IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 436 OF 2017

BETWEEN

JOHN MUGAMBI T/A MUGAMBI & COMPANY ADVOCATES.....1ST PLAINTIFF

BEATRICE KARIUKI T/A BEATRICE KARIUKI & ASSOCIATES...2ND PLAINTIFF

AND

SHOWCASE PROPERTIES LIMITED.....DEFENDANT

RULING NO. 2

1. The Defendant has filed a Notice of Motion dated 10th September 2020 seeking to review the order issued on 24th August 2020 directing it to deposit Kshs. 5 million in a joint account in the names of the parties advocates or in court or provide a bank guarantee in favour of the Plaintiffs as a condition for setting aside ex-parte judgment. The application is supported by the affidavit and further affidavit of Francis Muhoro Gachanja sworn on 10th September 2020 and 23rd September 2020 respectively. The application is opposed by the 1st Plaintiff's replying affidavit sworn on 15th September 2020.

2. Both parties filed written submissions which I have considered. The thrust of the Defendant's case is that the judgment set aside on 24th August 2020 was an irregular judgment. In the circumstances and based on the decision of the Court of Appeal in ***James Kanyiita Nderitu v Marios Philotas Ghikas and Another*** **MSA CA Civil Appeal No. 6 of 2016 [2016] eKLR**, the court ought not to have imposed conditions. It argued that there was already a defence on record which the parties were not aware of when default judgment was entered and that the Defendant only became aware of this fact when it was pointed out in the ruling. It further states that it has now paid filing fees for the defence and has hence cured the irregularity thus the court should review it decision.

3. The Plaintiffs have opposed the application on the basis that the Defendant has not established a case for review as the issue raised by the Defendant is one that requires argument. As regards the issue of the defence, they submit that there was no defence on record as the document purporting to be a defence had not been paid for. They point out that the court considered all the facts and that no new facts have been presented to the court to warrant review.

4. It is not in dispute that the application that resulted in the ruling dated 24th August 2020 was an application to set aside the ex-parte judgment. In the ruling, I found as a fact that service of summons to enter appearance on the Defendant's Advocate who had filed a Notice of Appointment was regular. I stated as follows:

> *[11] Since* ***Order 4 rule 8*** *of the* ***Civil Procedure Rules*** *permits service on the authorised agent and an advocate who has filed the Notice of Appointment is duly authorised to accept service of court process, the judgment entered against the Defendant was regular. I reject the Defendant's argument that its advocate was not authorised to accept summons on its behalf.*

5. After finding that the judgment was regular, I then proceeded to consider whether the Defendant had a bona fide defence to the Plaintiffs' claim and whether there was a reasonable explanation for the failure to file the defence. I held as follows in material parts of the ruling:

> *[14] According to the deposition by Ms. Ndirangu, the failure to file the defence, was an inadvertent mistake or oversight. I have perused the court record and I note that the Defendant's statement of defence dated 3rd January 2019 is annexed to the Replying*

Affidavit of Francis Muhoro Gachanja sworn on 31st January 2019. Although the defence was stamped on 1st February 2018, it does not appear to have been paid for. The reason why this is important is that it supports Ms Ndirangu's contention that failure to file the defence was inadvertent as the defence was presented for filing as part of the bundle. Moreover, that the defence was a distinct document is confirmed by the fact that it was not an annexture to the affidavit as it was not referred to. By the time judgment was entered on 9th October 2019, the hearing dated was fixed by consent before Tuiyott J., on 26th July 2019 for 20th and 21st January 2020 and for the Case Management Conference on 9th October 2019. On this basis I find that failure to file the defence by KONAN Associates was neither deliberate nor intended to obstruct justice. The application to set aside was filed barely a month after the judgment which time I do not consider inordinate.

6. I also considered the Defendant's conduct and its relation with its previous advocates on record whom its accused of negligence and whose actions it disowned. I stated as follows:

*[16] In **Hilary Rotich v Dr Wilson Kipkore NRB CA Civil Appeal No. 232 of 2010 [2018] eKLR**, the Court of Appeal accepted that, "Under Order IX A Rule 10, the learned judge had discretion to impose conditions that she considered just in the circumstances, taking into account the interest of both the appellant and the respondent." In this case, Mr Gachanja, in his deposition appeared to disavow the action of his previous advocates on record first to accept summons and second to even file the application, he however accepts the defence they presented as one raising triable issues. He cannot blow hot and cold.*[Emphasis mine]

7. Finally, I considered the nature of the defence to the Plaintiffs' claim proffered by the Defendant before making the final orders as follows:

*[17] The case against the Defendant is for fees arising out of the retainer agreement whose validity is neither disputed not denied. Nor is the fact that the Plaintiffs did some work toward prosecution of **HC COMM 577 of 2011** disputed until they were granted leave to withdraw from acting for the Defendant in that case on 31st March 2017. What I see to be the dispute is whether the full instruction fee or part thereof was due or whether the instruction fee was due until work was done to completion or upon withdrawal of instruction. In fact, by a letter dated 10th November 2017, counsel for the Defendant made the following proposal to the Plaintiffs:*

> *[5] Alternatively, if your clients are not willing to tax their bill of costs, our client is willing to pay an all inclusive sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000.00) as follows Kenya Shillings Ten Million (Kshs. 10,000,000/=) to Messrs Beatrice Kariuki & Associates Advocates and Kenya Shillings Five Million (Kshs.5,000,000/=) to Messrs Mugambi & Co. Advocates as full and final remuneration for work done to the point of your clients unilateral withdrawal from acting for our clients at the conclusion of the Nairobi HCCC 577 of 2011 Showcase Properties Limited v Bamburi Special Products Limited which is currently at hearing stage.*

[18] The offer was obviously not accepted but I have set it out an excerpt of the Defendant's advocate's letter to show that the Defendant does not deny issuing instructions to the Plaintiff. It admits liability under the remuneration agreement albeit not for the full amount hence I will only grant conditional leave to the Defendant to defend the suit.

8. The application for resolution is one for review made under Order **45** Rule**1** of the ***Civil Procedure Rules*** which provides as follows:

*45**(1)** Any person considering himself aggrieved-*

> *(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.*

9. Under these provisions, an applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter or for any other sufficient reason for the court to review. The Court of Appeal in ***National Bank of Kenya Limited v Ndungu Njau*** **[1996] KLR 469** explained what constitutes an error of law apparent on the face of the record and the scope of review:

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review. [Emphasis mine]

10. In ***Nyamogo & Nyamogo Advocates v Kogo*** **[2001] EA 170,** the Court of Appeal further explained that:

Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view as adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it

may be for appeal. [Emphasis mine]

11. The reason I have set out the material findings made in the ruling sought to be reviewed is to demonstrate that the arguments made by the Defendant require the court to re-evaluate the evidence on record. I made specific findings of fact upon which I exercised my discretion to grant a conditional order to set aside judgment. In particular, I considered whether the judgment was a regular or irregular one. In summary, the issues the Defendant has raised are suitable for appeal as they are an attack on this court's discretion.

12. I reject any attempt to re-open the order made on 24th August 2020 with the result that the Notice of Motion dated 10th September 2020 is dismissed with costs to the Plaintiffs.

DATED and **DELIVERED** at **NAIROBI** this **2ND day of OCTOBER 2020.**

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Otenyo instructed by Makhandia and Makhandia Advocates for the Plaintiff.

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Defendant.