

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 352 of 1999

MEA LIMITED.....PLAINTIFF

VERSUS

FAGS LTD.....DEFENDANT

RULING

The defendant filed an application by way of a chamber summons brought under **Order IXB rules 3 and 8** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking to set aside summary judgment that was entered for the plaintiff on 21st September 2004. The judgment was in the sum of Kshs.386,424.50.

In the suit that had been filed by the plaintiff against the defendant, the plaintiff had sought judgment in the sum of Kshs.406,014.50 plus costs and interest thereon. M/S Wambui Ndungu & Company Advocates entered appearance for the defendant and also filed a statement of defence.

On 27th March 2002 the plaintiff filed an application for summary judgment and the same was brought against **DICK K. NJUGUNA t/a FAGS LTD**. Mr. Dick K. Njuguna is a director of the defendant company. It is not clear why the plaintiff chose to file the application for summary judgment in the above manner. The application was served upon M/S Wambui Ndungu & Company but they declined to accept service saying that they were no longer representing the defendant. When the application was listed for hearing before Muga Apondi J, on 21st September 2004, counsel for the applicant urged the court to grant the application as the same was not opposed. The court proceeded to enter judgment for the sum of Kshs.386,424.50 together with costs and interest. Thereafter a decree was extracted and the same showed the defendant to be **Dick K. Njuguna t/a Fags Ltd**.

On 14th March 2006 M/S Kiplenge Ogola and Mugambi Advocates filed an application seeking leave to take over the conduct of this matter on behalf of the defendant in place of M/S Wambui Ndungu & Company Advocates. Subsequent to the filing of the said application a consent letter was filed between the said advocates to allow the application as prayed. Court filing fees in the sum of Kshs.300/- was paid for the said consent and on 20th March 2006 the Deputy Registrar endorsed the consent. It therefore became an order of the court. M/S Kiplenge Ogola and Mugambi Advocates then filed a notice of change of advocates for the defendant on the 21st March 2006.

In its affidavit in support of the application to set aside the aforesaid judgment, Mr. Dickson K. Njuguna deponed that he was a director of the defendant company and that the company had instructed M/S Wambui Ndungu Advocate to represent it in this matter but the said advocates did not inform the defendant that they had been served with the application for summary judgment. He further stated that he became aware of the decree herein when auctioneers proclaimed his personal property on 27th February 2006. He therefore urged the court to exercise its discretion to set aside the judgment that had been entered as aforesaid.

Mr. Kurgat for the defendant/applicant submitted that it was improper for the plaintiff to have applied for summary judgment against a director of the defendant company when the suit had been filed against the defendant company. He urged the court not to punish the defendant for a mistake which was not of his own making. He cited a Court of Appeal decision in **MUTHAIGA ROAD TRUST COMPANY LIMITED VS FIVE CONTINENTS STATIONERS LIMITED AND TWO OTHERS [2003] KLR 715**

where it was held that a court will not usually set aside an *ex parte* judgment unless it was satisfied that there was a meritorious defence. Such defence does not mean a defence that must succeed but rather a triable issue which raises a *prima facie* defence and which should go to trial for adjudication.

Mr. Kabue for the plaintiff/respondent opposed the said application saying that M/S Kiplenge Ogola and Mugambi had not been granted leave by the court to come on record in place of the defendant's former advocates as required under **Order 3 rule 9A** of the **Civil Procedure Rules**. However, in view of what I have already stated I believe the present advocates for the defendant are properly on record. **Order XLVIII rule 2A** of the **Civil Procedure Rules** empowers a deputy registrar to enter judgments or grant such other orders as may be agreed upon by parties in writing. Mr. Kabue further argued that the plaintiff had served the application for summary judgment upon M/S Wambui Ndungu Advocate who not only failed to attend court but also failed to file any grounds of opposition or a replying affidavit thereto. He added that there was no affidavit from the said advocates explaining their failure to attend court or file grounds of opposition and replying affidavit. Mr. Kabue further submitted that the defendant's application sought to set aside the decree only, without any prayer for extension of time to file a reply to the summary judgment application. In his view therefore, the application was an abuse of the court process. He further submitted that there had been inordinate delay on the part of the defendant in filing its application because summary judgment was entered on 21st September 2004 yet the present application was filed on 21st March 2006. He said that there was no reason given for such delay and urged the court to reject the application. He cited the Court of Appeal decision in **SHANZU INVESTMENT LIMITED VS THE COMMISSIONER OF LANDS, Civil Appeal No. 100 of 1993 (unreported)**.

With regard to the manner in which the application for summary judgment was filed and the decree that was extracted subsequent to the entry of judgment wherein the defendant was named as Dick K. Njuguna t/a Fags Ltd., Mr. Kabue admitted that that was an error on the part of the plaintiff's advocate but said that the same was curable under the provisions of **Sections 99 and 100** of the **Civil Procedure Act**.

I have considered the affidavits on record as well as the submissions made by counsel in this matter. It is not in dispute that this court has discretion to set aside an *ex parte* judgment in terms of **Order IXB rule 8** of the **Civil Procedure Rules**. Such discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to resist a person who has deliberately sought to obstruct or delay the cause of justice, see **SHAH VS MBOGO AND ANOTHER [1967] EA 116**. The defendant's former advocate in this matter, M/S Wambui Ndungu & Company entered appearance and filed a defence on behalf of the defendant. They were subsequently served with an application for summary judgment for and on behalf of the defendant but they declined to accept service. It was wrong for them to do so since they were officially on record for the defendant. Once an advocate has entered appearance and filed defence on behalf of a litigant he cannot refuse service of subsequent court process unless and until he has been granted leave by the court to cease acting for a party. It is most likely that the defendant had no idea that there was a summary judgment application that had been filed against it. The defendant was disadvantaged by the mistake of its former advocates. I have looked at the defence that was filed by the defendant. The said defence cannot be said to be a sham. As was stated by the Court of Appeal in **MUTHAIGA ROAD TRUST COMPANY LTD VS FIVE CONTINENTS STATIONERS LTD AND TWO OTHERS (supra)** a defence on merit does not mean a defence that must succeed but rather one which raises a *prima facie* triable issue.

The plaintiff chose to pursue one of the directors of the defendant company in purported execution of a decree against the defendant. It is not clear why the plaintiff's advocates chose to file the application for summary judgment against Dick K. Njuguna and not as against the defendant. An individual cannot trade in the name and style of a limited liability company. It is settled law that a limited liability company is a legal person with its own corporate identity totally different from that of its directors and the directors of the company cannot bear the company's liabilities unless the veil of limited liability has been lifted. It would be unjust and a miscarriage of justice to allow the plaintiff to proceed to execute the decree against Mr. Dick K. Njuguna when the decree that is sought to be executed was supposed to be against Fags Ltd. Mr. Njuguna stated in his affidavit that he became aware of the said decree on the 27th February 2006 when the plaintiff's appointed auctioneers proclaimed his personal properties. I do not therefore agree

that there was inordinate delay in bringing this application before court. I also do not agree with Mr. Kabue that the mistake that was occasioned by the plaintiff's advocate can be cured by the provisions of **Section 99** of the **Civil Procedure Act**. The Section deals with clerical or arithmetical mistakes in judgments, decrees or orders or errors arising from any accidental slip or omission. The plaintiff's act of filing an application for summary judgment in the name of Dick K. Njuguna t/a Fags Ltd. when the actual defendant was Fags Ltd., is not such error as envisaged by **Section 99**. The judgment that was entered pursuant to the aforesaid error and the decree that was extracted pursuant thereto are not valid in law. For these reasons I allow the defendant's application. The costs of the application shall be in the cause.

DATED, SIGNED and DELIVERED at Nakuru this 18th day of July, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Cheche holding brief for Mr. Kiplenge Ogola & Co. Advocates.

D. MUSINGA

JUDGE