



**REOUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURTS**

**CIVIL CASE 1721 OF 2001**

**WAKI CLEARING & FORWARDING AGENTS LTD.... PLAINTIFF**

**VERSUS**

**ROM COMMUNICATION SYSTEMS LTD.....DEFENDANT**

**RULING**

The Notice of Motion herein dated 30.4.04, under Order 50 Rule 17 of the Civil Procedure Rules seeks orders that:

1. The court do set aside the exparte order dated 17.4.03 and that the defendant's application dated 23.8.02 be heard interpartes.
2. Cost of this application.

The application is supported by an Affidavit of Yuvinais Angima, dated 2/5/03, and is in the grounds that the Exparte order was made following an exparte hearing of the defendant's application on 11/3/03. The application was heard on a date when Plaintiff's Counsel honestly believed that the matter had been fixed for mention by consent of both parties. The absence of the Plaintiff's Counsel on 11/3/03 was not intentional but was occasioned by an excusable mistake or error. It will be just for both parties to be heard and the defendant will suffer no prejudice which may not be compensated by costs.

Upon perusal of the pleadings herein and the submission by counsel for both sides on 20/5/04, I have reached the conclusion that there is no basis upon which the application herein can succeed, and this on the following grounds:-

- a) From the court records, there was no order made by this court on 17/4/03 as claimed in the current application. This court cannot set aside a non-existent order. What appears on the court record is an order issued by Mbaluto J. on 9.4.03 by which order Mbaluto allowed the defendant/Respondents application of 23.8.02. But the current application does not seek to set aside that order of 9/4/03.
- b) Even if the application herein referred to the correct order, the issue of inordinate delay cannot be overcome. The correct order was issued on 23/8/02 and the current application is dated 2/5/03. That is well over eight months. Clearly, the applicant is guilty of laches.
- c) The exparte hearing of 23/8/02 sought to review yet another order of Mbaluto J. There is a defence in the court file, and it seems little would change even if this application were miraculously to succeed. d) While conceding the error in the current application to set aside the non-existent order, Counsel for the applicant sought to amend the date to reflect the correct date. This court, under the provisions of the Civil Procedure Rules could easily grant that application to amend. But how about the Supporting Affidavit to that application? That also refers to a wrong date, and as far as the law stands, that error on the Affidavit cannot be amended.
- e) Of even greater concern is the fact that the applicant did not deem it necessary to put in an Affidavit by Mr. Masika, the Counsel alleged to have honestly mistaken the hearing date for a mention. How then is this court supposed to assess the bona fides of such claim? Not at all.

For all the above reasons, the application herein fails and I rule that:

(a) The Application is dismissed.

(b) Applicant/Plaintiff do pay the costs of this application.

**DATED and delivered at Nairobi this 22nd Day of April, 2005.**

**O.K. MUTUNGI**

**JUDGE**