**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 149 of 2002**

**STEPHEN NDICHU…….…..……..... PLAINTIFF**

**VERSUS**

**MONTY'S WINES AND SPIRITS LTD…….....……..…..…DEFENDANT**

**RULING**

On 8.3.2005 the Plaintiff's suits in HCCC No. 149, 170 AND 171 OF 2002 came up for hearing before me. The hearing date had been taken by consent and there being no explanation for the non-attendance of the defendant's representative or its advocates, the cases proceeded ex parte. I delivered judgment in favour of the Plaintiffs (hereinafter called the Respondents) against the defendant (hereinafter called the Applicant) on 20.4.2005. It is that judgment that is sought to be set aside in this application.

The reasons for the application are that the non-attendance of the Applicant's advocate on the hearing date was due to her involvement in a road accident; that the Applicant has a meritorious defence to the Plaintiff's claims; that setting aside the judgment will not prejudice the Plaintiffs and that the Applicant ought not to be punished for the mistakes of its advocates.

The application is supported by an affidavit, sworn by Ashana Raikundalia, the Applicant's advocate. To that affidavit are annexed 3 exhibits including a copy of a police abstract in respect of an accident which occurred on 8.3.2005 and correspondence exchanged between counsel for the Applicant and her counter-part for the Respondent and the Deputy Registrar of this court. The said advocate also avers that the Applicant has a meritorious defence as the Loan Agreements upon which the Respondents claims are based are null and void as the Applicant did not authorize the same and are also not properly executed and further that the same contravene the Banking Act, the Companies Act and the Transfer of Property Act. The said advocate further depones that the Loan Agreements are unenforceable for want of any or any sufficient consideration.

The application is opposed and there is a replying affidavit sworn by Charles Alenga Khamala an Advocate in the employ of Vishnu Sharma the Advocate on record for the Respondent and Grounds of Opposition filed by the said Vishnu Sharma Advocate. The primary reasons for objecting to this application are that counsel for the Applicant and the only witness for the Applicant were not diligent in ensuring representation for the Applicant when the case came up for hearing on 8.3.2005. Indeed counsel for the Respondents casts doubt on the reasons advanced by counsel for the Applicant for failing to attend when the suit was called out for hearing. The Respondent is further of the view that the Application has been lodged rather late since it was quite easy to know the date of judgment by a simple enquiry from the

Court Clerk on 8.3.2005. It is also the contention of the respondent that the applicant does not have an arguable defence to the Plaintiffs' claims and if the discretion to set aside the ex-parte judgment is to be exercised in favour of the Applicant it should be on terms that the Applicant deposits the decretal amount in court and pays all thrown away costs.

I have considered the applications, the affidavits both in support of the application in reply thereto the Grounds of Opposition the submissions of Learned counsels and the cases cited. Having done so, I take the following view of the matter.

The principles governing the exercise of judicial discretion to set aside ex-parte judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See **Patel –vs- E.A. Cargo Handling services Ltd (1974] E.A.75).** The discretion is intended 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 cause of justice (see **Shah –vs- Mbogo [1969] E.A.116)**. The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See **Sebei District Administration – vs- Gasyali [1968] E.A. 300).** It also goes without saying that the reason for failure to attend should be considered.

Applying those principles to the case at hand, I find that this application has been brought into court rather late. Judgment was delivered on 20.4.2005 yet this application was lodged on 23.9.2005, five (5) months thereafter. I see no reason why counsel for the applicant could not enquire about the date of judgment when she learnt that the case had been dealt with on 8.3.2005. However that is not the only consideration in determining this application. The other principles must still be considered notwithstanding the delay in bringing the application.

Learned counsel for the applicant has deponed that on the said hearing date she was involved in an accident and was for that reason unable to attend court on 8.3.2005. She has supported that deposition by a police abstract. I do not doubt that indeed counsel for the applicant had an accident on 8.3.2005. She has further deponed that after the accident she communicated with her clerk who had business at the Kenya Industrial Property Institute on Mombasa Road but who failed to reach the court in time to brief another counsel of the predicament of the applicant's counsel. Her subsequent actions may have been imprudent but should this be visited on the applicant? I think not. In the case of **Philip Chemwolo & Another –vs- Augustine Kubende [1992 – 88] 1 KAR 1036,** Apaloo, JA as he then was delivered himself as follows:-

"**I think a distinguished equity Judge has said:**

'***Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits.'***

**I think the broad equity approach to this matter, is that unless there is fraud of intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline".**

In **Ngome –vs- Plantex Company Limited [1984] KLR 792**, Chesoni Ag. J.A as he then was in allowing an appeal against an order refusing to set aside an exparte order of dismissal of a suit held at page 798 as follows:-

"**By dismissing the appellant's application as incompetent in that it could not be preferred under rule 8, both the magistrate and learned judge, did not consider its merits and consequently, they failed to take into account matters they ought to have taken into account, which is an essential consideration in the exercise of a discretion:**

**……. and as said by Hancox JA in Herman Mugachia, Supra, by visiting the error of his advocate on the unfortunate appellant, the two lower courts denied him the right of having his case heard at all. That, as said by Ainley J (as he then was) in *Sodha –vs- Hemraj [1952] Uganda L.R Vol.7 p.11* should be the last resort of any court."**

I have perused the defences filed by the applicant. In my view the same cannot be described as sham defences. The applicant challenges the contracts forming the foundation of the respondents' case and avers that the same are null and void in law and cannot be enforced. There is further an averment that the contracts are ultra vires as the applicant did not authorize the same and infact contravened the applicant's Memorandum and Articles of Association. There is also an averment that the said contracts are void for non-execution and that they contravene the Banking Act, the Companies Act and the Transfer of Property Act. There is yet an averment that the contracts were entered into by the applicant's chairman while he was on his death bed and while he was so incapacitated by sickness as to lack capacity to transact business and further that the same are voidable for having been obtained through undue influence. There is further an averment that the said contracts are unenforceable for want of any or any sufficient consideration.

In my view the issues raised by the applicant in its defences are bonafide issues. At this stage, I am not required to make a finding as to whether the applicant will succeed in establishing these issues. But they are arguable issues.

I have further considered whether the respondent would be compensated by costs for any delay to the trial occasioned by setting aside the exparte judgment. I have weighed this against driving the applicant from the judgment seat unheard. I have come to the conclusion that the respondent can be adequately compensated by costs particularly as the applicant cannot be said to be deliberately attempting to obstruct or delay the course of justice.

The upshot, is that the defendant's application dated 23.9.2005 and filed on the same date is allowed. The ex-parte Judgment entered against the applicant on 20.4.2005 and all consequential orders are set aside.

The applicant shall pay to the respondents the costs of this application and all thrown away costs.

Those then are the orders of this court.

**DATED AT NAIROBI THIS 12TH DAY OF MAY 2006.**

**F. AZANGALALA**

**JUDGE**

**12.5.2006**

**DATED** AND **DELIVERED** ON **12TH** DAY OF **MAY, 2006.**

**M. KASANGO**

**JUDGE**

**12.5.2006**

Read in the presence of:-