



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 6 OF 2020

YANG GUAN PROPERTY DESIGN

& MANUFACTURING LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

CHINA WU YI COMPANY (K) LIMITED.....DEFENDANT/APPLICANT

RULING

[1] The Notice of Motion dated **3 March 2020** was filed herein by the Defendant/Applicant, **China Wu Yi Company (K) Limited**, pursuant to **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya; Order 51 Rule 15 and Order 12 Rule 7** of the **Civil Procedure Rules, 2010**, for Orders that:

- [a] Spent
- [b] The Court be pleased to set aside its orders made on **3 March 2020** pending hearing of the application.
- [c] the Court be pleased to reinstate the Plaintiff/Respondent's application dated **18 February 2020** to be determined on merit;
- [d] The Costs of the application be provided for.

[2] The application is based on the grounds that the respondent had duly instructed counsel to appear for them, which counsel was in the High Court situate in Nairobi; and that he had appointed an external advocate, **Mr. Kwame Ramo**, to hold his brief; but that **Mr. Ramo** showed up late at the Court only to be informed by the court clerk that the matter had proceeded *ex parte*. It was therefore the assertion of the applicant that the non-attendance on the part of its advocate was neither deliberate nor intentional as the calendar clash was beyond the advocate's control.

[3] The application was supported by the affidavit of **Mr. Conrad Maloba**, the advocate on record for the applicant; and the affidavit of **Mr. Kwame Ramo**, whose duty it was to attend court on behalf of **Mr. Maloba** on **3 March 2020**. Counsel conceded that notice was duly served for **3 March 2020**; but explained that **Mr. Ramo**, who had instructions to attend court on behalf of **Mr. Maloba**, had another matter before the Environment and Land Court which was coming up for ruling; and that by the time he showed up for this matter, orders had already been made. They pleaded that the mistake of counsel should not be visited on their client who wishes to be heard in respect of the application dated **18 February 2020**. They further explained that what was served on **Mr. Maloba** was a mention notice; and therefore that no dispositive orders ought to have been made in respect of the application dated **18 February 2020**.

[4] In response to the application, the plaintiff/respondent filed a Replying Affidavit, sworn on **17 March 2020** by its manager and director, **Lejia Chen**. It was averred that in the mention notice served on the applicant's counsel, the applicant was warned that the matter would be heard and decided in its absence should it fail to attend court. The respondent made reference to **Annexure KR-1** to **Mr. Ramo's** affidavit and averred that **Mr. Ramo's** failure to schedule the matter in his diary betrays a lack of interest and explains why he failed to attend court for it. It was also the contention of the respondent that the applicant failed to demonstrate in what way the orders of **3 March 2020** are prejudicial to him; and that if anything, those orders will not only help expedite this matter, but also assist the Court in making a fair and just determination with a view of meeting the ends of justice in this case.

[5] The application was urged by way of written submissions, pursuant to the directions made herein on **11 March 2020**. Thus, in his written submissions dated **20 July 2020**, **Mr. Maloba** urged the Court not to visit counsel's mistake on his innocent client. In that regard, counsel relied on **Burhani Decorators & Contractors vs. Morning Foods Ltd & Another** [2014] eKLR and **Patriotic Guards Ltd vs.**

James Kipchircir Sambu [2018] eKLR. It was further the submission of **Mr. Maloba** that an error occurred herein when substantive orders were given herein on a mention date. He relied on **Samson Makubo Marigo vs. Permanent Secretary Ministry of Internal Security** [2020] eKLR and **Central Organization of Trade Unions vs. Cabinet Secretary Ministry of Labour Social Security & Services & 2 Others** [2014] eKLR.

[6] On his part, **Mr. Bake** for the respondent maintained the posturing that the applicants have not shown any reasonable cause why the orders dated **3 March 2020** should be vacated. He made reference, *inter alia*, to **Patel vs. E.A. Cargo Handling Services Ltd** [1974] E.A. 75; **Peter Kiplagat Rono vs. Family Bank Ltd** [2018] eKLR; **Mawji vs. Lalji & Others**, Civil Appeal No. 236 of 1992 and **Omwoyo vs. African Highlands & Produce Co. Ltd** [2002] eKLR, for the proposition that whereas the Court has discretion to set aside the *ex parte* orders issued herein, the applicant ought not to be excused for its deliberate failure to attend court despite service. He submitted that a differentiation ought to be made between negligence and genuine error or mistake on the part of counsel.

[7] **Mr. Bake** also submitted that it was imperative for the applicant to demonstrate how the *ex parte* orders of **3 March 2020** will prejudice its interests, should they not be vacated. His view was therefore that the instant application is an afterthought, and has only been brought in a vain attempt to delay the hearing and determination of the main suit. He accordingly prayed that the said application be dismissed with costs.

[8] The application was brought pursuant to **Order 51 Rule 15** of the **Civil Procedure Rules**, which recognizes that the Court may set aside an order made *ex parte*. There is no gainsaying therefore that the Court has unfettered discretion to set aside or vary any default judgment or order so long as it is done upon such terms as are just; and bearing in mind that such discretion must be exercised judiciously and in accord with the principle set out in the case of **Shah vs. Mbogo** [1967] EA 116, namely, that the discretion is intended to be exercised to avoid injustice or hardship resulting from 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.

[9] Similarly, in **Patel vs. East Africa Cargo Services Ltd (1974) EA 75** this principle was reiterated thus:

"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 to it by the rules ... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits."

[10] I have accordingly perused and considered the affidavit sworn on **3 March 2020** by **Mr. Kwame Ramo**, Advocate. He confirmed that he was instructed by **Mr. Conrad Maloba**, Advocate, to hold his brief in this matter; and that by the time he received the instructions, he already had another matter scheduled for ruling before the **Eldoret Environment and Land Court, being ELC No. 121 of 2016**. He further averred that after taking the ruling he availed himself to take directions herein, only to be told that orders had been given *ex parte*. **Mr. Ramo** annexed to his affidavit an extract of his diary for **3 March 2020** in proof of his averments. He therefore asserted that his failure to attend court when the matter was called out was not deliberate or attributable to negligence. He likewise implored the Court not to visit his omission as counsel on the applicant.

[11] I am satisfied that the applicant has given a plausible explanation as to why its counsel was unable to be in court on **3 March 2020** when the impugned orders were given; and that the non-attendance by **Mr. Ramo** was neither negligent or deliberate. The applicant is desirous of being heard in respect of the application dated **18 February 2020**; and therefore I take the view that no prejudice would be suffered by the respondent that cannot be compensated by an award of costs. Indeed, in **Philip Keipto Chemwolo and Mumias Sugar Co. Ltd vs Augustine Kubende [1986] eKLR**, the Court of Appeal expressed the following viewpoint:

"The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

[11] *In the premises, the applicant's Notice of Motion dated 3 March 2020 is hereby allowed and orders granted as hereunder:*

[a] *That the orders made herein on 3 March 2020 be and are hereby set aside;*

[b] *That the application dated 18 February 2020 be and is hereby reinstated for disposal on merit;*

[c] *The Costs of the application be costs in the cause.*

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF FEBRUARY, 2021

OLGA SEWE

JUDGE