



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**HIGH COURT CIVIL APPEAL NO. 105 OF 2013**

**GIBB AFRICA LIMITED.....APPELLANT/RESPONDENT**

**VERSUS**

**DAVID KIPLAGAT ROTICH.....RESPONDENT/APPLICANT**

**RULING**

The applicant filed an application dated 3<sup>rd</sup> September 2020 seeking the following orders;

- a. Spent
- b. The honourable court be pleased to set aside, vary and discharge the ex parte orders issued on 30<sup>th</sup> June 2020.
- c. The applicant's application dated 4<sup>th</sup> June 2020 be fixed for inter partes hearing.
- d. The respondent be granted leave to respond to the applicant's application dated 4<sup>th</sup> June 2020.
- e. The costs of the application be borne by the applicant/respondent.

**APPLICANT'S CASE**

The application is based on the grounds that the applicant's ex parte application dated 4<sup>th</sup> June 2020 proceeded ex parte on 30<sup>th</sup> June 2020 and ex parte orders were issued on the same date. The matter was due for mention virtually on 25<sup>th</sup> June 2020 and without notice to the respondent the appellant's counsel called for the file and sought orders in respect of their application thus condemning the respondent unheard.

The orders sought by the appellant herein were issued irregularly and without disclosure of material facts as there is no appeal from the judgment delivered on 17<sup>th</sup> October 2019 which dismissed the appellant's appeal. The order is premature as there is no certificate of costs issued yet that is capable of being stayed. The application should be made once a certificate of costs has been issued after taxation.

The appellant served the respondents with the application together with the mention notice dated 24<sup>th</sup> June 2020 fixing the application dated 4<sup>th</sup> June 2020 for mention for purposes of taking directions on 25<sup>th</sup> June 2020. On the said date the counsel for the respondent/applicant logged into the court session but the matter had not been cause listed.

The respondent's counsel was never served with any other date regarding the hearing of the application. The application dated 4<sup>th</sup> March 2020 was on 30<sup>th</sup> June 2020 allowed by the honourable court in the absence of the respondent who was not served with a hearing notice. There is no appeal pending before the court of appeal to warrant the orders granted on 30<sup>th</sup> June 2020. The orders were made on the basis of non-disclosure of material facts by the appellant.

The applicant had no way of knowing of the hearing date of 30<sup>th</sup> June 2020 as this was the appellant's application and it was therefore his duty to ensure that the proper hearing date was served upon the respondent. He relied on the case of *Ongom vs Owota and Shah v Mbogo (1967) EA 116* where the court held;

That for such orders to set aside to issue inter alia, the court must be satisfied about one of two things namely;

- a. Either that the defendant was not properly served with summons; or
- b. That the defendant failed to appear in court at the hearing due to sufficient cause.

The applicant also relies on the case of **Nixon Murathi Kiratu v Director of Criminal Investigations & 2 others: Mercy Nyakio Mburu & another (interested parties) [2019] EKL**R on the issue of ex parte judgments.

In paragraph 4 of the replying affidavit the respondent admits that the matter was due for directions on 25<sup>th</sup> June 2020. How this matter graduated to a hearing on 30<sup>th</sup> June 2020 is still a puzzle. It is common practice that an application cannot be heard on a mention date and orders issued on the said date allowing the application were improper. The applicant barely had four days to respond to the application which was served on 24<sup>th</sup> June 2020 and the application was due for mention for directions and not a hearing. The court did not consider the merits of the application as the application was premature as taxation has not been done to warrant an application of stay. A party can only stay execution of a decree or certificate of costs but not stay taxation of costs.

As a consequence of the applicant not having been served with the hearing date of the application he was not in attendance when the court allowed the application without allowing the applicant a chance to respond to the application. The respondent failed to disclose to the court that there is no appeal pending from the judgment delivered on 17<sup>th</sup> October 2019 and as such the orders issued on 30<sup>th</sup> June 2020 were obtained irregularly.

The applicant relies on the case of *The King Vs General Commissioners for the purposes of the Income Tax for the District of Kensington (1917) 1 K.B 486* where the court laid down the legal principle that an ex parte applicant must make a full and fair disclosure of all material facts.

The applicant/respondent in his replying affidavit annexed and marked as ZKY2 to the application dated 4<sup>th</sup> June 2020 raises weighty and triable issues. The applicant cites the case of **Wachira Karani vs Bildad Wachira (2016) EKL**R on the issue of setting aside an ex parte judgment.

The applicant should be allowed to respond to the appellant's application dated 4<sup>th</sup> June 2020 which was served upon them on 24<sup>th</sup> June 2020. The applicant should not be condemned unheard and this court should set aside the orders issued and the application dated 4<sup>th</sup> June 2020 be fixed for inter partes hearing. Costs of the application should be borne by the firm of Albert Kamunde & Company and not their clients as this is a case of sharp practice.

#### **RESPONDENT'S CASE**

The respondent filed submissions in opposition to the application dated 5<sup>th</sup> October 2020.

The respondent submits that the orders granted on 30<sup>th</sup> June 2020 were valid. It was the appellant/respondent's response vide a replying affidavit sworn by Lorna Malosoy on 5<sup>th</sup> October 2020 that the application dated 27<sup>th</sup> November 2019 was scheduled to come up before the court for hearing on 30<sup>th</sup> July 2020 which date was set by the court for matters that were to proceed on 29<sup>th</sup> April 2020. Mr. Murithi who was counsel appearing for the applicant requested via email; that the applicant's application dated 4<sup>th</sup> June 2020 be placed before Hon. Justice Githinji for directions. The absence of counsel for the applicant was not due to lack of service of a hearing notice since the above matter was still slated for hearing of another of the appellant respondents' application dated 27<sup>th</sup> November 2019 on 30<sup>th</sup> June 2020.

The mere fact that the appellant/respondent's other application dated 27<sup>th</sup> October 2019 was also coming up for hearing on 30<sup>th</sup> June 2020 which date was scheduled by the court for the matters that were coming up for hearing on 29<sup>th</sup> April 2020 shows that the counsel for the respondent failed to attend court on his/her own accord and cannot claim to not have attended court for lack of service of a hearing notice. The failure of counsel to be in court on 30<sup>th</sup> June 2020 when the orders were granted as prayed, is not excusable and hence the orders are valid.

The respondent/applicant failed to attend court on his own accord and has not offered any sufficient cause as to why he failed to attend court on the said date. He relied on the cases of **Mohammed Salim Ali Mohamed Juma & another v Commissioner of Lands & 2 others (2017) EKL**R, **J.A.M versus FOK (2019) EKL**R on the issuing of ex parte orders. The respondent also cited the case of **Auto Selection (K) Ltd and 2 others v John Namasaka Famba (2016) EKL**R on the issue of sufficient cause.

The respondent cited *Section 27(1) of the Civil Procedure Act* which states that awarding of costs shall be in the discretion of the judge who has power to determine to whom costs will be awarded.

The applicant's application should be dismissed with costs to the appellant/respondent.

#### **ISSUES FOR DETERMINATION**

1. Whether the ex parte orders that were granted should be set aside.
2. Whether the applicant should be granted leave to respond to the application dated 4<sup>th</sup> June 2020.

#### **WHETHER THE EX PARTE ORDERS SHOULD BE SET ASIDE**

In the cases of Ongom vs Owota and Shah v Mbogo (1967) EA 116 the court held;

**That for such orders to set aside to issue inter alia, the court must be satisfied about one of two things namely;**

**a. Either that the defendant was not properly served with summons; or**

**b. That the defendant failed to appear in court at the hearing due to sufficient cause.**

**a) Whether the defendant was properly served with summons**

The application was due for directions on 25<sup>th</sup> June 2020 and the file was not placed before the court. The respondent deponed that Mr. Murithi who was counsel appearing for the applicant requested via email that the application dated 4<sup>th</sup> June 2020 be placed before Hon. Justice Githinji for directions. If this was the case the respondent should have attached the email as an annexure to prove that counsel appearing for the applicant had made this request. Further, the fact that there is another application that was set to be heard by the court on 30<sup>th</sup> June 2020 is not sufficient to warrant that the applicant was aware of the date for the application dated 4<sup>th</sup> June 2020.

The respondent has not proven that he properly served the applicant with summons.

**b) Whether the defendant failed to appear in court at the hearing due to sufficient cause**

The defendant has not proven that the applicant was aware of the date given by the court for the mention or hearing of the application. The respondent has not proven that the applicant or the advocate appearing for the applicant requested that the matter be placed for directions before the court on 30<sup>th</sup> June 2020. In the premises, the applicant failed to appear in court for this particular matter due to sufficient cause.

It is trite law and equally sensible that a matter listed for mention cannot proceed for hearing on a date it was to come up for mention.

The applicant has therefore made out a good case warranting setting aside of the ex parte orders issued on 30<sup>th</sup> June 2020.

**WHETHER THE APPLICANT SHOULD BE GRANTED LEAVE TO RESPOND TO THE APPLICATION DATED 4TH JUNE 2020**

**Justice Adoyo** of the High Court of Uganda in Transafrika Assurance Co Ltd vs Lincoln Mujuni stated that: -

*"The rationale for this rule lies largely on the premise that an ex parte judgment is not a judgement on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing"*

In the interests of justice, the applicant should be given leave to respond to the application. The applicant should not be condemned unheard.

In Patel vs East Africa Cargo Handling Services, Duffus, V.P. stated:-

*"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 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. 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"*

In the premises the application dated 3/9/2020 is merited. The ex parte orders of 30/6/2020 are set aside and the applicant is allowed 14 days leave to respond to the application dated 4/6/2020.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 10<sup>th</sup> day of December, 2020.**

**In the presence of:-**

Ms Malosoy for the Applicant

Mr. Yego for the Respondent (absent)

Gladys - Court Assistant