REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Civil Appeal 37 of 2000

ALPHAX TECHNOLOGIES LIMITED ……..……..... APPELLANT

-VERSUS

JACOB OTIENO ……..…...RESPONDENT

RULING

This is an application by the respondent by way of Notice of Motion dated 28th April 2005. It is purported to have been brought under section 3A of the Civil Procedure Act (Cap.21) and Order XLI rules 8B(1), 11, 12 and 18; and Order XXI rule 22; and Order L rule 1 of the Civil Procedure Rules. It seeks for four orders, two of which have been spent –

1. (Spent).

2. (Spent).

3. That the honourable court be pleased to set aside the judgement of 8th November 2002 together with all other consequential orders arising therefrom and order the appeal to proceed for hearing interpartes.

4. That the costs of this application be provided for.

The grounds of the application are on the face of the Notice of Motion. The application is further supported by an affidavit sworn on 28th April 2005 by Nicholas Gituhu Karira advocate. It is also supported by an affidavit sworn by the respondent Jacob Otieno on 28th April 2005.

The grounds of the application are that the exparte judgement is irregular; that the execution proceedings herein are irregular and materially defective; that the respondent was not given notice of the proceedings of the appeal; that no decree and or certificate of costs has been extracted to enable execution to proceed; that the respondent is entitled to be heard in respect of the appeal herein as it has a substantial effect on his livelihood; that the taxation of costs in this matter was irregular and proceeded exparte; and lastly, that the application has been brought timeously.

The application is opposed. A replying affidavit to that effect sworn on 13th May 2005 by Paul Gicheru advocate, was filed in court on 16th May 2005.

At the hearing of the application, Mr. Kigamwa for the applicant whom I shall refer to as the respondent, submitted that the respondent was seeking for prayers 3 and 4 of the application. The said prayers were for setting aside of the judgement or orders of the court, as well as costs. He submitted that the appeal herein was heard exparte without notice to the respondent. The respondent came to know of the appeal

proceedings on 3rd May 2005 when he was served with a Notice to Show Cause. Under Order XLI rule 8 of the Civil Procedure Rules, the Registrar was required to issue a notice to the parties to the appeal for directions. That was not done. The appeal was also heard without notice to the respondent. He submitted that Mr. Nyagaka was not Mr. Karira's agent as reflected in the record of the proceedings. The appeal proceedings were therefore irregular. The execution was also irregular as it related to civil suit No.37 of 2005. The provisions of Order XLI rule 12 of the Civil Procedure Rules were not complied with.

He submitted further, that this application was brought to court without undue delay. The apparent delay was explained by the fact that the respondent had changed his address to Siaya. In response, Mr. Gicheru for the appellant submitted that there was no prayer in the application for declaring the execution irregular. The court could not issue orders that were not prayed for in the application. Therefore those prayers which were merely raised in submissions should be disregarded.

On the prayer for setting aside of the judgement, he submitted that the respondent was required to give sufficient reasons as to why he never turned up in court for the hearing of the appeal. The appeal came for directions before Justice Omondi Tunya and Mr. Nyagaka advocate held brief for Mr. Karira. Directions were taken, appeal confirmed for hearing, and a hearing date was taken by consent for 11th October 2002. On the hearing date, nobody turned up for the respondent. The learned Judge alluded to the non-attendance of counsel for the respondent in the judgement.

On whether Mr. Nyagaka had instructions to hold Mr. Karira's brief, Mr. Gicheru sought to rely on annexure "PG1" of the replying affidavit. This was a notice to Messrs. Karira and Company Advocates for the taking of directions in the appeal. He submitted that the notice was received by Messrs. Karira and Company Advocates. Otherwise Mr. Nyagaka would not have known when the matter was coming up for directions.

He also referred to a consent to withdraw money deposited which was signed after the judgement in the appeal. The consent was dated 5th February 2003 and was signed by Messrs. Karira and Company Advocates. That consent was entered two years ago. He wondered why the respondent took two years to file an application for setting aside the judgement. He submitted that Messrs. Karira and Company Advocates were being untruthful. They had even denied service of notice of taxation, while the notice annexed as "PG4" to the supporting affidavit, showed that they actually received the same under protest, for the reason that they were not acting for their client. They did not turn up for the taxation either.

He therefore submitted that no sufficient reason had been given for the non-attendance of Messrs. Karira and Company Advocates both at the hearing of the appeal and the taxation. The conduct of Messrs. Karira and Company Advocates did not warrant the granting of the relief of setting aside the judgement and subsequent orders of the court, as sought. He also submitted that the judgement had already been acted upon by withdrawing the money earlier deposited. That withdrawal was with Mr. Karira's written consent. Further, the respondent had to show that the setting aside would serve some useful purpose. That was not the case here, as evidenced from the contents of page 3 and 4 of the judgement, which showed that the party that the respondent had sued was different from the contracting party. Therefore setting aside the judgement and subsequent orders would not serve any useful purposes. On the issue of the Deputy Registrar not having given directions, he referred to annexure "PG1" to the replying affidavit. He submitted that the court did give directions and no objections were raised. Directions were taken by consent.

This is an application for setting aside an ex-parte judgement and consequential orders. The court has wide discretion in setting aside exparte judgements. The principles upon which a court may set aside an exparte judgement were set out in the case of **Patel –vs- EA Cargo Handling Services Limited [1974] EA 75** at page 76, where Sir William Duffus P. held –

> **"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."**

The discretion to set aside a judgement is intended to be exercised to avoid injustice or hardship resulting

from accident, inadvertence or excusable mistake or error but not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice **(see Shah –vs- Mbogo & Another [1967] EA 116 at page 123, which was approved by the Court of Appeal for East Africa in Mbogo –vs- Shah [1968] EA 93).**

In our present case, the respondent has sought for setting aside the exparte judgement on appeal delivered on 8th November 2002 by Justice Omondi Tunya.

He has argued that the exparte appeal judgement was irregular. That there were no directions for the appeal by the Registrar. That he was not given a notice of the proceedings of the appeal as required by law. That Mr. Nyagaka advocate who appeared for Messrs. Karira and Company Advocates during directions before Justice Tunya, and took a hearing date for the appeal, was not an agent of Karira and Company Advocates.

I will start with the issue as to whether a notice was issued for directions for the appeal. Order XLI rules 8A and 8B(1) provide as follows –

> **"8A. After the refusal of a judge to reject the appeal under section 79B of the Act the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent. 8B(1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall list the appeal for the giving of directions by a judge in Chambers.**

From the above provisions of the law, it is my view that the registrar's (or court's) mandatory obligations are firstly to notify the appellant that a judge has refused to reject the appeal under section 79B of the Civil Procedure Act (Cap.21). The second mandatory obligation of the registrar is to list the appeal for the giving of directions by a judge in Chambers. From the wording of rule 8B(1) it is my view that it is not an obligation of the Registrar to give or deliver the notice to the parties, which is to be delivered not less than twenty-one days after the date of service of the memorandum of appeal, by the appellant. The law does not require that the notice for direction must be issued by the registrar.

In my view, the notice for directions issued to Messrs. Karira and Company Advocates to the respondents, and dated by Messrs. Kalya and Company Advocates on 18th March 2002 for the directions to be given by the judge, was a valid notice. Those directions were actually given by Justice Omondi Tunya. That ground therefore has to fail.

I now turn to the issue as to whether Mr. Nyagaka had instructions to hold Messrs. Karira and Company Advocates' brief at the time of directions before Justice Tunya. The respondent's counsel has argued that Mr. Nyagaka did not have instructions to hold brief for Mr. Karira. The record shows that Mr. Nyagaka appeared before Hon. Justice Tunya holding brief for Mr. Karira for the respondent and took directions for the appeal as well as a date for hearing of the appeal. There is no affidavit filed from Mr. Nyagaka to confirm whether or not he had instructions. Also both the affidavits sworn by Mr. Karira advocate and the respondent respectively, do not indicate why Mr. Nyagaka could not swear an affidavit to clarify the position.

It is normal practice for an advocate to be instructed to hold brief for another advocate. Unless there are convincing reasons to doubt that position, a court will normally take it that that advocate has the instructions to hold that brief. In our present case, as I have not been given any possible reason why there is no affidavit by Mr. Nyagaka to support the respondent's position, I hold that Mr. Nyagaka actually had instructions from Messrs. Karira and Company Advocates to take directions in the appeal, and also take a hearing date for the appeal. Mr. Nyagaka having taken a hearing date, it is now the contention of the respondent that such hearing date was not communicated to Messrs. Karira and Company Advocates. This argument also fails because, as I have said earlier, there is no indication given by either the respondent and his counsel as to why Mr. Nyagaka would not swear an affidavit to explain the position held by Messrs. Karira and Company Advocates, that Mr. Nyagaka did not have instructions.

The respondent is challenging the taxation. It is instructive to note that Mr. Karira advocate had on 5th February 2003, signed a consent for the release of the money deposited. This consent which was annexed to the replying affidavit as "PG3" was signed on behalf of the respondent. That consent has not been disputed by any of the parties. It follows in my view, that Mr. Karira knew that there was a judgement on appeal, and that is why he signed for the release of the money. I also find that Mr. Karira was also served with a notice of taxation, which is annexed to the replying affidavit as exhibit "PG4". He endorsed a protest that he did not have instructions. That was on 14th February 2005. He does not dispute receiving the notice of taxation and endorsing that he did not have instructions. Therefore, in my view, there is no reason why he should challenge the taxation. If he wanted to protect the interests of his client, he should have attended the taxation.

There is also the argument that the respondent changed his address. He moved from Eldoret and went to Siaya in Nyanza Province. Counsel for the respondent has argued that he could not move to file this application quicly because he did not have instructions. In my view, if it was possible for the appellant to serve the respondent with a Notice to Show Cause, there could be no possible reason for Messrs. Karira and Company Advocates to fail to trace their own client and obtain instructions. No evidence has been shown to the court of efforts made Messrs. Karira and Company Advocates to trace the respondent. At no time did the respondent's counsel communicate with the counsel for the other party, that his client had changed address and could not be traced. I find no merit in the argument that Karira and Company Advocates failed to get instructions from their client because he had changed addresses.

Having considered the application and given weight to the documents filed and arguments put before me, I am of the view that this is not a proper case for me to exercise the court's discretion to set aside the judgment. It will not be in the interests of justice to do so. In my view, this is a belated attempt by the respondent to obstruct the cause of justice. I have to dismiss the application, as it lacks merit.

For the above reasons, I dismiss the application with costs to the appellant.

Dated and delivered at Eldoret this 26th day of July 2005.

George Dulu

Ag. Judge

In the Presence of:

Mr. Gicheru for appellant

Mr. Kigamwa for respondent