REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 864 OF 2001

CHAPEX LIMITED ……………..……PLAINTIFF/RESPONDENT

-VERSUS-

KENYA AIRPORTS AUTHORITY…...DEFENDANT/APPLICANT

RULING

The defendant's application by Chamber Summons dated and filed on 8th June, 2004 was brought under s.3A of the Civil Procedure Act (Cap 21), Order IXB, rule 8 and Order L, rule 7 of the Civil Procedure Rules.

The defendant seeks orders in respect of a judgment which I had delivered on *26th March, 2004***.** The prayers are:

> (a) that, the *ex-parte* judgment of 26th March, 2004 together with all consequential orders arising therefrom, be set aside;
>
> (b) that, pending the hearing and determination of this application, there be a stay of execution of the said judgment and all consequential orders arising therefrom;
>
> (c) that, costs be in the cause.

What are the grounds supporting this application? Firstly, that the non-attendance by the defendant on the hearing date (*17th February, 2004)* was due to a *bona fide* mistake on the part of the defendant's advocates. Secondly, that the defendant should not be unduly penalised for the mistake of its advocate. Thirdly, that the defendant has a serious and arguable defence to the plaintiff's claim which ought to be heard on the merits. Fourthly, that the plaintiff's suit raises serious legal issues concerning the proper interpretation and application of the Government's Legal Notice No.189 of 1996, and the *ex-parte* judgment would affect the defendant's operations in all airports in the country. Fifthly, that the plaintiff can be adequately compensated in costs for any loss, damage or prejudice that it may suffer if the *ex-parte* judgment is set aside. Sixthly, that the defendant is willing, if ordered to do so, to deposit the judgment amount in an interest-bearing account in the joint names of the parties' advocates, as a condition for staying the execution, and setting aside of the said *ex parte* judgment. Seventhly, that this is a suitable case for the exercise by the Court of its unfettered discretion to set aside the *ex-parte* judgment.

The application is supported by two affidavits – that of ***Julius Ries Kaakua***, an advocate in private practice, and that of ***Christine Natome***, a State Counsel in the Attorney-General's Chambers. Both are dated and filed on 8th June, 2004.

Mr. Julius Ries Kaakua works in the firm of M/s. Keriako Tobiko Advocate, and has the conduct of the instant matter on behalf of the defendant. He depones that due to a mix-up in diary entries his firm had written to the defendant informing the defendant that the case had not been confirmed for hearing on 17th and 18th February, 2004; and thereafter the deponent's firm stayed put, waiting for hearing date, only to be informed by a letter from the Deputy Registrar's office, dated 4th May, 2004 that typed proceedings and judgment were ready for collection. The deponent avers: "My failure to attend the hearing on 17th February, 2004 was as a result of my honest and mistaken belief that the matter had not been confirmed for hearing at the call-over of 22nd January, 2004." The content of ***Julius Ries Kaakua'***s affidavit is supported by the depositions of ***Christine Natome*** who at the material time was an advocate in the same firm as ***Julius Ries Kaakua.***

On the occasion of hearing this application, on 7th November, 2005 learned counsel ***Mr. Kilukumi*** represented the defendant/applicant, while ***Mr. Namada*** represented the plaintiff/respondent.

Mr. Kilukumi submitted that the applicant had a good defence which should be heard on the merits. Referring to pages 7-8 of the judgment, he expressed agreement with the interpretation of terms such as "Business Centre", in connection with the activities of the defendant; but he contested the kind of data which had been applied by the plaintiff, on the ground that it failed to provide an accurate picture.

Learned Counsel submitted that the plaintiff had commenced suit without giving notice to the defendant , as required by the Kenya Airports Authority Act (s.34); and this point had been pleaded in the statement of defence as a matter with a bearing on the jurisdiction of the Court to determine the issues in the suit. He cited the decision of this Court in ***Birds Paradise Tours & Travel Ltd*** v. ***Kenya Airports Authority,*** HCCC No.1219 of 1996, in which ***Hayanga, J*** thus remarked:

> "***s.34 of the [Kenya Airports Authority Act] (Cap 395) makes the institution of action against the [Authority] conditional on a month's notice preceeding the action. [This] was not done here and still goes to underline the unlikelihood of the success of this case."***

On the basis of that persuasive authority, learned counsel submitted that the defendant did have a good case which should be given a chance to be heard on the merits.

Mr. Kilukumi also remarked that by s.34(g) of the Kenya Airports Authority Act, there was a year's limitation period in respect of legal proceedings; and that the plaintiff had not complied with that requirement.

Learned counsel submitted that if the applicant was given a chance, the applicant would be able to show that there is indeed a good defence, and that probably, the plaintiff would not have been entitled to the judgment in question. He urged that the Court's discretion be exercised, as had been done by the Court of Appeal in ***Joseph Njuguna Muniu*** v. ***Medicino Giovanni***, Civil Appeal No.216 of 1997, to accord the applicant a chance to be heard in defence. It had also been held by the former East African Court of Appeal, in Patel ***v. E.A. Cargo Handling Services Ltd*** [1974] E.A 75 (at p.76 **–** ***Duffus, P***):

> "***There are no limits or restrictions on the Judge's discretion except that if he does vary judgment, he does so on such terms as may be just … The main concern of the Court is to do justice between the parties."***

The same principle is apparent in the Court of Appeal decision in ***Pithon Waweru Maina*** v. ***Thuka Mugiria*** (1982-88) 1 KAR 171 (at pp 180 -181 ***Chesoni, Ag. JA***):

> "***It is unfortunate that advocates' sins and omissions are sometimes visited on their clients, who are left without the remedy they sought, but to sue the advocate for professional negligence, but where a litigant shows that his default has been due to the party's advocate's mistake, in an application of this nature unless injustice would be occasioned to the other party, the Court should consider the applicant's case with broad understanding."***

Learned counsel observed that the veracity of the depositions in support of the application was not in doubt, and that the plaintiff/respondent had not attempted to controvert it through affidavit evidence, opting instead to file grounds of opposition, on 13th August, 2004. He urged that it was only fair, in all the circumstances, that the judgment of 26th March, 2004 be set aside. He urged, in that event, that an early date be taken for *inter partes* hearing.

Learned counsel ***Mr. Namada*** opposed the application because it would prolong litigation unnecessarily. He submitted that since the proceedings which led to the judgment of 26th march, 2004 were taken in every respect in accordance with proper procedure, there would be no basis for setting aside the judgment. Counsel contended that the applicant should instead consider filing an appeal, in case of dissatisfaction with any particular findings in the judgment.

Mr. Namada urged that if the application were to be allowed, the respondent should not be held entitled to just thrown-away costs; the applicant should be ordered to deposit the judgment amount in Court, or have it held in a joint-account of the advocates in this suit.

On the evidence in this matter, I do not doubt that counsel for the defendant/applicant had not intentionally failed to come to Court, when the suit was heard. This, *by itself*, would not necessarily incline the Court to set aside the judgment delivered in the absence of the defendant: because other factors must also come on to the scales, such as the *need for efficient trial*, the *age of the case*, the *materiality of the applicant's prayers*. A crucial factor in an application such as this, in the way in which the Court will exercise its discretion, is the *triability of the issues* raised in the defence. This is what lends validity and purpose to the prayer that a judgement properly arrived at, be set aside.

Three particular paragraphs in the applicant's statement of defence of 11th July, 2001 appear to me to disclose issues that would best be resolved only in a contested hearing. Paragraph 6 of the statement of defence reads:

> "*The defendant denies the contents of paragraph 6 of the plaint and avers that the amount charged was lawful and in accordance with the Legal Notice of 5th July, 1996 and that, further, the amount was agreed by the parties herein [by] signing and affixing their seal/stamp on the letter of offer dated 17th July, 1998 and other relevant lease documents signifying acceptance of its terms and conditions therein which included payment of Kshs.100,000/= per business unit for the two units the plaintiff occupies at the Airport.*"

Paragraph 7 of the statement of defence pleads:

> *"The defendant is a total stranger to the allegations in paragraph 7 of the plaint and shall require strict proof from the plaintiff. Further and without prejudice to the foregoing the defendant avers that if any space was ever allocated as alleged, which is denied then this was within the [defendant's] statutory powers and the defendant has no duty, contractual or otherwise, to involve the plaintiff when ….. allocating … space within the Airport to any tenant which is not part of the Plaintiff's leased portions."*

And paragraph 12 asserts:

> "*The defendant contends that the plaintiff's suit is bad in law, misconceived and incurably defective as it contravenes sections 33(1) and 34 of the Kenya Airports Authority Act (Cap.395) and is based upon an incurably defective verifying affidavit. The defendant shall, prior to or as the hearing hereof, raise a preliminary objection on a point of law to have the plaint herein struck out with costs."*

The above-quoted paragraphs in the defence are a demonstration that issue is squarely joined in the pleadings, and the defendant clearly has a triable defence which, in the best conditions of litigation, should be canvassed in Court, to the intent that a balanced and correct decision may be arrived at.

That is the *weightiest factor* in my mind as I consider the instant application. My inclination is to allow the application, and to have the suit heard a second time.

I will make the following orders:

1. The defendant shall, within 30 days of the date hereof, deposit in Court the entire judgment amount specified in the judgment of 26th March, 2004.

2. Upon the above order No.1 being complied with, the said judgment of 26th March, 2004 shall forthwith stand vacated and set aside, without any need for either party to move the Court.

3. The defendant shall within 30 days of the date hereof, pay the plaintiff's costs for, and occasioned by, the proceedings of 17th February, 2004; and the amounts to be paid shall be agreed between the parties, failing which the matter shall abide taxation in favour of the plaintiff, in any event.

4. The costs of this application shall be in the cause.

5.* The suit shall be listed for hearing early in the new term (2006), *on the basis of priority.

DATED and **DELIVERED** this 16th day of December, 2005

J.B. OJWANG

JUDGE