REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 443 OF 2002

WANYEE BOOKSHOP LIMITED …….. APPELLANT

VERSUS

UCHUMI SUPERMARKETS LTD. …… RESPODENT

(Appeal from Judgment Order and Ruling of the

Business Premises Rent Tribunal at Nairobi (The

Chairman Mr. G.K. Mwaura) delivered and given

on 23rd April, 2002 and 7th April. 2002

respectively)

JUDGMENT

This is an appeal from the Ruling of the Chairman, Business Premises Rent Tribunal at Nairobi delivered on 7th August 2002 in BPRTC No. 295 of 2001.

Briefly, the Appellant is a tenant of the Respondent at the Respondent's building on plot No. L.R. 209/7120 along Aga Khan Walk in Nairobi. The Respondent gave the Appellant a notice to terminate the tenancy and as a result the Appellant filed a reference to the Business Premises Rent Tribunal.

On 26th March 2002 when the case came up for hearing, Mr. Rayani appeared for the Respondent as usual but Mr. Kihara sent Mr. Kagii to hold brief. Hearing of the case was by consent adjourned to 23rd April 2002.

On that date Mr. Rayani was present with the Respondent's witness but Mr. Kihara and the Appellant were absent. Hearing proceeded and judgment was delivered on the same date in favour of the Respondent.

The Appellant applied to set aside that judgment and in the ruling delivered on 7th August 2002, that application was dismissed. That is the ruling appealed from.

I have had submissions from both sides in light of what has been filed to support or opposed this appeal, noting that the Appellant has listed six grounds of appeal. I take into account the authorities cited. I will not, however write a long judgment as I am of the opinion that the main problem in the application before the Chairman and in this appeal is the absence of explanation from the Chambers of M/s C.N. Kihara & Company, Advocates, as to what happened; why their Mr. Kihara and the Appellant failed to appear on 23rd April 2002.

Although in his ruling Chairman G.K. Mwaura speaks as if there were two affidavits, one from the Appellant and another from the Appellant's advocates, the filed record and what has been said during the hearing of this appeal do not support the statement that

> "The application is supported by two affidavits, one by the tenant's counsel and the other by the tenant' s director".

The position is that the application to set aside the judgment was supported by an affidavit sworn by the Appellant's director and that was the only affidavit in support.

Apart from expressing the Appellant's gravity of concern pointing out that the Appellant has always been keen to have the reference heard on merits despite the fact that at one time the Appellant's director became sick, the main thrust of the Appellant's affidavit dated 23rd May 2002, as sworn by the director Lydia Wanjiku Wanyee, was in the information said to have been received from the Appellant's counsel. Since the Appellant's counsel did not file an affidavit to affirm that information and since Mr. Kagii who held brief for Mr. Kihara on 26th March 2002 did not swear an affidavit as to how he handled the relevant case file in the Tribunal and thereafter and whether or not he handled Mr. Kihara's diary on that day, all that was said by the Appellant's director in that respect remained hearsay which could not be relied upon.

It is important for the court to know exactly what happened in the Chambers of counsel for the Appellant and for that purpose the court should not be expected to rely on hearsay evidence.

An applicant in an application to set aside a judgment entered in his absence must bring out the whole truth why he failed to be present and persuade the court to exercise its discretion in his favour. It is not sufficient to try and persuade while hiding some useful information from the court or tribunal. That is what the Appellant is doing in this matter. A hearing date by consent three weeks away. On the hearing date neither the advocate nor his client appears. Later the client comes up with an affidavit in which she informs the court that there was no appearance because she has been informed by her advocate that the consent hearing date had in advertently not been diarised in any of the advocates diaries. The advocate is there, hears what his client is saying about failure to enter the hearing date in the diary. But the advocate keeps mum on that crucial issue, yet expecting the Tribunal to agree with him to set aside the judgment the advocate failed to be present to oppose. That is not a mere mistake or error by an advocate. It is something more than a mere mistake or error by an advocate and should not be encouraged by the Court.

In those circumstances, I hold the view that the Tribunal Chairman was justified to dismiss that application. He exercised his discretion judicially and I find no good reason to interfere with the exercise of that discretion.

Accordingly this appeal is hereby dismissed with costs to the Respondent.

Dated this 13th day of June 2003.

J.M. KHAMONI

JUDGE