



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 82 OF 2002**

**ALLIANCE STEEL WORKS LTD.....PLAINTIFF**

**VERSUS**

**MILLING CORPORATION (K) LTD.....DEFENDANT**

**RULING**

This is a chamber summons made under the provisions of **Order IXB Rule 8, Order XXI Rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** made by Milling Corporation (K) Ltd, the Defendant herein seeking the orders of this court to set aside and vacate the judgment of the court delivered on the 4th of October 2004. The Defendant has further prayed that stay of execution be granted pending the hearing and determination of the Application. The Application is based on the grounds that the failure by the Defendant to attend court was occasioned by the mistake of their previous advocates on record. The Defendant further contend that the mistake of counsel should not be visited upon it as an innocent litigant. The Defendant has further stated that this court ought to give it a hearing as the subject matter of the suit was a substantial sum of money. The Defendant has further stated that it would be in the interest of justice if the said judgment is set aside; that the application has been made without undue delay; that no prejudice would be occasioned to the Plaintiff if the Application is set aside; that the Plaintiff would suffer irreparable loss and prejudice if the application is not granted and finally that the Defendant was ready and willing to compensate the Plaintiff by way of costs. The Application was supported by the annexed affidavit of Benjamin Birgen, the Managing Director of the Defendant Company. The Application is opposed. The Plaintiff has filed grounds in opposition to the Application.

At the hearing of the Application, Mr Gai Learned Counsel for the Defendant submitted that the suit against the Defendant proceeded ex-parte and judgment subsequent thereto entered. It was submitted that the previous counsel on record did not inform the Defendant that the case would be proceeding on the day that the case was fixed for hearing. Mr Gai submitted that the said then counsel on record instructed Mr Nyamwange to hold his brief and seek an adjournment as he was unable to attend court. Learned Counsel submitted that the said judgment should be set aside in the interest of justice so that the Defendant may be given an opportunity to be heard. The Defendant reiterated the grounds stated on the face of the application and further submitted that it had, prior to the said date, not sought any adjournment to warrant the court to punish them for failing to proceed with their case on that particular day. Learned Counsel submitted that the Defendant had a good defence and should be allowed to cross-examine the Plaintiffs so that the case may be decided on merit. The Defendant further submitted that they would not be opposed to the said judgment being set aside conditionally, otherwise they urged the court to allow their application.

Mr Okundi, Learned Counsel for the Plaintiff opposed the application. He submitted that the court did not have jurisdiction under the provisions of **Order IXB Rule 3 of the Civil Procedure Rules** to grant the orders sought by the Defendant. He submitted that the said rule was only applicable when the proceedings sought to be set aside were ex-parte. It was his further submission that in the instant case the proceedings were not ex-parte as the Defendant was represented on the material day when the case had been fixed for hearing. It was contended on behalf of the Plaintiff that when the Application for adjournment was refused, the Defendant declined to proceed with the case. Learned Counsel submitted that the only remedy available to the Defendant was to file an appeal and not to apply to set aside the said judgment. It was submitted that the issue whether or not the Defendants Counsel failed to attend court was an issue between the Defendant and the said counsel and cannot be used to impeach a judgment lawfully entered. The Plaintiff submitted that it would be prejudiced if the application filed by the Defendant was allowed.

The Plaintiff relied on the case of **Din –vs- Lalji Visram & Co. (1937) 4 EACA 1 and Finaughty t/a Hi-way Services & Engineering –vs- Prinsloo [1958] EA 657** to support its argument that the Defendants’ application ought not to be allowed.

I have carefully considered the submissions made by the counsel for the Defendant and the counsel for the Plaintiff. I have also read the application together with the annexed affidavit thereto. I have also perused the grounds of opposition filed by the Plaintiff. This court did state on the 4th of October 2004 when it delivered its judgment at page 2 as follows:-

***“This court considered the application for adjournment made by the Defendant and ruled that the case proceeds to hearing. The reason for the rejection of the application for adjournment by the defendant is because the Defendant had not given any acceptable reason why the case should be adjourned. The contradictory reasons given in the letter written to court and the submission made to the court did not help the Defendant’s argument in support for an adjournment.”***

After the court had refused to grant the Defendant the Application for an adjournment, its counsel chose not to participate in the proceedings. For all intents and purposes, the Defendant had appeared in court during the hearing of the case but declined to proceed with the case once its application for adjournment was disallowed. The Defendant cannot therefore say that the proceeding that took place on that day was ex-parte. The proceedings were not ex-parte as the Defendant was present, through counsel, but chose not to participate in the proceedings after its application for adjournment was refused by the court. In **Finaughty t/a Hi-way Services and Engineering –vs- Prinsloo [1958] E.A. 657** at page 660 the Court of Appeal of East Africa (the predecessor of the Court of Appeal of Kenya) held that:

***“In the present case, Mr Todd appeared for the Plaintiff and he had received general instructions to go on with the case, but he was unable to do so because the Plaintiff was not present to give evidence. This is not at all the same as being unable to proceed because he had no instructions to do so. In our opinion, the appropriate action for the court then to take, if it did not wish to grant an adjournment, was not to say that the Plaintiff had not appeared when manifestly he had by his Advocate, but call upon the Plaintiff to prove the unadmitted part of the claim. Upon his failure to do so because the Plaintiff was not present in person, the court could have dismissed the unadmitted portion of the claim and proceed to call upon the defendant (as it did) to prove the counterclaim, but not ex-parte. .... In Din Mohamed –vs- Lalji Visram & Co (2) (1937) 4 EACA 1 where the defendant had appeared by an advocate who had been unable to proceed with the defence because of the absence of his client and had withdrawn, having been refused an adjournment, it was held that the case had not been heard ex-parte. We are bound by the that decision ...”***

The facts of the cases referred to in the above case are in the pari materia with the facts of this case. The court in the said case held that when an advocate appears for a litigant in a case, it cannot be said that the party was not present. The proceedings of the day cannot therefore be said to have proceeded ex-parte. In the instant case, the advocate for the Defendant withdrew from the proceedings after his application for adjournment was refused by this court. The subsequent proceedings took place in the absence of the Defendant and his counsel, not because they were not aware of the proceedings, but by their own choice. The submission by the Plaintiff that the Defendant cannot therefore make an application to set aside the said judgment entered under the provisions of **Order IXB Rule 3 of the Civil Procedure Rules** is therefore not without merit. **Order IXB Rule 3 of the Civil Procedure Rules** is only applicable in circumstances where the proceedings take place when the Defendant has not attended court. The judgment of this court was not therefore ex-parte. It cannot be set aside by an application to set aside an ex-parte judgment. The Application filed by the Defendant is therefore incompetent. The only remedy for the Defendant, if he was dissatisfied with the judgment of this court was to file an appeal or if it has sufficient reasons, to make an appropriate application for review.

For the said reasons given, the application by the Defendant is hereby dismissed with costs. The temporary stay of execution granted is hereby vacated.

**DATED at NAKURU this 31st day of January, 2005.**

**L. KIMARU**

**JUDGE**