REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 474 OF 2002

ELITE EARTHMOVERS LTD. ……..…... PLAINTIFF

VERSUS

KRISHA BEHAL & SONS……DEFENDANT

RULING

By an application brought under a Certificate of Urgency dated 15.2.2004 the Defendant herein sought two principal orders -

(a) Stay of execution of the decree issued herein on 2.11.2004 pending the hearing and determination of this application,

(b) The ex-parte judgement herein and all consequential orders be set aside.

The application was supported by the Affidavit of Sunil Behal sworn and filed together with the application on 16.12.2004 and the grounds that -

(a) The Defendant had given instructions to the firm of G. B. M. Kariuki & Co. Advocates to act for him in the matter.

(b) The hearing of the suit proceeded ex parte without due notice to the Advocates on record.

(c) It is fair and just that the Defendant be given an opportunity to vindicate its defence in the suit.

(d) The Defendant has a strong and arguable defence and hence the suit ought to be heard on merits.

Submitting on this application, Mr. Kiplangat Counsel for the Respondent told the Court that the ex parte judgement was irregular as the hearing notice was not served as required by law, and that there were sufficient grounds to warrant the Court's discretion to set aside the judgement.

From the record the firm of G. B. M. Kariuki represented the Defendant and filed a Defence on behalf of the Defendant on 25.06.2002. The record shows that no hearing date was served on that firm. From the record also, no application was made by that firm under Order III rule 12 to cease acting for the Defendant and the Court has never made any order to that effect, and until such order is made the Advocate on record remains the Advocate in the matter. The Defendant/Applicant never also applied to act in person as is required under order III rule 9 (1), and to all intents and purposes, the Advocate remained on record, and ought to have been given notice which was not done. The resulting ex parte judgement would therefore irregular. Counsel for the Defendant/ applicant submitted, again for the

record, that the firm of G. B. M. Kariuki & Co. Advocates ceased to act for the Defendant when the current advocates were instructed to act for the Defendant/Applicant.

Counsel submitted that the allegation that G. B. M. Kariuki ceased to act for the Defendant upon being appointed judge is not correct, as it was his firm and not the Advocate in person who was acting for the Defendant. No evidence was given that the firm had been wound up.

Counsel also urged in the alternative that if the position was that the judge could not be found, then the Plaintiff sought to have invoked the provisions of Order III, rule II for order of Court that the Advocate could not be found, or that he had ceased acting for the party in question, and directing that this order be served upon the Defendant, and a Certificate of Service filed in Court. A notice was sent direct to the Defendant, and Affidavit Service was filed.

This was not due service as there was an Advocate on record. Counsel also took issue with the Affidavit of Service sworn by Edith Wanjiku Muriu. It was not dated, but is signed. An Affidavit so signed but not dated is contrary to section 5 of the Oaths and Statutory Declaration Act (Cap 5) which requires that such Affidavit be signed and dated before the attesting Commissioner for Oaths. Counsel submitted that the Affidavit is therefore defective, and should be struck out, no postal code was indicated in the postal address and on the balance of probability the hearing notice was never received. The Court has wide discretion to grant the orders sought to set aside the ex parte judgement. There has been no delay in coming to Court, notice of judgement having been received on 28.11.2004, leave to come on record was granted on 9.12.2004 and the application was made on 16.12.2004. If there was any delay, any prejudice caused to the Plaintiff/Respondent may be compensated by costs.

Counsel also submits that the Defendant/Applicant has a good defence and should be granted an opportunity to defend the action on merit.

Finally, Counsel for the Defendant/Applicant also took issue with the Replying Affidavit of **Lupendra Damodar Vaghani** which he said is incompetent for failure to depone that he is authorized to swear the Affidavit on behalf the Plaintiff a corporation within the meaning of the provisions of Order III rule 2 (C) of the Civil Procedure Rules. For this propositions Counsel cited the case of

1. TRUST BANK LTD. -VS- ANGLO AFRICAN PROPERTIES HOLDINGS LTD. & 2 OTHERS (Milimani Commercial Courts HCCC NO. 2118 of 2000),

2. ABRAHAM K. KIPTANUI -VS- DELPHIS BANK LTD. & NYAGUNGA TRADERS (Milimani Commercial Courts HCCC No. 1664 of 1999).

3. GANDHI BROTHERS -VS- H. K. NJAGE T/A H. K. ENTERPRISES (Milimani Commercial Courts HCCC No. 1330 of 2001)

4. ABDUL KADIR MOHAMMED -VS- KENYA COMMERCIAL BANK LTD. (Nairobi, Milimani Commercial Courts, HCCC No. 588 of 2003) and

5. REMCO LIMITED -VS- MISTRY JADVA PARBAT & CO. LTD. & 2 OTHERS (Nairobi, Milimani Commercial Courts HCCC No. 171 of 2001)

I shall refer to these case in my concluding remarks after considering the arguments by Miss Edith Wanjiku Muriu, learned Counsel for the Plaintiff, who opposed the application.

In her grounds of opposition dated 4.01.2005, and filed in Court on the same day, learned Counsel submits that -

> (1) the Plaintiff is properly entitled to the fruits of its judgement given on 19.10.2004 which was given on merit,

(2) Messrs. Kiplagat & Co. Advocates are not properly on record in this matter and therefore have no right of audience before Court,

(3) there has been inordinate, excessive and unexplained delay in the bringing of the Application,

(4) the application is brought in absolute bad faith and is merely an attempt to avoid execution and is therefore an abuse of the Court's process,

(5) the Defendant has failed to disclose material facts and has therefore not come to Court with clean hands to entitle him to the remedy sought,

(6) the applicant has not met any of the standards required for the granting of an order for stay,

(7) the Defendant does not have a good defence to the Plaintiff's claim and it would be unnecessary to reinstate the suit only to arrive at a similar decision at a later stage,

(8) the application has no merit and is frivolous vexatious and misconceived any way.

In addiction to, and by way of amplification of those grounds, Miss Muriu graciously abandoned ground No. 2 of the Grounds of Opposition as the firm of Messrs. Kiplangat & Co. Advocates were now properly on record.

Counsel's argument was that the Plaintiff would not adhere to the provisions of Order II rule 11 or 12 of the Civil Procedure Rules, as to the service of notice of hearing, or obtaining of orders to serve the Notice upon the Defendant. Hon. Mr. Justice G. B. M. Kariuki was appointed judge on 4.06.2003 and was sworn in the same day. He therefore ceased to be an Advocate became incapable of representing a party in these and other proceedings. His was a sole practice. From the date of his appointment he ceased to be an Advocate, and the contention that he continued acting for the Defendant up to 9.12.2004 cannot therefore be correct. Paragraph 10 of Mr. Sunil Behal's Supporting Affidavit shows that he himself was aware of this fact. There was therefore a duty imposed upon him to look for alternative representation, and must now suffer the consequences of his indolence. In these circumstances the said provisions of Order III are irrelevant in these proceedings. It applies in the situations specified, death, bankruptcy, failure to take out a practising certificate or disappearance of Counsel when he cannot be found.

Counsel submitted that the supporting affidavit of Lupendra Damodar Vaghani should not be struck out because it describes the great length to which the Plaint went to ensure that the Defendant was represented in these proceedings. Counsel contended that in view of the exhibits produced by the Plaintiff at the ex parte hearing, the Defendant has no case.

The Defendants were served using the same address without the postal code, with the notice of Entry of Judgement. The reasonable inference is that the Defendant did also receive the Hearing Notice, sent under a Certificate of Postage, as the letter was not returned to the Plaintiff's Advocates firm as it is usual where registered mail is not received. Counsel prayed that that the Defendant/Applicant's application be dismissed with costs.

It is now convenient to consider the application in light of the material on record and the above captioned submissions of learned Counsel on both sides. The point of departure is of course always the applicable legal principles. I think I shall commence with Mr. Kiplagat's contention that the Replying Affidavit of Lupendra Damodar Vaghani is defective and incompetent for failure to state on whose authority be swore the Affidavit

Mr. Lupendra Damodar Vaghani depones that - I am the General Manager of the Plaintiff - Decree Holder in this case, with full knowledge and information concerning this matter and I am therefore competent to swear this Affidavit.

Mr. Vaghani does not state or disclose that he had authority of the Bank to make the Affidavit. This is

a requirement of Order III rule 2 (c) of the Civil Procedure Rules, which says -

> "2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are -
>
> (a) …..
>
> (b) …..
>
> (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

It is now, I think, a matter of judicial notoriety that an affidavit by a corporation, whether of in verification of a Plaint or an application thereunder, will be struck out on the ground of being defective and incompetent if it is not authored and signed by a person who is not only an officer of the corporation, but must also be authorized to so sign. Mr. Vaghani, the deponent of the Replying Affidavit is the Plaintiff's General Manager, and how do we know? We know it because he depones so. The law of procedure always requires him to say that in that capacity of General Manager, he is or has been authorized to so sign. If he does not say so, the other party and the Court will not know, and the law will regard his Affidavit as defective and incompetent. That was the situation in the case of MICROSOFT CORPORATION -VS- MITSUMI COMPUTER GARAGE cited with approval by Ibrahim J. in the case of DELPHIS BANK LTD -VS- ASUDI (K) LTD & JACOB BWALI OMOLLO (supra).

As I am unable to imply that Mr. Vaghani, the Plaintiff's General Manager was authorized so to sign, I must hold that the Replying Affidavit of the said General Manager as being defective and incompetent and the same is struck out. That means I shall shut my eyes to its contents in the Rest of the Ruling.

Akin to this was Mr. Kiplangat other submission that the Affidavit of Service of the Hearing Notice sworn by Edith Wanjiku Muriu and filed in Court on 11.08.2004 was defective on the sole ground that it was not dated contrary to the provisions of Section 5 of the Oaths and Statutory Declaration Act, (Cap 15, Laws of Kenya) which requires every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

The affidavit herein states that it was made in Nairobi, it is duly commissioned by the Commissioner of Oaths who forgot to date it. For the ends of justice I am prepared to allow this affidavit in terms of Order XVIII Rule 7 notwithstanding the absence of the date of when it was sworn, as I believe it was in substance the oversight of the commissioner for oaths, and not deponent Advocate.

That being my view of the said Affidavit, I shall now proceed to determine this matter in terms of Order IXB rule 8 which reads -

"Where under this order judgement has been entered or the suit has been dismissed, the Court, on application by summons may set aside or vary the judgement or order upon such terms as are just."

The circumstances under which a Court may on a day fixed for hearing proceed ex parte are set out in Order IXB rule 3 -

> **"3. If on the day fixed for hearing after the suit has been called on for hearing outside the Court only the Plaintiff attends, if the Court is satisfied -**
>
> **(a) that notice of hearing was duly served, it may proceed ex parte,**
>
> **(b) that notice of hearing was not duly served it shall direct a second notice to be served,**

(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing."

In this case, as indicated above, the Court was satisfied that hearing notice was duly served and proceeded to hear the Plaintiff's evidence and on the basis of that evidence and after looking at the Defence of the Defendant herein, decided on the balance of probability of that evidence that the Plaintiff had proved its case and determined the suit accordingly.

Mr. Kiplangat urged the Court to find that where there is an Advocate on record direct service upon a party to the suit even if effected is not proper service it being contrary to the provisions of order III rule II which requires that service be effected upon that Advocate, unless the situation falls under one of the exceptions under that rule, that the Advocate has died, become bankrupt, has disappeared and cannot be found, has failed to take out a practising Certificate or has been struck off the role of Advocates. In this circumstances, the other party that is the Plaintiff is permitted by this rule to serve notice personally on the other party or by pre-paid post letter addressed to the party's last known place of address. An application by Chamber summons is only necessary where that other party, (the Plaintiff in this case) seeks an order declaring that the Advocate has ceased to be acting for the first named party in the cause or matter. There is no bar to party or his Advocate in those circumstances from addressing the other party personally. The appointment of an Advocate from the Bar to the Bench is a matter of public knowledge and record of the appointment is placed in Kenya Gazette. It is widely reported in the print and electronic media.

The defendant cannot be said to have failed to notice or know that his erstwhile legal adviser or Advocate had been elevated to a high judicial office. In addition the Court was satisfied that the Defendant was duly served with the hearing notice, and chose for his own reasons not to attend Court on the date fixed for hearing. He will not in my ruling found excuse on the claim that he was not served with a hearing notice or his Advocate was not so served. Mr. Kiplagat referred the Court to the several authorities setting out the principles upon which the Court will set aside an ex parte judgement in terms of Order IXB rule 8. I have dealt with one such consideration, whether the party was served with a hearing notice. In my ruling he was so served.

The other grounds which are peppered throughout the case law, all tend to show that the discretion of the Court to set aside an ex parte judgement is a wide and flexible one, and is exercised upon terms that are just (PATEL -VS- EA CARGO HANDLING SERVICES LTD. [1975] EA 75, SHAH -VS- MBOGO [1975] EA 116, and PHILIP CHEMWOLO & ANOTHER -VS- AUGUSTINE KEBENDE [1982 - 88] KAR 1036) 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 or delay the course of justice. SHAH -VS- MBOGO (supra).

In exercising the discretion the Court should consider among other things the facts and circumstances both prior and subsequent and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgement which would not or might not have been present had the judgement not been ex parte KIMANI -VS- MCDOWNER [1966] EA 547.

In JAMNADAS -VS- SODNA GORNANDAS [1952] U.L.R 11 cited with approval in SEBEI DISTRICT ADMINISTRATION -VS- GASYALI [1968] E. A 300 Sir Udo Ujoma C.J. said the Court should consider the question whether the affected party can reasonably be compensated by costs for any delay occasioned, and that to deny a subject a hearing should be the last resort of the Court.

In PHILIP CHEMWOLO & ANOTHER -VS- AUGUSTINE (supra) APALOO JA (as he then was) put the matter this was: - "I think a distinguished equity Judge has said:-

"I think 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 merit." I think the broad equity approach to this matter, is that unless there is fraud or 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 persons and not for the purpose of imposing discipline"

Other Courts of equity have in the context of summarily procedure expressed similar sentiment that the Court would not permit a Plaintiff (or for that matter a defendant) to be **driven from the judgement seat except where the cause of action is obviously bad and incontestable bad** (per Fletcher Moulton, L. J. in Dyson -vs- Attorney General [1911] LKB at page 419) and yet on the other hand, a stay or even dismissal of proceedings may **"often be required by the very essence of justice to be done."**

So in the case at hand the action was simple and straightforward. The Plaintiff ws contracted by the Defendant to supply road construction material, sand, murram, quarry, pre-cast concrete products (the products). The Defendant paid for most of the products supplied. For those it failed to pay, the Plaintiff sued. The Plaintiff's evidence was that the Defendant issued cheques each of Shs.2,253,223/= thus making the total claim in the suit of shs.4,506,446.00. Those cheques were on presentation dishonoured or were returned unpaid by the Defendant's banker's. These dishonoured cheques apart from the invoices evidencing supply of the products, were part of the Plaintiff's evidence in the formal proof of his claim. In these circumstances, I do not share the Defendant's counsel's view that the Defendant has a good defence if the ex parte judgement were set aside. What possible defence could he have in light of the dishonoured cheques? I can discern none at all. I do not therefore see what justice would be done by setting aside ex parte judgement. I see justice in affirming that judgement.

Unlike a judgement in default of appearance or defence under Order IXA rules 3, 4 and 10 of the Civil Procedure Rules a judgement under Order IXB rule 3 (a) is a product of actual proceedings, only without the defendant or the other party. This is what happened in this case. The Plaintiff presented cogent evidence of his claim and looking at that evidence as briefly outlined above, I do not on the facts and circumstances of this case, share or subscribe to the view that costs would be an adequate compensation to the Plaintiff. The cheques, the subject matter of the suit, were issued in January and February 2002, that is to say, more than four years ago. The suit herein was filed on 18.04.2002 also just about four years ago. Having lost the value of the Defendant's cheques in payment for the products for the value of which the Defendant issued those cheques it would be patently inequitable to keep the Plaintiff away from the fruits of his judgement even if I were to order that the full decretal sum be deposited in Court as a condition precedent to the setting aside of the ex parte judgement herein. I will not do so, for so to do, would merely be prolonging the Plaintiff's agony in failing to realise the costs and profit for his products, ordered for, delivered and accepted by the Defendant. The cause of equity and justice dictates to me that this is one of those cases where it is just to affirm the ex parte judgement, and I so do. In the result therefore, the Defendant's application dated 15.12.2004 and filed in Court on 16.12.2004 is dismissed with costs.

Dated and Delivered at Nairobi this 11th day of March 2005.

ANYARA EMUKULE

JUDGE