



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 115 OF 2015**

**SHIVA CARRIERS LIMITED .....PLAINTIFF/APPLICANT**

**VERSUS**

**HOPEWELL (K) LIMITED .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**APEX STEEL MILLS LIMITED .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The applicant has brought an application by way of Notice of Motion dated 6<sup>th</sup> September, 2016 under order 51 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of statutes (sic). The applicant seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That the proceedings of 18<sup>th</sup> August, 2016 be set aside and/or vacated; the ruling set to be delivered on 22<sup>nd</sup> September, 2016 in relation thereto be and is hereby halted and all other subsequent proceedings thereto be set aside and/or vacated and the plaintiff/applicant be allowed to prosecute its application dated 21<sup>st</sup> January, 2016 and defend the respondent's application dated 13<sup>th</sup> January, 2016 and 2<sup>nd</sup> February, 2016 respectively, on merit; and

(iv) The costs of this application be provided for.

The application is predicated on the grounds in support of the same and the affidavit of Sam Machio dated 29<sup>th</sup> August, 2016.

2. Learned Counsel for the 1st defendant filed grounds of opposition on 6<sup>th</sup> September, 2016. Learned Counsel for the 2<sup>nd</sup> defendant filed no response. At the time of hearing this application, Learned Counsel for the plaintiff informed the Court that Mr. Nanji for the 2<sup>nd</sup> defendant was out of the Country.

**PLAINTIFF'S SUBMISSIONS**

3. Ms. Muthee, Learned Counsel for the plaintiff submitted that she was seeking orders for the court to have the proceedings of 18<sup>th</sup> August, 2016 set aside and/or vacated and for the ruling scheduled for 22<sup>nd</sup>

September, 2016 halted to enable them prosecute their application dated 21<sup>st</sup> January, 2016 and defend the other applications dated 18<sup>th</sup> January, 2016 and 2<sup>nd</sup> February, 2016. She submitted that there was miscommunication from Mr. Mwasaa Advocate that the court had directed the matter to be mentioned before Justice P.J. Otieno.

4. She further submitted that on the day that the matter was to be heard, her court clerk went to Judge P.J. Otieno's Court but was informed that the matter was listed before this Court. Her Court clerk found that this Court had dealt with the said matter which led to the filing of the present application. Ms. Muthee informed this court that her client will suffer irreparable harm if their application dated 21<sup>st</sup> January, 2016 is not heard on merit. She sought the Court's indulgence and apologised for oversight on their part.

## **1<sup>ST</sup> DEFENDANT'S SUBMISSIONS**

5. Ms. Rajab, Learned Counsel for the 1st defendant relied on her grounds of opposition filed on 6<sup>th</sup> September, 2016 to the effect that;

(i) The application is misconceived and amounts to an abuse of the Court process as it contains false allegations to wit at ground 4 on the face of the application that parties were directed that the three pending applications would be heard on 18<sup>th</sup> August, 2016 before Hon. Justice Otieno, yet no such directions were made;

(ii) The plaintiff/applicant was aware of the hearing date of 18<sup>th</sup> August, 2016 but chose not to attend Court on the said date despite taking the date by consent of all parties in Court before Hon. Lady Justice Njoki Mwangi;

(iii) The contents of ground 6 on the face of the application demonstrates clearly that the plaintiff/applicant was not ready to proceed with the hearing of the three (3) applications despite being granted time to file and serve its response from 26<sup>th</sup> June, 2016 to 18<sup>th</sup> August, 2016, a clear period of almost two (2) months. The 1<sup>st</sup> and 2<sup>nd</sup> defendant's applications were undefended and thus (sic) there is no basis for setting aside and/or vacating the proceedings of 22<sup>nd</sup> September, 2016 (sic) and halting the ruling set for delivery on 22<sup>nd</sup> September, 2016;

(iv) The cause list of 18<sup>th</sup> August, 2016 as pinned (sic) on the notice board clearly indicated that the case was fixed for hearing before Hon. Justice Njoki Mwangi and there is no reasons (sic) why the plaintiff/applicant failed to check on the same before the Courts begun sessions at 9:00 a.m;

(v) The plaintiff/applicant has not demonstrated any grave and irreparable harm it will suffer if this application is not allowed. The plaintiff's/applicant's failure to file and serve response (sic) to the 1st and 2nd defendant's application amounted to conceding to the same as no justifiable reasons have been given for the default; and

(vi) It is in the best interest of justice that the application be dismissed/struck out with costs to the 1<sup>st</sup> defendant as the same is raised to delay justice on the part of the 1<sup>st</sup> defendant.

6. Ms Rajab highlighted the above grounds of opposition by stating that no directions were given on 18<sup>th</sup> August, 2016 that the matter would be heard by Judge Otieno. She submitted that no response was filed by the plaintiff by the time they (defendants) appeared for the hearing of the applications thus the plaintiff herein was not ready to proceed with the applications. She indicated that Ms Muthee did not inform the court why she did not instruct Mr. Mwasaa or Ms. Soni to appear in court on the said date but chose to send a clerk.

7. She further submitted that the cause list for 18<sup>th</sup> August, 2016 shows that the matter was listed before this court and not before Judge Otieno. No explanation has been given as to why the plaintiff's Advocate did not check the cause list. She added that this application is meant to delay justice and that in the

application dated 21<sup>st</sup> January, 2016 the plaintiff's counsel thought that leave had been granted only to find that it had not. Ms. Rajab prayed for the application to be dismissed and for the ruling scheduled for 22<sup>nd</sup> September, 2016 to be on course.

## **PLAINTIFF'S REJOINDER**

8. Ms. Muthee responded by stating that the other Advocates in their law firm were engaged in other courts on 18<sup>th</sup> August, 2016 and that is why they sent a court clerk to look for an Advocate to hold her brief. She submitted that they had in the application dated 21<sup>st</sup> January, 2016 found that leave had not been granted thus the application. She sought that the earlier application be allowed. She added that she had no intention to delay the due process of the law.

## **ANALYSIS AND DETERMINATION**

The issues that call for determination are:-

(i) If the explanation given by the plaintiff's counsel for her non-attendance in court on 18<sup>th</sup> August, 2016 is plausible; and

(ii) If this court should vacate and/or set aside the proceedings of 18<sup>th</sup> August, 2016 and its orders for delivery of the ruling scheduled for 22<sup>nd</sup> September, 2016.

9. The application before me is straight forward. It seeks orders for this court to set aside and/or vacate its proceedings of 18<sup>th</sup> August, 2016 and orders that scheduled the 22<sup>nd</sup> of September, 2016 as the date for delivery of a ruling in respect to three applications dated 21<sup>st</sup> January, 2016, 18<sup>th</sup> January, 2016 and 2<sup>nd</sup> February, 2016. The sole reason for the request is that Ms. Muthee for the plaintiff failed to attend court on 18<sup>th</sup> August, 2016 to argue the plaintiff's application dated 21<sup>st</sup> January, 2016 that sought leave to amend the plaint, and defend the 2<sup>nd</sup> defendant's application dated 13<sup>th</sup> January, 2016 seeking orders to strike out the amended plaint filed on 15<sup>th</sup> December, 2015 and the 1<sup>st</sup> defendant's application dated 2<sup>nd</sup> February, 2016 seeking similar orders.

10. In reference to the court record, on 27<sup>th</sup> June, 2016, Mr. Mwasaa for the plaintiff, Ms. Rajab for the 1<sup>st</sup> defendant and Mr. Nanji for the 2<sup>nd</sup> defendant appeared before this court whereby the court granted each party 15 days to file and serve their responses to the foregoing applications. This court ordered that the 3 applications would be heard on 18<sup>th</sup> August, 2016. Come the said date, Ms. Rajab for the 1<sup>st</sup> defendant and Mr. Nanji for the 2<sup>nd</sup> defendant attended court. There was no attendance by the plaintiff's Counsel.

11. Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants prosecuted their applications and prayed for the plaintiff's application dated 21<sup>st</sup> January, 2016 to be dismissed and for costs to be awarded to the defendants. The court gave the 22<sup>nd</sup> September, 2016 as the date for delivery of the ruling for the said applications. In the intervening period and specifically on 29<sup>th</sup> August, 2016, Counsel for the plaintiff filed the present application under certificate of urgency. The court ordered for the application to be served for interparties hearing on 8<sup>th</sup> September, 2016.

12. This court finds the supporting affidavit of Mr. Sam Machio to be most misleading and laced with falsehoods. In paragraph 5 thereof, the deponent states that on 23<sup>rd</sup> June, 2016, this court gave orders that the 3 applications would be heard on 18<sup>th</sup> August, 2016, before Hon. Justice Otieno given that he had previously handled the matter and given directions on the same. Paragraphs 6 and 7 thereof is to the effect that on the said date, Counsel for the plaintiff was held up before Justice Makau at the Employment Labour Court (sic) in ELRC 899 of 2015 and ELRC 136 of 2016 listed as mention and a hearing respectively. The said unnamed Counsel being under the implication (sic) and misconception that the current matter would be heard before Hon. P.J. Otieno sent their clerk to the said court with

directions to have the matter set aside or seek an adjournment and for some time to file the plaintiff's responses to the defendants'/respondents' applications on the grounds that the plaintiff's counsel was awaiting return of the duly (sic) signed replying affidavits from the plaintiff's Director who had been taken ill. The alternate Director, it was deposed, was away on business and could thus not assist in having the said affidavits sworn.

13. Paragraphs 8, 9 and 10 of the said affidavit are to the effect that the clerk was re-directed to the registry by Hon. Justice P.J. Otieno's clerk upon realizing that the matter was not listed and at the registry, he was informed that the matter had been listed before this court, contrary to the previous directions issued in the matter. Upon arriving before this court, the clerk was informed that the matter had been dealt with and that counsel for the respondents had submitted their respective submissions. A ruling was slated for 22<sup>nd</sup> September, 2016.

14. At paragraphs 14 and 15 of the affidavit it is averred that the applicant's fundamental rights and freedoms as enshrined under the bill of rights will continue to be infringed upon, violated and/or breached and that the applicant stands to suffer a serious travesty of justice and irreparable harm.

15. Firstly this court notes that paragraphs 5 and 9 of the deponent's affidavit is based on falsehoods. Contrary to the foregoing, at no time did this court issue orders to the effect that the 3 applications in issue would be heard before Justice P.J. Otieno on 18th August, 2016. The said applications were not partly heard before the said Judge and as such there should have been no misconception on the mind of the Counsel for the plaintiff that the applications would be heard before Judge P.J. Otieno.

16. Secondly, it is common knowledge that a Judge who gives a hearing date does so after making reference to his/her diary and after ascertaining that a matter can be accommodated by the said court for hearing. Orders that a matter will be heard before another Judge are specifically endorsed in a court file, should there be need for a matter to be heard in another court. The foregoing scenario, was not the case here. The hearing date for 18th August, 2016 was taken in the presence of Counsel for the three parties.

17. Thirdly, if the Counsel for the plaintiff was in doubt as to which Judge would hear the application, the least that she could have done was to make reference to the cause list for 18th August, 2016 which was available in the court notice board and the Judiciary website. This court finds it peculiar that Counsel for the plaintiff had a cause list for the ELRC and none for the Mombasa High Court where she knew one of her client's matters was listed for hearing. Had Counsel for the plaintiff bothered to check the cause list, she would have established that the matter was listed for hearing before this court.

18. Fourthly, if Mr. Mwasaa, Advocate is indeed the one who misled Ms Muthee into believing that the 3 applications would be heard before Judge P.J. Otieno, he should have sworn and filed an affidavit to that effect. The impression formed by this court is that Mr. Mwasaa did not mislead Counsel for the plaintiff as to the court that was seized of the 3 applications. Had he filed such an affidavit, he would have stood the risk of being cross examined on the veracity of the contents of such an affidavit by the defendants' counsel.

19. In the case of **Josphat Nderitu Kariuki vs Pine Breeze Hospital Ltd.** (2006] eKLR, Koome Judge (as she then was) held thus;

***“The Advocate should bear the consequences of their own professional negligence of failure to attend court on behalf of their client. Similarly, the client should bear the consequences for their choice of his legal counsel .....”.***

20. In the case of **John Onger Mariaria & 2 Others vs Paul Matundura**, [2004] 2 EA 163, it was held that:-

***“Legal business can no longer be handled in such a sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders ..... whenever a solicitor by his inexcusable delay***

*deprives a client of his cause of action, his client can claim damages against him ..... whereas it is true that the court has unfettered discretion, like all Judicial discretion must be exercised upon reason not capriciously or sympathy alone ..... Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.”*

21. Section 1A of the Civil Procedure Act provides as follows:-

*“1. The overriding objective of the Act and rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by this Act.*

*2. The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub section (1).*

*3. A party to Civil proceedings or an advocate for such a party is under duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.”(emphasis added).*

22. This court gave an opportunity to all the Counsel for the parties on record to prosecute their applications on 18th August, 2016. The plaintiff's counsel failed to attend court as directed by the court and thereby failed to comply with the provisions of section 1A (3) of the Civil Procedure Act. I also find the present application which is supported by an affidavit which contains some falsehoods is an abuse of the court process. The prayer for this court to vacate or set aside its orders of 18<sup>th</sup> August, 2016 is therefore not justifiable.

23. This court has shown that the plaintiff's Counsel's explanation for her non-attendance of court on 18<sup>th</sup> August, 2016 is not plausible. It is a doctrine of equity that whoever comes to equity must come with clean hands. The plaintiff's Counsel's hands are soiled by relying on some depositions that are false to argue the present application.

24. Lastly, this court notes that it is the duty of any Counsel to manage his/her diary in such a manner that will enable him/her to handle the cases that are listed for hearing on any specific date. This court in the circumstances of this case cannot be held to account for hearing the 3 applications, the subject of the present application, in the absence of Counsel for the plaintiff. This court has said enough to illustrate that the present application is an abuse of the court process. I am in agreement with Counsel for the 1<sup>st</sup> defendant that the present application is without merit. It is hereby dismissed with costs to the 1<sup>st</sup> defendant.

25. The upshot of the foregoing is that the ruling scheduled for 22nd September, 2016, remains on course.

**DELIVERED, DATED and SIGNED at MOMBASA on this 13<sup>th</sup> day of September, 2016.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms. Muthee for the plaintiff

No appearance for the 1<sup>st</sup> defendant

Mr. Ondego holding brief Mr. Nanji for the 2<sup>nd</sup> defendant

Rose Echor Court Assistant