



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO. 417 OF 2000

MARKET MASTERS LIMITED.....PLAINTIFF

VERSUS

INCH OF GOLD (K) LTD. & 20 OTHERS.....DEFENDANTS

RULING

The Defendants herein have sought by chamber summons dated 16th June, 2004 the main order that the judgment entered against them on 9th April, 2003 and all consequential orders be set aside. The application is brought under Order IXA, Rules 10 and 11 of the Civil Procedure Rules. The grounds for the application as stated on the face thereof are:-

- 1) That the Defendants were never given a chance to be heard.**
- 2) That the Plaintiff's application dated 19.9.2002 was never heard and determined on merit.**
- 3) That the Defendant's defence raises triable issues and they stand to suffer irreparable damage if the order sought is not granted.**
- 4) That the Plaintiff would not be prejudiced in any way by the order sought.**

There is a supporting affidavit sworn by one **WASHINGTON MBAYA MUTHAMA**, a director of the 1st Defendant in which he set out what transpired in court prior to the entry of the judgment now sought to be set aside. There is another affidavit sworn by the Defendants' advocate and filed on 6.8.2004 which is in similar vein.

The Plaintiff has opposed the application upon the following grounds as they appear in the grounds of opposition dated 16th July, 2004.

- 1) That the application is fatally defective and bad in law.**

2) That the facts deponed to in the supporting affidavit contravene the provisions of Order 18, Rule 3 of the Civil Procedure Rules.

3) That the application is devoid of merit.

A replying affidavit sworn by the Plaintiff's advocate and filed on 8.2.2005 elaborates the grounds of opposition.

The thrust of the Defendants' argument in this application is as follows. The Plaintiff's application for summary judgment (**by notice of motion dated 19TH September, 2002**) came up for hearing before Mbaluto, J. on 3rd December, 2002. The Plaintiff's counsel presented the application. In the course of the reply of the Defendants' counsel Mbaluto, J expressed the view that the suit was purely an account dispute and that therefore the parties should try to sort out the matter out of court. Further hearing of the application was therefore adjourned for out-of-court settlement to be attempted. As it happened no settlement was forthcoming and the application for summary judgment was fixed for further hearing on 26th March, 2003. On that date the Defendants' advocate was unable to attend court due to another commitment but he sent another counsel to hold his brief and seek adjournment. Adjournment was refused and the Plaintiff's counsel argued afresh and ex parte the application for summary judgment.

It is conceded in the replying affidavit that the application for summary judgment was only partly heard on 3rd December, 2002 and that further hearing of the same was adjourned to enable the parties to attempt an out-of-court settlement. I have on my part perused the court record, and it is apparent that the Defendants' counsel was in the middle of his reply on 3rd December, 2002 when an order effectively adjourning further hearing of the application was entered to enable the parties to attempt to settle the accounts between them. The precise order was-

“Order: By consent parties given up to 16.1.2003 to come up with statements of account showing what they consider to be outstanding, if any. Mention on 16.1.2003.”

What has disturbed me is the record of the court of 26th March, 2003. That is when the application for summary judgment was to be further heard, apparently after the parties failed to settle the accounts. The record of the court shows that one Mr. Ng'ang'a held brief for Mr. Ngala for the Defendants. Mr. Mungai was present for the Plaintiff. There is no record of Mr. Ng'ang'a having said anything at all, not even to apply for adjournment as he had apparently been instructed by Mr. Ngala to do. There is no record of the court having refused to grant such adjournment. The court record shows that Mr. Mungai presented the application afresh immediately after the coram. The record does not show that Mr. Ng'ang'a was invited by the court to address it. Immediately after Mr. Mungai finished his address the court reserved its ruling to 4th April, 2003. Yet it appears to be common ground that at least Mr. Ng'ang'a did apply for adjournment which was refused!

The first ground of the application is that the Defendants were not given a chance to be heard. This complaint, in my view, is justified by the court's own record of 26th March, 2003. In his ruling, Mbaluto J. never referred to the submissions that had been made by the Defendant's counsel on 3rd December, 2002 when the application was partly-heard. It is clear that Mbaluto, J. proceeded on the basis that the application for summary judgment had been presented ex parte. Of course I am not purporting to sit on appeal over the decision of Mbaluto, J. If Mbaluto, J had been available to hear this application I would not have heard it.

The right to be heard is one of the cardinal tenets of natural justice. The defendants were denied this right at the hearing of the application for summary judgment on 26th March, 2003. In the circumstances of this case that denial of the right to be heard must override all the objections that the Plaintiff has taken to the application

I will in the circumstances set aside the order and judgment entered on 26th March, 2003. I will further order that the application for summary judgment be fixed for hearing afresh *inter partes*. The costs of this

application shall be in the cause. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF APRIL, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 22ND DAY OF APRIL, 2005.