



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NARIBOI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 558 OF 1998**

**RAMJI RATNA & COMPANY LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling relates to a notice of motion application dated 7<sup>th</sup> December 2018, brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 12 Rule 3(1), and (7), Order 17 Rules 1(1) and (4), Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the Law.

2. The Applicant is seeking for orders that:

*(a) This Honourable Court be pleased to set aside the Order of the Honourable Court issued on 22<sup>nd</sup> November 2018, dismissing the suit herein pursuant to Order 12 Rule 3 (1) and Order 17 Rule 1(1) and 4 of the Civil Procedure Rules, 2010;*

*(b) Consequently, the Honourable court be pleased to reinstate the suit herein forthwith and grant the Plaintiff/Applicant leave to prosecute the said suit in accordance with the law;*

*(c) This court be pleased to set aside this suit down for hearing within this year in accordance with the Hon. Chief Justice's directive that matters that are five (5) years old should be disposed of before the end of this year;*

*(d) The orders granted in prayers 1, 2 and 3 above do apply to Nairobi High Court Civil Suit No. 557 of 1997 which was consolidated with the instant suit;*

*(e) Costs of this application be provided for.*

3. The application is premised on the grounds on the face of it and an affidavit dated the even date, sworn by Naran Shamji Pindoria, a director of the Plaintiff. He deposed that the Plaintiff's suit was dismissed for want of prosecution when the matter came up for hearing on 22<sup>nd</sup> November 2018. That he was not able to attend court on that date as he had lost his father-in-law that morning of the hearing. Therefore, the circumstances prevailing at that time could not allow him to immediately inform his advocates of the developments. Therefore the reasons of his inability to attend court on 22<sup>nd</sup> November 2018 are excusable in the circumstances.

4. That the Plaintiff has fully complied with the pre-trial directions having filed and served the witness statement on 24<sup>th</sup> January 2017 and suit certified ready for hearing on 13<sup>th</sup> July 2017. Thereafter the Plaintiff is ready and willing to prosecute the suit and has at all material times been constantly willing as demonstrated by the numerous correspondences and invitations to fix the hearing dates.

5. He argued that undoubtedly the Plaintiff will suffer substantial loss if the suit is not reinstated as it relates to a substantial amount of money rightfully due to it for services already rendered to the Defendant. It is in the interest of justice and fairness that, this Honourable Court be pleased to reinstate the suit and grant the prayers sought as no prejudice will be occasioned to the Defendant if the Plaintiff's application is allowed.

6. However the Defendant objected to the grant of the orders sought based on the Replying affidavit sworn by Lieutenant Colonel Gabriel Muchoki Kibuchi dated 25<sup>th</sup> January 2019. He deposed that, the Applicant has not attended court for hearing on several occasions and on the 22<sup>nd</sup> day of November, 2018, when the matter was called out for hearing the file was placed aside to wait for the Applicant's advocate who was on his way to court.

7. The matter was then called out the second time and the Applicant's advocate informed the court that his witness was indisposed. He did not tell the court that the witness was bereaved. The matter was then dismissed due to its age and the Hon. the Chief Justice's directive that matters of five (5) years and above be concluded by end of the year 2018. Therefore, the suit was dismissed due to the Applicant's conduct and the court's discretion should not be exercised in its favour.

8. The matter was disposed of through filing of submissions. The Plaintiff relied on the provisions of; Article 50 of the Constitution of Kenya, 2010, which provides that:

*“Every person has the right to have any dispute which can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body”.*

9. The Plaintiff further relied on the case of; CMC Holdings Limited vs James Mumo Nzioki Nairobi Court of Appeal Civil Appeal NO. 329 of 2001 (2004) eKLR. where the Court of Appeal held that;

*“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise would in our mind be wrong in principle”.*

10. That the court in the same case went on to say:

*“failure to hear a case on merit due to a mistake or negligence of an advocate, is an injustice to the “injustice litigant”. The compensation in forms of damages from a counsel cannot be equated to the constitutional right of a party to be heard, as enshrined under Article 48 of the Constitution of Kenya. Indeed, the purport of Article 159(2) (d) of the Constitution is to uphold decision based on the substance of the matter. The substance thereof can only be tested through a hearing of the substantive issue. Such rights cannot be enjoyed where a party is prevented from entering the temple of justice, and/or approaching the seat of justice.”*

11. The Respondent filed submissions reiterating the averments in the Replying affidavit and argued that it is clear from the facts herein that the Applicant's witness was cavalier in his attitude to this case. That he knew the case was coming up for hearing but he did not get in touch with his advocate Mr. Odoyo. He did not call him to explain his predicament or send a runner for that purpose. Therefore he is the author of his own misfortune and the court should not come to aid.

12. The Respondent relied on the procedural provisions of; Order 12 Rule 3(1), Order 17 Rule 1(1) and (4) of the Civil Procedure Rules and the case of; Python Waweru Maina vs Thuku Mugiria (1882-1988) 1 KAR 177, where the Court stated:-

*“Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just....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. Patel vs E.A. Cargo Handling Services Ltd (1974) EA 75 at 76C and E.B. Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who deliberately sought, whether by evasions or otherwise to obstruct or delay the course of justice. Shah vs Mbogo (1967) EA 116, Shabir Din vs Ram Parkash Anand (1965) 22 EACA 48C. Thirdly, the court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice Mbogo vs Shah (1968) EA 93.*

13. I have considered the application and the arguments for and against it and I find that the subject application herein is premised on Order 12 Rule 3(1) of the Civil Procedure Rules, which states as follows:

*“if on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”*

14. In the same vein, the provisions of; Order 17 Rule 1(1) and (4) of the Civil Procedure Rules states that:-

*“ (1) (1) once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfied the court that it is just to grant the adjournment.*

*(4)“where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith.”*

15. From the legal authorities above, it is trite law that the court will set aside an ex parte order if it is satisfied that, the factors that led to the none appearance of the defaulting party were as a result of inadvertent, accidental, or excusable error and/or mistake. However, such act should not be an intended reckless act on the part of the person seeking to set aside the order. In a nutshell, the court's order should serve the interest of justice. Thus, it should not cause prejudice to the party who may be affected by the setting aside of the order.

16. I have considered averments in the Plaint herein and find that the Applicant is seeking for inter alia, an aggregate sum of Kenya shillings

seventy three million, three hundred and eighty thousand, eight hundred and eighty three (Kshs. 73,380,883.00)(as at 31<sup>st</sup> May 1998, in civil case No. 557 of 1997 and Kenya shillings one hundred and thirty two million, nine hundred and thirty one thousands, three hundred and thirty one and sixty cents (Kshs. 130,931,331.60) herein.

17. The matter has already been prepared for trial and had been certified as such. These are substantial amount by any standard. The court record shows that, it has been active in court throughout the year 2015 to 2018. On the material date, when the suit was dismissed, Mr. Odoyo informed the court that, he had made efforts to trace the Plaintiff's witness for pretrial conference, but the letters and phone calls had gone unanswered. He therefore sought for time to apply to cease acting as he had no instructions. The court found no good reasons to adjourn the matter and it was dismissed. The Respondents are therefore right in arguing that, the reasons advanced by the Applicant for non-attendance of the court and the reasons given to the court in this application are not the same.

19. Be they as it may, I have considered the fact that the witness was bereaved as evidenced by the burial permit produced and being an event that is beyond human control, I find that it will be in the interest of justice to allow the application as prayed. I therefore allow the same in terms of prayers (a), (b) and (d) herein. I order the suit be set down within (1) one month of this order. In default of compliance, the suit shall stand dismissed at the expiry of that period. The Defendant will be compensated with thrown away costs of Kenya shillings ten thousand (Kshs. 10,000).

20. Those then are the orders of the court.

Dated, delivered and signed in an open court this 3<sup>rd</sup> day of April 2019

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Odoyo for the Plaintiff/Respondent

Mr. Onyambu holding brief for Mr. Onyiso for the Defendant/Applicant

Dennis .....Court Assistant