



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL DIVISION –MILIMANI

CIVIL CASE NO. 1159 OF 2002

GULHAMID MOHAMEDALI JIVANJI:.....1ST PLAINTIFF

ZARINA GULHAMID JIVANJI :..... 2ND PLAINTIFF

VERSUS

F.K. MOTORS (KENYA) LTD:.....1ST DEFENDANT

HYUNDAI MOTORS (KENYA) LTD :.....2ND DEFENDANT

MOHAMMED KARMALI :.....3RD DEFENDANT

RULING

The Chamber Summons dated 6th December 2004 was brought under Order IXB Rule 8, Order XXI Rule 7 and 15 of the Civil Procedure Rules; Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. It originally sought 6 orders. It appears that the first 3 orders have been dealt with. The primary prayers that now remain to be dealt with are prayers 4 and 5 which are that the ex-parte orders and/or judgment entered in favour of the Plaintiff on 27th November, 2003 and all consequential orders be set aside and the Plaintiff's application dated 27th October 2003 be heard a fresh and the Defendants be allowed to file a Preliminary Objection, grounds of Opposition and a Replying Affidavit out of time.

The grounds for the application are as follows:-

- (a) That the Defendant's Advocates failure to attend Court on 27th November, 2003 to oppose the Plaintiff's application was not intentional or deliberate;**
- (b) That the Defendant's Advocates failure to file a Preliminary Objection, grounds of Opposition and a replying affidavit to the application dated 27th October, 2003 was not deliberate or intentional;**
- (c) That unless the judgment is set aside the Defendant will suffer great prejudice as the decree herein is over Kshs 13,000,000/=.**
- (d) That the Plaintiff will not suffer great prejudice as the suit and/or application dated 27th October, 2003 can be relisted for hearing;**

(e) That the Court has a wide discretion to set aside judgment entered ex parte;

(f) That the application has been made without unreasonable delay;

(g) That it would be in the interest of justice to set aside the ex-parte judgment.

The application was supported by an affidavit sworn by Titus Kanyi Ndurumo, Learned Counsel for the Defendants.

The application was opposed and there are grounds of opposition and a replying affidavit sworn by Patrick Ogola Onyango an Advocate in the firm of Advocates acting for the Plaintiffs.

The Application was canvassed before me on 18th April, 2005 by Mr. Ndurumo Learned Counsel for the Defendant and Mr. Njogu Learned Counsel for the Plaintiffs. Counsel for the Defendants took me through the supporting affidavit and emphasized that when the Plaintiffs' application for summary judgment dated 27th October 2003 was served upon his firm, the same was not brought to his attention and was therefore not only not diarised but was also by an oversight placed in a wrong file with the result that on the hearing date the Defendants were not represented and the application proceeded ex-parte. Counsel for the Defendants further submitted that he came to know about the judgment when his firm was served with a Notice of Taxation on 19th October, 2004 prompting him to read the Courts file which revealed that the application for summary judgment had been allowed on 27th November, 2003 as the same was not opposed. Counsel explained that the delay of about 1 ½ months from the time he knew of the judgment and the time he filed this application was the time he took to retrieve his diaries for the year 2003 and the relevant cause list for 27th November, 2003. It was Counsel's view that his mistake led to the matter proceeding ex parte and this mistake was excusable and should not be visited upon his clients. Counsel further submitted that if he had not made the above slips he would have raised a Preliminary Objection to the application for summary judgment and that his failure to raise the said Preliminary Objection and oppose the Plaintiffs' said application was not intentional or deliberate and it would be a grave injustice to punish the Defendants who are innocent. Reliance was placed upon the case of **PITHON W. MAINA – V- MUGIRA: (1982) – 88) KAR** for the proposition that there is no limit to the Court's discretion to set aside an ex-parte judgment except that it should be on terms the main concern of the court being to do justice to the parties.

Counsel for the Plaintiff on his part submitted that it was not true that Counsel for the Defendants did not know of the hearing date of the application for summary judgment as Counsel for the Plaintiff had by telephone informed him of the hearing of the application and Counsel for the Defendants had responded that he had no instructions to challenge the application. Counsel also took me through the replying affidavit and the grounds of opposition. He emphasized that the Defendants did not have a reasonable defence on merits and were in any event guilty of laches. He further argued that the Plaintiffs will suffer great prejudice should the judgment be set aside as the said judgment had been regularly obtained and the Plaintiffs had incurred expense in investigating the Defendants for purposes of executing the decree against them and there is danger that the Defendants will dispose of their assets should the judgment be set aside. Counsel placed reliance on the case of **MAINA –V- MURIUKI (1984) KLR 407** for the proposition that before an ex parte judgment can be set aside the Court must be satisfied that there is a valid defence. In Counsel's view the Defendant had not filed a defence to the amended plaint filed by the Plaintiffs despite leave having been granted to them to file an amended defence. In the premises Counsel urged me to dismiss the Plaintiffs' application. I have now considered the rival submissions of Counsel. I have also considered the application, the affidavits, the annexures, the grounds of opposition and the authorities cited. Having done so I take the following view of the matter. The law is now settled and the principles to be applied in setting aside an ex-parte judgment are well known. The case of **PITHON WAWERU MAINA –V- THIKA MUGIRIA (SUPRA)** reviewed the case law on this subject extensively. The Learned Judges of Appeal cited **PATEL –V- E.A. CARGO HANDLING SERVICES LTD (1924) E.A.75 AT P.76 C AND R** as follows:-

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just The main concern of the Court is to do

justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

They also cited SHAH –V- MBOGO (1967) E.A. 116 at page 123B as follows:-

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”

They cited the case of SHABIR DIN –V- RAM PARKASH ANAND (1955) 22 E..A.C.A 48 at page 51 as follows:-

“.....the discretion of the Court is perfectly free and the only question is whether upon the facts of any particular case it should be exercised. In particular mistake or misunderstanding of the appellant’s legal advisers even through negligent may be accepted as a proper ground for granting relief but whether it will be so accepted must depend on the facts of the particular case...”

The above are the principles. I am alive to them. I am alive to the fact that the discretion I have even though free should be exercised judiciously. Counsel for the Defendant blamed himself for failing to file any response to the Plaintiffs’ application for summary judgment and for failing to attend the hearing of the said application. It is obvious from the record that the Defendants were not aware of their counsel’s mistake. When the Plaintiffs’ application for summary judgment was heard the Defendants did not know that their advocate was not in Court. They cannot therefore be said to have sought deliberately to obstruct or delay the course of justice. The Defendants Counsel may not have acted diligently and may in fact have acted negligently but the fact remains that his mistake or lack of diligence or negligence led to the ex-parte hearing of the Plaintiff’s application for summary judgment. Such mistakes do occur and will continue to occur and the innocent litigant should not suffer as a consequence unless the prejudice that may be occasioned to the other party cannot be compensated in costs.

In this case there is no doubt that the Plaintiffs have a regular judgment in their favour. They may even have carried out investigations regarding the assets of the Defendants with a view to executing against the said assets. In my view whatever expenses the Plaintiffs may have incurred can be compensated in costs. The fact that the Plaintiffs believe strongly in their case is not sufficient to deny the Defendants their day in Court. The Plaintiffs have not alleged that they will have any difficulty in presenting their application afresh.

The upshot of the above is that I do allow the Defendant’s application dated 6th December, 2004 in terms of prayers 4 and 5 thereof. The Defendants shall pay all the costs thrown away in any event together with the costs of this application.

Orders accordingly.

DATED AND DELVIERED AT NAIROBI THIS 25TH DAY OF MAY 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-