REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT

MILIMANI COMMERCIAL COURTS, NAIROBI

HCCC NO. 573 OF 2004

PRISCILLA NYAMBURA NJUE

T/A NAIROBI MOSCOW AIRWAYS……..PLAINTIFF

-V E R S U S

COUNTRYSIDE SUPPLIERS LTD……..DEFENDANT

R U L I N G

This is an application by Notice of Motion dated 29th March, 2005, and expressed to be brought under O.IXB Rule 8, O.XXI Rule 22 of the Civil procedure Rules, and S.3A of the Civil Procedure Act. The applicant seeks from the court three main orders-

1. THAT there be a stay of execution of the judgment and or decree herein pending inter partes hearing

2. THAT the order and or summary judgment issued/entered on the 8th March, 2005, be set aside and or varied.

3. THAT the defendant/applicant be granted leave to file a replying affidavit to the Notice of Motion dated 22nd November, 2004.

The application is supported by the annexed affidavit of JOHN M.N. MUTUTHO, the managing director of the defendant company, an based on the grounds that-

(a) Unless stay of execution is granted the defendant may suffer irreparable loss

(b) The defendant's then advocates M/s T.O. Kopere & Company Advocates failed to attend court during the hearing of the application dated 22nd November, 2004.

(c) The defendant's then advocates failed to file a replying affidavit

(d) The defendant has filed a complaint against its then advocates with the Advocates Complaints Commission.

(e) It is not the defendant's fault that the matter proceeded ex-parte but that of his then advocates.

(f) The defendant has a good defence to this suit.

Opposing the application, the plaintiff/respondent has filed the following grounds of opposition-

(i) That prayer number (2) in the application is res judicata, the same having been rejected by the court on 8th March, 2005.

(ii) That the applicant has not in any way demonstrated to the court that it has a good defence.

(iii) That the issues raised by the defendant are issues between the defendant and its former advocates and the plaintiff should not be exposed to suffering at the expense of the defendant and its advocates.

(iv) That the application lacks merits, is vexatious, and an abuse of the court process.

While making his oral submissions for the applicant, Mr. Mutua relied on the affidavit sworn by Mr. Mututho and on the grounds set out on the face of the application.He contended that the main reason for seeking the setting aside of the judgment was that this matter proceeded ex parte on the 9th February, 2005, as a result of default on the part of the defendants former advocates. He also submitted that prayer number (2) in the application was not res judicata as alleged by the respondents as there was no other application similar to this one, and the court record is adequate testimony to this fact. He urged the court to weigh between the two evils of setting aside the ex parte judgment, which may prejudice the plaintiff, and the implications of not setting aside the ex parte judgment which will be detrimental to the defendant and will amount to shutting it out of the proceedings. Mr. Mutua then referred the court to **MBOGO & ANOR. v. SHAH** [1968] E.A. 93 and urged the court to exercise its discretion in the applicant's favour.

On his part, Mr. Kimani for the respondent opposed the application and relied on the grounds of opposition as well as the replying affidavit. He submitted that prayer No.2 was res judicata because on 8th March, 2005, a similar prayer had been sought by counsel holding brief for the defendant's advocate, the plaintiff's advocate objected, and the court refused to grant that prayer. The defendant was on that day granted leave to appeal, but todate they have not served the plaintiff with the notice of appeal. Mr. Kimani further submitted that the applicant had not demonstrated that it had an arguable defence, and also that between the two evils alluded to by Mr. Mutua, the pendulum swings against granting the orders. He also submitted that even as the respondent's application for summary judgment was pending hearing and determination, the defendant/applicant authorized M/s Kopere & Co., advocates, to pay the respondent someKsh.500,000/=.

This conduct, he submitted, estops the applicant from trying to set aside the judgment, as it has no defence. Counsel finally submitted that the applicant is silent on security, but that if the court is inclined to grant the orders sought, then the applicant should be ordered to deposit the amount owed either in court or in an interest earning account.Otherwise he urged the court to dismiss the application with costs

.In a short reply, Mr. Mutua reiterated that res judicata was not applicable, and that the only way in which the defendant/applicant could comment on its offer to pay the respondent some Ksh.500,000/= was by a replying affidavit to the application for summary judgment. On that note, he asked for the orders as prayed.

After considering the application, I note from the court record that the plaintiff's application for summary judgment was filed in court on 22nd November, 2004. To this application, the defendant filed neither a replying affidavit nor grounds of opposition.When the matter came for hearing on 26th January, 2005, Mr. Kopere for the defendant told the court that he no longer had instructions in this matter and thereupon applied for an adjournment. However, he said that he could take a hearing date. By consent of counsel, the application was then fixed for hearing on 9th February, 2005. On the appointed date, Mr. Kimani appeared for the plaintiff/applicant. Mr. Kopere, the advocate on record for the defendant did not attend, and the defendant was not represented. Bearing in mind that Mr. Kopere was privy to the taking of the

hearing date by consent, and that he was still on record for the defendant, the court opted to proceed ex parte.

Upon consideration of all the matters placed before the court, and bearing in mind especially the pleadings, the application and its supporting documents from which it appeared that the defendant had frankly admitted the plaintiff's claim, this court ruled, inter alia-

> **"The total effect of all these utterances is that the defendant has thereby unequivocally admitted owing the plaintiff the sum of Kh.5,095,000/= as claimed in the plaint. The later day denial contained in the defence filed herein on 8th November, 2004 is clearly an afterthought. As such, it is nothing more than a smokescreen to disguise the liability so frankly acknowledged previously. Such a denial can neither withstand the tide of those previous acknowledgments, nor can it derogate from liability to pay. I agree with Mr. Kimani for the applicant that the defence is a sham.**
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> **The preliminary objection raised by the defendant falls short of a preliminary objection in the context of the test laid down by the Court of Appeal in MUKISA BISCUITS CO. v. WEST END DISTRIBUTORS LTD [1969] EA. 696 inasmuch as it raises matters which should be heard in the normal course of the hearing of the application. Coupled with the fact that the defendant has filed neither a replying affidavit nor grounds of opposition, and that the defendant opted not to attend the hearing, I find that the application is not opposed and that the plaintiff is entitled to judgment as prayed…"**

The defendant/applicant now comes back moving the court to set aside the judgment under O.XIB Rule 8 of the Civil Procedure Rules. This rule states as follows-

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

This rule donates to the court very wide discretionary powers which are almost unfettered. The powers should, however, be exercised judicially, and upon such terms as are just. In the case of **PITHON W. MAINA v. MUGIRIA** [1982-88], KLR 171, Kneller, J.A., addressing this aspect of the law, reviewed some previous cases and said at pp. 177-178-

> **"The court has a very wide discretion under the order and rule and there are no limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: PATEL v. E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75, 76 BC.**
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> **This discretion is intended to be exercised 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 v. Mbogo [1969] E.A. 116, 123 BC Harris J.**
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> **The matters which should be considered, when an application is made, were set out by Harris J. in Jesse Kimani v. McConnel [1969] E.A. 547, 555F which include, among other matters, 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 judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in Mbogo v. Shah [1968] E.A. 93, 95F.**
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> **There is also a decision of the late Sheridan J. in the High Court of Uganda in Sebei**

District Administration v. Gasyali [1968] E.A. 300, 301, 302 in which he adopted some wise words of Ainley J., as he then was, in the same court in Jamnadas Soddha v. Gordandas Hemraj [1952] 7 ULR 7 namely:

'The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can be compensated by costs for any delay occasioned should be considered, and finally, I think, it should be always remembered that deny the subject a hearing should be the last resort of a court'."

Bearing in mind all these principles, the matter before the court deals with a regular judgment. Where a regular judgment is entered, the court will not usually set aside the judgment unless it is satisfied that there is a triable issue which raises a prima facie defence which should go to trial. In the instant case, the court did observe that the documents before it comprised admissions, and that the defence filed was an afterthought and a sham. Such observations are not conducive to the setting aside of a regular judgment. Indeed, by a letter dated 10th January, 2005, at a time when the application for summary judgment had already been filed on 22nd November, 2004, and when that application was pending hearing, the applicant wrote to their advocates as follows-

"Tom O. K'Opere & Co. Advocates

P.O. Box
Nairobi

Dear Sir,

RE: FUNDS DISBURSEMENT

From the Ksh.2,500,000.00 cheque received on our behalf on 23rd December, 2004, without any delay or protestation whatsoever, release the following payments immediately DIRECTLY to our clients listed below:

Details Amount Mode of payment Person to collect Priscilla Nyambura 500,000 Cash Or Bankers Cheque Priscilla Nyambura

cc. Clients

Collect your dues from M/s K'opere & Co. Advocates at Norwich Union House 1st Floor as instructed without fail."

With profound respect, I don't think that such a letter would emanate from any defendant who purports to have a defence in such a matter as this one. The applicant simply can't be allowed to blow it hot and cold.

The facts and circumstances of this matter are very plain. Although Mr. Kopere was party to the taking of the hearing date by consent, he did not attend court. No explanation was given on the hearing date, and none has been proffered to the present moment. The applicant is alive to that state of affairs. In a letter it wrote to the Complaints Commission on 10th March, 2005, the applicant states in paragraph 10-

"10. We have looked at the court record and established as follows:-

(i) On 26th January, 2005 when the plaintiff's application came up for hearing Mr. K'Opere attended court and fixed the application for hearing on 9th February, 2005.

(ii) On 9thFebruary, 2005, Mr. K'Opere failed to attend court despite his having been on record, taken the date and written to say that he was to attend court.

(iii) On 8th March, 2005, Mr. K'Opere received a notice of Ruling from the court . (11) On the said 8th March, 2005, when Mr. K'Opere received the Notice of ruling he called Miss Kalewa advocate (of M/s E.K. Mutua & Co. advocates) and asked that she holds his brief in the said ruling. A ruling was delivered striking out our defence and entering summary judgment of Ksh.5,095,000/=."

In the absence of an explanation as to why there was no attendance by or on behalf of the applicant on the material date, the applicant has not offered any material upon which to exercise the court's discretion in its favour. Under O.III rule 1 of the Civil Procedure Rules, an advocate is a recognised agent of his client. The law of agency ordains that a principal is bound by the acts of his agent. There is nothing before this court to warrant departure from that principle.

In sum, my view if this matter is that the applicant is deliberately seeking to obstruct and delay the course of justice. Having found that the defendant had admitted on diverse occasions the amount of the claim, and that the defence was a sham, the court gave summary judgment not merely under O.IXB, but also substantially on the merits of the case. I therefore find no merit in this application and I accordingly dismiss it with costs to the plaintiff/respondent

Dated and delivered at Nairobi this 8th day of April 2005

. L. NJAGI

JUDGE