to substantiate its allegation referred to above, I find no good ground to justify the setting aside of the exparte judgment.

In conclusion, I find the Defendant's application dated 31st July, 2008 lacking in merits and bona fides and I accordingly dismiss it with costs to the Respondents/Plaintiffs.

Dated at Nairobi this 14th day of November, 2008.

LESIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Kibera for the Applicant

V. Sharma for Mr. Khamale for the Respondents

LESIT, J.

JUDGE