REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.84 OF 2010

MOTREX LIMITED.....PLAINTIFF/APPLICANT

VERSUS

1. NDURUHU JULIUS

2. NYERI MOTORS SERVICES LIMITED.....DEFENDANTS/RESPONDENTS

RULING

1. This **Ruling** relates to a **Notice of Motion** Application dated **17th November, 2020** brought under the provisions of **Article 50 & 159** both of the **Constitution** and **Sections 1A, 1B, 3A** all of the **Civil Procedure Act** and all other enabling provisions of the law.

2. In the application, the Applicant is seeking for orders that: -

> ***1. Spent;***
>
> ***2. The Court Orders made on 8th October, 2020 be set aside and the Notice of Motion application dated 17th September 2020 be heard inter parties and on merit;***
>
> ***3. The Replying Affidavit to the said application, annexed hereto, be deemed duly filed upon payment of the requisite court fees;***
>
> ***4. Costs be in the cause.***

3. The Application is premised on the grounds on its face and a **Supporting Affidavit** dated **17th November, 2020**, sworn by **Thomas K'bahati,** an Advocate of the High Court of Kenya, the Applicant's Counsel who states that he has personal conduct of the matter herein.

4. He has averred that on the **8th October, 2020**, the Court granted the 1st Defendant/Respondent's Application dated **17th September, 2020** *ex parte* for non-appearance of the Plaintiff/Respondent.

5. That the Applicant became aware that orders were granted on the **8th October, 2020** when he tried to follow up on Warrants of Attachment & Sale that had not been processed by the registry.

6. **Mr. Thomas K'Bahati** has averred that the non-attendance was not deliberate but due to regrettable human mistake being that he erroneously diarized the hearing as **8th December, 2020** instead of **8th October, 2020**.

7. The Applicant's case is that they have never failed to attend Court for this matter and that they have even attended court for simple applications such as applications for change of advocates hence they could not have missed to attend court for an important application such as the one dated **17th September, 2020** that sought to disturb the judgment as entered on the **9th February, 2018**.

8. According to the Applicant, the Application dated **17th September, 2020** was coming up for mention for the first time on **8th October, 2020** and the 1st Defendant/Respondent ought to have extended him courtesy by calling him to confirm the reason for his non-attendance.

9. The Applicant avers that the court order issued on **8th October, 2020** set aside a valid judgment that was entered after the main suit was heard and judgment delivered on **9th February, 2018**. It is averred an application for review to set aside a judgment requires that the it be

heard on its merits.

10. The Applicant has found it strange that it took the 1st Defendant over twenty (20) months to disturb the existence of the judgment delivered on **9th February, 2018** and that the filing of the application dated **17th September, 2020** was a back handed attempt to disturb the judgment after their failure to file an Appeal.

11. To add to this, the Applicant has stated that the judgment delivered on **9th February, 2018** is partly settled and that it was an abuse of the court process for the 1st Defendant/respondent to attempt to set aside the said Judgment.

12. It has been buttressed by the Applicant that under **Articles 50 and 159 (2) (a)(b)(d) and (e)** of the **Constitution of Kenya** there is a guarantee of justice, fairness and impartiality as well as the right to be heard before a decision is made.

13. Further, that the orders extracted are invalid, ineffective for the reason that there is a grant for stay of execution pending the hearing of the application when the said application was determined in finality by the grant of the order reviewing and setting aside of the Judgment delivered on **9th February, 2018.**

14. It is an averment that this court has since dismissed four applications for stay of execution for being *res judicata* and thus an order for stay could not issue, a fact that the 1st Defendant/Respondent did not disclose to the court.

15. The Applicant has urged the court to allow the application dated **17th November, 2020** in the interest of justice.

16. The Application has been opposed by the 1st Defendant/Respondent vide a **Replying Affidavit** sworn by **Nancy Murage**, Advocate on **2nd December, 2020.** She has deponed that she filed an Application on **17th September, 2020** seeking an order for review and setting aside of the judgment delivered on **9th February, 2018**. That pending the determination of review, she also sought for stay of execution of the said judgment.

17. It has been deponed that the application dated **17th September, 2020** was filed under certificate and the *ex parte* orders were that the application be served on the Plaintiff/Applicants for hearing on **8th October, 2020**.

18. According to the 1st Defendant/Respondent the Plaintiff/Applicant was duly served with a hearing notice that indicated the application dated **17th September, 2020** was coming up for hearing on the **8th October, 2020**.

19. It has been deponed that on the **8th October, 2020** when the Plaintiff/Applicant's Counsel did not attend court after proof of being duly served, the 1st Defendant/Respondent's Counsel urged the court to enter *ex parte* orders.

20. The 1st Respondent has stated that it is not correct that the judgment as delivered on **8th October, 2020** has remained undisturbed for over twenty (20) months, and that the Applicant has been desirous to challenging the Judgment but the file herein had been missing hence making it impossible to Appeal.

21. That the Plaintiff/Applicant did not suffer any prejudice when the Judgment dated **8th October, 2020** was reviewed and set aside and the matter ordered to be heard afresh as they have already been paid the sum of **Kshs.1,100,000/=.**

22. Lastly, the 1st Respondent has averred that if the court is inclined to allow the Plaintiff/Applicant's application, they be ordered to pay throw away costs to the 1st Defendant/Respondent in the sum of **Kshs.100,000/=** and the same be paid before the hearing of the application dated **17th September, 2020.**

23. Directions were taken on 14th December, 2020 that parties file their written submission. They duly complied with the Plaintiff/Applicant filing their submissions on the **21st January, 2021** while the 1st Defendant/Respondent filed theirs on **12th March, 2021.** Parties relied on their written submissions.

24. I have had the benefit of reading the written submissions. They replicate much on the grounds in support and opposition of the application as captured above that I need not to duplicate the same herein.

ANALYSIS AND DETERMINATION

25. Having read through the application dated 17th November, 2020, the affidavits in support and opposition thereof and submissions filed by either party, I find that the main issue for determination is whether the applicant has established sufficient cause to warrant a grant of the orders sought.

26. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In the case of **Shah –vs- Mbogo & Another [1967]EA 116,** the Court of Appeal of East Africa held that:

> ***"This discretion (to set aside ex parte proceedings or decision) 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 a person who has deliberately***

sought, whether by evasion or otherwise, to obstruct or delay the course of justice." *(emphasis added)*

27. The legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In the case of **Wachira Karani –vs- Bildad Wachira [2016]eKLR,** Mativo J. held that:

> ***"Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."***

28. In this case, it is not in dispute that the Plaintiff's/Applicant's counsel was served with a hearing notice but failed to attend court on **8th October, 2020**. The reason given for the Plaintiff/Applicant's failure to attend court is that the counsel who had the conduct of the matter mis-diarized the matter for **8th December, 2020** instead of **8th October**, **2020**. A copy of the diary annexed to the supporting affidavit indicates that indeed the matter herein had been diarized for **the 8th December, 2020**. The question that then arises is whether the applicant failed to attend the hearing on the said date due to willful neglect or deliberately to delay the course justice.

29. Having carefully considered the explanation given by the applicant and their conduct in the matter herein that they were always diligent in attending court save for the mis-diarized date, I am satisfied that the failure to attend the hearing by the Applicant on **8th October, 2020** was not due to his negligence but a genuine error on the part of Counsel. Consequently, I hold that the Applicant has demonstrated a sufficient cause upon which the court can exercise its discretion.

30. Further the Plaintiff/Applicant has sought for an order that the **Replying Affidavit** sworn on **17th November, 2020** be deemed as properly filed being a response to the application filed on **17th September, 2020**.

31. It is trite law that the Court must consider whether the applicant has any defence which raises triable issues. In the case of **Patel –vs- East Africa Cargo Handling Services Ltd (1974) EA 75,** Duffus P. held that:

> ***"…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. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication…"***

32. Further the Court in the case of **CMC Holdings Limited -vs- James Mumo Nzioki [2004] eKLR,** stated:

> ***"…The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues…"***

33. I have considered the Reply filed by the Plaintiff/Applicant and noted that it has stated that the application dated **17th September, 2020** is *res judicata*, and further that there is a partial fulfillment of the judgment as delivered on **9th February, 2018** through a consent.

34. I have also considered the documentary evidence filed together with pleadings by both parties and formed the opinion that the Reply by the Plaintiff/Applicant is not frivolous but one that raises serious issues of law and fact that are to be considered in the determination of the application dated **17th September, 2020.**

35. Having found that the Plaintiff/Applicant has demonstrated sufficient cause warranting setting aside of the impugned order; that its reply raises serious issues; and that the 1st Defendant/Respondent will not suffer damage which cannot be remedied by costs, I proceed to allow the application dated **17th November, 2020** in the following terms;-

> ***a) The ex parte order issued on 8th October, 2020 is hereby set aside and application dated 17th September, 2020 be heard inter partes;***
>
> ***b) That the Replying Affidavit sworn by the Plaintiff/Applicant as duly attached and filed on the 18th November, 2020 be and is hereby deemed as being properly filed as a response to the application dated 17th September, 2020;***
>
> ***c) That the Application dated 17th September, 2020 be set down for hearing at the registry on a priority basis.***

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7TH DAY OF JULY, 2021.

D. O. CHEPKWONY

JUDGE