**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**(MILIMANI LAW COURTS)**

**CIVIL SUIT 313 OF 2000**

**PETER KINUTHIA MWANIKI……..…….1ST PLAINTIFF/APPLICANT**

**THOMAS NJOROGE KAMAU……...…2ND PLAINTIFF/APPLICANT**

**JACKSON KENYA GATHU……..….3RD PLAINTIFF/APPLICANT**

**VERSUS**

**PETER NJUGUNA GICHEKA……1ST DEFENDANT/RESPONDENT**

**JAMES MATARA CHEGE…….2ND DEFENDANT/RESPONDENT**

**JAMES CHOGI THOTHO……..3RD DEFENDANT/RESPONDENT**

**LIMURU BUTCHERS UNION……...4TH DEFENDANT/RESPONDENT**

**RULING**

On 9th day of June 2006, I delivered a judgment in this case by which I granted "***a permanent injunction order to restrain the defendants, their agents and servants from continuing to construct a slaughter house in the parcel of land known as Plot No. Zone 6, within Limuru township……"***

Soon after that on 21st June, 2006, the defendants moved the court, under a Certificate of Urgency praying the court to set aside the judgment delivered on 9th June 2006, and the case do start, "***de novo***", on the basis that,

**(a) "the plaintiff proceeded for hearing on 16th and 17th May 2006, in their absence, plus the absence of their advocate….."**

**(b) "That the advocate previously on record never notified them of the hearing date".**

**(c)** "**That the defendant/applicants, have a good defence to the suit".**

(d) "**That the defendants/applicants have invested heavily for the construction of the modern slaughter house and stand to suffer great financial loss…"**

The affidavit in support of the application dated 21st June, 2006, was sworn by James Matara Chege, Secretary of Limuru Butchers Union. He averred at para 15 thereof, as follows:-

"**That the butchery has been built on modern standards having taken into consideration the issues of Environment, i.e.**

**(a) There is a biogas digester – system in place to take care of foil odors.**

(b) **There are provisions for disposal of effluent discharge (annexed and marked "JMC5" is an Environmental audit report)."**

The Chamber Summons application was also supported by the affidavit of M/s Wambui Ng'ang'a the advocate for the defendants, who failed to turn up in court on the 16th May 2006, the day that I heard the plaintiff's suit, ex parte,

She concedes in her affidavit that she was "***personally***" served with a hearing Notice for the 16th and 17th May 2006, but that "***from 25th February 2006, she started ailing, and since then I have not been attending to office regularly***".

At para 8 she averred further,

"That due to the ailing, I lost control of my diary and that I forgot to instruct counsel to hold my brief in this particular matter and hence it proceeded in my absence…"

and finally at paragraphs 10 and 11 she averred,

"**That my failure to appear in court was not deliberate or intentional but rather was caused by illness**" and finally,

"**That the defendants/applicants should not be punished for my mistakes".**

In response to the application, the 1st plaintiff, Peter Kinuthia Mwaniki filed a replying affidavit and asserted that the defendants were properly served with a hearing Notice "***for the 16th and 17th May 2006, which is admitted",*** and again, "***The advocate who made the mistake should be held responsible by the defendants***".

The plaintiff prayed the court to "***be allowed to enjoy the fruits of successful litigation…."*** As the defendant's application is, "***a way to obstruct and delay the cause of justice".***

In court during the hearing of the application, Mr. Busolo advocate for the defendants sought to set aside the ex parte judgment on the basis that the defendants were not aware of the hearing date as the advocate on record then, did not notify them of the said date. He relied on a decided case, **MAINA – vs – MURIUKI Civil Case No. 1079 of 1980** where O'Kubasu, J (as he then was) held, inter alia,

**1.** "**The court has a wide discretion to set aside ex parte judgment on such terms as are just and that power does not cease to apply because a decree has been extracted".**

**2.** "**Before ex parte judgment can be set aside, it must be satisfied that there is a valid defence".**

3. "**As the applicant had stated that he was not aware that the suit was to proceed and that he was relying on his advocate who had failed to turn up at the hearing, the applicant would not be punished due to his advocate faults (Shabir Din – vs – Prakash Anand (1955) 22, EACA".**

Mr. Ojienda for the plaintiffs noted that the issue of service of hearing dates on the advocate who was on record for the defendants at the time, M/s Wambui Nganga, has not been denied. All she averred was that she "**lost control of her diary**" due to illness.

Mr. Ojienda submitted further that the defendants had not shown "**sufficient cause to call upon court**," to set aside the judgment.

He relied on the decision of **MUTUNGI, J in GOVINDA & SONS LTD – vs – LABAN ANAMBILI LTD**, where the learned Judge on relying on the decision of **SHAH – vs – MBOGO & ANOTHER [1967] EA** said,

"The proposition that a litigant should not be victimized for willful mistake or neglect of his counsel no longer holds water as tightly as in yonder years.."

The judge then quoted the holding in **SHAH & MBOGO** which reads,

"the discretion of the court to set aside a judgment obtained ex parte 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice".

In this case, service of the hearing date on counsel for the defendants, has been admitted. Reasons for failure to appear in court, were given and further to that was the averment by Wambui Ng'ang'a, advocate that

"**after being served with a hearing Notice, I placed it in my diary, and I was exclusively in control of my diary and that the staff in my office could have instructed a counsel to hold my brief if they were aware that the case was to come for hearing on 16th and 17th May, 2006".**

I will have to consider the averments of Wambui Ng'ang'a advocate, plus all the reasons she gives why she did not attend court, alongside the decisions in the cases quoted by both advocates during the hearing of this application.

Perusing the judgment I delivered on 9th June 2006, once more particularly at page 17 thereof, I found that the defendants breached the provisions of the Environmental Management and Co-ordination Act, 1999, especially sections 58 on, "**Application for an Environmental Impact Assessment Licence**," which I found the defendants did not have.

I was also satisfied that on the issue of disposal of effluent charge, I said as follows in the judgment,

"As the defendants have not made any provisions for disposal of effluent discharge, yet their butchery is almost ready for use, I find that they are likely to contravene the provisions of Section 75 of the Act".

The defendant's defence at para 7 denied the contents of para 13, of the plaint and stated that the slaughter house,

"is being constructed to International standards and with specific regard to water, waste disposal and in accordance with all relevant provisions of the law and counsel by laws…"

The defence does not in my considered opinion, specifically address the issue of "**an affluent discharge licence".**

The affidavit in support of the chamber summons application before me at para 15 refers to and annexes an Environmental Audit Report. This cannot be the same thing as an affluent discharge licence, or is it?

Be that as it may, I have considered the application before me from the point of view of the defendants who appear not to have been aware of the hearing date of 16th and 17th May 2006, as their advocate did not inform them.

I do not find the advocate's reasons for failure to attend court completely convincing, nevertheless I have decided to exercise a discretion in favour of the applicants, who are the defendants and grant them leave to defend the suit. In this way, I have followed the decisions of this court quoted to me during submissions. However, the permanent injunction order I granted to "**restrain the defendants, their agents and servants from CONTINUING TO CONSTRUCT the slaughter house in the parcel of land known as Plot No. Zone 6, within the Limuru Township**", will remain in force, until the determination of the suit.

Similarly, the further injunction order I granted, "**to restrain the defendants, their agents and or servants from commencing the slaughter of animals in the building they have been constructing and are about to complete**," will also remain in force, until the determination of the suit.

I have therefore granted the defendant's leave to defend the suit, on terms. In this way the hearing will start "**de novo**". I did this because of the apprehension that the suit by the plaintiffs will be defeated if the construction of the building continues and the slaughter of animals begin before issues in the suit are determined.

Finally, I order the defendants to pay to the plaintiffs' thrown away costs amounting to Kshs.5,000/= before the hearing of the suit by the Division of Lands and Environment, in the High Court.

Mention before the Presiding Judge of the Division on Monday, 7th May 2007, at 9.00 a.m., for further orders pertaining to the hearing of the suit, "***de novo***".

Dated at Nairobi this 27th day of April, 2007.

**JOYCE ALUOCH**

**JUDGE**