



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO 41 OF 2011**

**FARAH MOHAMED AWAD.....PLAINTIFF**

**VERSUS**

**BACTLAB LIMITED.....1<sup>ST</sup> DEFENDANT**

**HUSSEIN AHMED FARAH.....2<sup>ND</sup> DEFENDANT**

**SOFIA ASSALI.....3<sup>RD</sup> DEFENDANT**

**GREGORY SMARAGDIS.....4<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff’s Notice of Motion dated 15<sup>th</sup> August 2012 and filed on 21<sup>st</sup> August 2012 was brought under the provisions of Section 3A of the Civil Procedure Act, Order 45 Rules 1 and 2 and Order 12 Rule 7 of the Civil Procedure Rules. It sought the following orders:-

- 1. THAT the ex parte Order made herein on 12<sup>th</sup> June 2012 be reviewed or set aside.**
- 2. THAT the Honourable Court be pleased to make any other orders deemed fitting for the ends of justice.**
- 3. THAT the costs occasioned hereby be awarded to the applicant.**

**THE PLAINTIFF’S CASE**

2. The application was supported by the Affidavit of Farah Mohamed Awad, the Plaintiff herein, which was sworn on 15<sup>th</sup> August 2012. His Written Submissions were dated 30<sup>th</sup> January 2015 and filed on 4<sup>th</sup> February 2015.

3. His contention was that M/S Letangule & Company Advocates, his former Advocates, never informed him about the 4<sup>th</sup> Defendant's application dated 29<sup>th</sup> May 2012. He said that his Advocates failed to file any response to the application or attend court for the hearing of the same, if indeed they were served. He stated that it was apparent that none of the Defendants were served with the said application.

4. He averred that it was not competent to refer to arbitration a mere application seeking interlocutory orders. According to him, there was no issue that had arisen for determination either by the court or through arbitration as the Defendants had not filed their Defences yet.

5. He further disclosed to the court that the dispute in the present suit had been amicably resolved as between him, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who by resolution had received him back into the Board. He stated that the resolution to reinstate him to the Board of Directors of the 1<sup>st</sup> Defendant was made in a Board's meeting held on 15<sup>th</sup> November 2011. It was therefore his position that after his reinstatement the dispute that could have been referred to the decision of an arbitrator became spent.

6. It was further his contention that the 4<sup>th</sup> Defendant was informed of the Board meeting held on 15<sup>th</sup> November, 2011 and the resolutions made therein. He was categorical that the 4<sup>th</sup> Defendant suppressed, from this honorable court, the information about his reinstatement to the Board and in the premises deliberately misled the court into making orders it should not have made. He also stated that the 4<sup>th</sup> Defendant had ceased being a Director of the 1<sup>st</sup> Defendant Company in or about April 2012 and therefore, in the said application dated 29<sup>th</sup> May 2012, he had misrepresented to the court that he was a member of the Board of Directors.

7. It was therefore his averment that he had neither abused the process of the court nor its orders and that he had not lost interest in his suit but that the dismissal of the suit on the basis of misrepresentations and perjury by the 4<sup>th</sup> Defendant was not in the interests of justice.

8. In the circumstances foregoing, he implored the court to review or set aside the *ex parte* orders made herein on 12<sup>th</sup> June 2012.

### **THE 4<sup>TH</sup> DEFENDANT'S CASE**

9. In opposition to the said application, the 4<sup>th</sup> Defendant filed a Notice of Preliminary Objection dated 18<sup>th</sup> March 2014 on even date. He alluded to a Replying Affidavit which was not on the court file. His Written Submissions were dated 11<sup>th</sup> March 2015 and filed on 17<sup>th</sup> March 2015.

10. The 4<sup>th</sup> Defendant's only objection was that the Plaintiff's application was incompetent as it offended the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules.

### **LEGAL ANALYSIS**

11. Before the court can proceed to determine the application it will be appropriate to determine the Preliminary Objection that was raised by the 4<sup>th</sup> Defendant. It was his case that the present application offended the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules which provides as follows:-

**“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing Advocate and the proposed incoming advocate**

**or party intending to act in person as the case may be.”**

12. The 4<sup>th</sup> Defendant submitted that at the time the firm of M/s F.N Wamalwa & Company Advocates filed the present application on behalf of the Plaintiff, the entire suit had been concluded by the orders of the court on 12<sup>th</sup> June 2012 dismissing the suit herein. Therefore, it was his submission that the said Advocates were required, under Order 9 Rule 9 of the Civil Procedure Rules to obtain leave from the court.

13. From a reading of the provisions of Order 9 Rule 9 of the Civil Procedure Rules, it is evident that the same applies where judgment has been passed. The dismissal of a suit cannot strictly be considered as a judgment. Hence, the provisions of Order 9 Rule 9 of the Civil Procedure Rules cannot apply.

14. In this case, a Notice of Change of Advocates would suffice as provided for under Order 9 Rule 5 of the Civil Procedure Rules. The court did not see any Notice of Change of Advocates. However, from the 4<sup>th</sup> Defendant's submissions, it appeared that one was filed. The court was therefore not inclined to dismiss the present application for want of Notice of Change of Advocates. In the circumstances, the 4<sup>th</sup> Defendant's Preliminary Objection could not be sustained.

15. Turning to the substance of the application, the court has power to review orders and/or judgment under Order 45 Rule 1 of the Civil Procedure Rules, 2010 where there is a mistake or error on the face of the court or where there is discovery of new and important evidence. It is apparent from facts pleaded by the Plaintiff, that there was no mistake or error apparent on the face of the record. It was clear that the 4<sup>th</sup> Defendant's application dated 29<sup>th</sup> May 2012 which was to be heard on 12<sup>th</sup> June 2012 was not opposed. The Plaintiff or his Advocates did not file any response and they subsequently failed to attend the hearing of the said application.

16. As was held in the case of **Shah vs Mbogo & Another [1967] EA 116**, discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. It is not unlikely for an advocate to inadvertently fail to file a pleading on behalf of his client or to fail to attend a hearing. However, in this matter no such inadvertence or mistake on the part of the Plaintiff's Advocate was demonstrated before this court.

17. Therefore, the court rightfully determined the application *ex parte* and went ahead to dismiss the suit for want of prosecution. There were no grounds that were demonstrated by the Plaintiff to persuade the court to review the said *ex parte* order. In the circumstances, the only option left was for the court to determine the setting aside of the Order.

18. Appreciably, the Plaintiff admitted in Paragraph 18 of his Supporting Affidavit that after his reinstatement to the 1<sup>st</sup> Defendant Company's Board of Directors, the dispute that could have been referred to the decision of an arbitrator became spent. This essentially means that the dispute and the prayers the Plaintiff was seeking in this suit became spent.

19. This court could not therefore discern why the Plaintiff wanted the suit reinstated. It is worthy to note that under Section 1B of the Civil Procedure Act, Cap 21 (Laws of Kenya), in furthering the overriding objective of the Act, the court is enjoined to ensure the efficient disposal of its business and the efficient use of the available judicial resources. Reinstating the suit herein would not be efficient by using the available judicial resources in any way as currently there was no dispute between the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

20. In any event, the consent order of 12<sup>th</sup> May, 2012 restraining the Defendants, from amongst other things, interfering with the Plaintiff's rights, as a director, shareholder and signatory to the 1<sup>st</sup> Defendant's bank account was granted pending the outcome of an intended arbitration. Once the parties consented to having their dispute resolved by way of arbitration, the jurisdiction of the court was completely ousted. The court can only become seized of jurisdiction of this matter if parties agreed, by

consent, to return this matter to court for its determination. In the absence of such a consent, the court's hands remained tied and must allow the matter to take its course.

21. Having considered the pleadings, the affidavit evidence and Written Submissions by the parties, this court found that there were no justifiable reasons to set aside the *ex parte* orders of 12<sup>th</sup> June 2012 as had been sought by the Plaintiff.

**DISPOSITION**

22. For the foregoing reasons, the upshot of this court's ruling was that the Plaintiff's Notice of Motion application dated 15<sup>th</sup> August 2012 and filed on 21<sup>st</sup> August 2012 was unmerited and the same is hereby dismissed with costs to the 4<sup>th</sup> Defendant.

23. It is so ordered.

**DATED and DELIVERED at NAIROBI** this 16<sup>TH</sup> day of JULY 2015

**J. KAMAU**

**JUDGE**