



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 482 OF 2004**

**PIONEER HOLDINGS (AFRICA) LIMITED.....PLAINTIFF**

**- VERSUS -**

**JOSE EDUARDO MULLY.....1<sup>ST</sup> DEFENDANT**

**DANIEL NJUGUNA..... 2<sup>ND</sup> DEFENDANT**

**IMMACULATE OWAJA.....3<sup>RD</sup> DEFENDANT**

**CORNELIUS WAITHAKA.....4<sup>TH</sup> DEFENDANT**

**(Being sued in their representative capacity as the registered officials of the Universal Church of the Kingdom of God)**

**RULING**

1. On 3<sup>rd</sup> June 2010 Koome J. (as she then was) handled the plaintiff's Notice of Motion dated 20<sup>th</sup> December 2005. It was an application for Judgement on Admission.
2. On that date the plaintiff was represented by Ms Ngendi Advocate, whilst the defendants were not represented. In the circumstances, the defendants did not make any submissions in respect to the application dated 20<sup>th</sup> December 2005.
3. After the learned Judge had given due consideration to the application, she granted judgement in favour of the plaintiff, for the sum of Kshs. 3,263,013/-. The learned Judge also awarded interest at the rate of 2.5 % per month on each month's rent, from the date when the same became payable.
4. Finally, the costs of the application, together with the costs of the suit were also awarded to the plaintiff.
5. The defendants have now come before the court, seeking to set aside the judgement which was entered on 3<sup>rd</sup> June 2010.
6. The defendants' advocates readily conceded that they were duly served with a Hearing Notice which indicated that the application dated 20<sup>th</sup> December 2005 was scheduled for hearing on 3<sup>rd</sup> June 2010.
7. So, if the defendants' advocates had received notification concerning the hearing date, what is their explanation for the failure to attend court at the material time?
8. They have said that it was because at the time in question, the plaintiff had two applications which were pending. The first of those applications was actually one through which the firm of **NGATIA & ASSOCIATES ADVOCATES** had sought leave, from the court, to cease acting for

- the plaintiff.
9. The second application was the one for Judgement on Admission.
  10. According to the defendants' advocates, their clients did not intend to oppose the application which would have granted leave to Ngatia & Associates Advocates, to cease acting for the plaintiff.
  11. Therefore, as the defendants' advocates thought that the Notice served upon them was in relation to the application which they had no intentions of opposing, they did not deem it necessary to attend court.
  12. Mr. **DANIEL KIOKO MUSYOKA** Advocate, swore an affidavit stating that his failure to attend court on 3<sup>rd</sup> June 2010 was due to a mistaken but honest belief that the application scheduled for hearing on 3<sup>rd</sup> June 2010 was the one by which the plaintiff's advocates had sought leave to cease acting.
  13. He has also pointed out that the Replying Affidavit which the defendants had filed in response to the application dated 20<sup>th</sup> December 2005, disclosed triable issues. He expressed the belief that if he had come to court, he would have persuaded the court that the plaintiff's application should have been disallowed.
  14. The defendants said that it was mete and just to set aside the Judgement.
  15. Finally, the defendants drew the court's attention to the fact that the plaintiff had failed to prosecute the case between the year 2004 and 2010. In those circumstances, the defendants' said that they had been ready to seek the dismissal of the suit for want of prosecution.
  16. Mr. Muria, the learned advocate for the defendants, asked me to set aside the Judgement, so that the defendants may have an opportunity to put forth their substantive case before the court.
  17. In answer to the application, Miss Nyaga, the learned advocate for the plaintiff, submitted that the defendants had not provided any substantive reason for failing to attend court on 3<sup>rd</sup> June 2010.
  18. The plaintiff pointed out that before serving a Hearing Notice on the defendants' advocates, their lawyers had, first, invited the advocates to attend at the High Court Registry, for purposes of fixing a hearing date for the application dated 20<sup>th</sup> December 2010.
  19. And when that application came up in court on 3<sup>rd</sup> June 2010, the plaintiff's advocate informed the court that he had been instructed to continue representing the plaintiff in this case.
  20. When replying to that submission, Mr. Muria advocate pointed out that the defendants had never been informed by the plaintiff's advocate, that the said advocates had abandoned the application for leave to cease acting.
  21. I note that the plaintiff did not assert that it had ever told the defendants' advocates that the quest by their advocates, to cease acting for them had been abandoned. It therefore follows, that, as far as the defendants were concerned, there is no evidence at all that the advocates for the plaintiff had told the defendants about the fact that they had abandoned the intention to cease acting for the plaintiff.
  22. I have also perused the record of the proceedings, and established that there was no record to show that the advocates for the plaintiff did tell the court, on 3<sup>rd</sup> June 2010, that the application to cease acting had been abandoned.
  23. But even if the advocates had given that information to the court on the date when the defendants were absent, the defendants would not have become aware of that development, until they were duly informed.
  24. In those circumstances, I find that the explanation tendered by the defendants was plausible. In effect, there had been a real possibility of confusion, on the part of the defendants' advocates, concerning the application which was scheduled for hearing on 3<sup>rd</sup> June 2010.
  25. In **CMC HOLDINGS LIMITED Vs NZIOKI [2004] 1 E.A. 23**, the Court of Appeal said;

**“We are fully aware that in an application before a court to set aside ex parte judgement, the court exercises its discretion in allowing or rejecting the same: That discretion must be exercised upon reasons and must be exercised judiciously”.**

26. In that case the advocate had forgotten to alert his client about the Hearing Date. As a consequence, the client failed to attend court. The Court of Appeal appreciated that the client could possibly sue his advocate for negligence. Nonetheless, the Court said the following, at page

**“... but two matters arise from the same decisions which are in our humble opinion, fairly disturbing. These are first, whether, it having established through the Appellant’s affidavits, which were not challenged, that the Respondent was served through its advocates who did not inform it about the hearing date, the Respondent could be said to have deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice or whether the Respondent found itself in hardship resulting from excusable mistake”.**

27.To my mind, that consideration was very apt, in the light of the fact that when an *ex-parte* judgement was set aside by the court, the intention is;

**“...to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...”**

**– per SHAH Vs MBOGO & ANOTHER [1976] E.A. 116.**

28.In the circumstances of the case before me, I have found no evidence that the defendants have tried to obstruct or delay the cause of justice.

29.The defendants had already filed an affidavit in answer to the application dated 20<sup>th</sup> December 2005.

30.In the said affidavit, the 4<sup>th</sup> defendant indicated that on 27<sup>th</sup> May 1999, the **UNIVERSAL CHURCH OF THE KINGDOM OF GOD**, had given Notice to the plaintiff, terminating the Lease.

31.According to the defendants (who are all sued in their capacities as the registered officials of the church), the Lease was terminated on 31<sup>st</sup> May 1999. The caretaker of the church promptly took the keys of the premises to the Collection Manager of the plaintiff. The said Collection Manager is named **GLADYS IHAJI**.

32.The church then vacated the premises altogether.

33.According to the defendant they had already paid Kshs. 657,003/- to the plaintiff, whilst the rent outstanding was Kshs. 214,000/-. Therefore, the defendants claimed that it was the plaintiff who owed them Kshs. 314,003/-, as at the end of May 1999.

34.The defendants also cast doubt on the authenticity of documents allegedly signed by its officials. As far as the defendants were concerned, it would be wrong for an alleged official of the church to admit a debt whose very foundation did not exist. The example given by the defendants was in respect to **DEVELOPMENT LEVY**, in the sum of Kshs. 2,000,000/-. The defendants asserted that that sum cannot have been owing when the lease did not have any provision for Development Levy.

35.In the light of those contentions, it does appear that the defendants may have issues which the court may be obliged to delve into, before making a determination.

36.Of course, the said issues do not arise directly from the Defence which was lodged in court on 9<sup>th</sup> August 2005. However, it is sufficient that the said lines of the defence has been placed before the court.

37.In **MAINA Vs MUGIRIA [1983] KLR 78**, at page 91, the Court of Appeal quoted the following words of Ainley J. from the case of **JAMNADAS SODHA Vs GORDANDAS HEMRAJ (1952) 7 ULR7**, describing them as wise words;

**“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned, should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court”.**

38.In effect, the courts tend towards offering the applicant an opportunity to have his case considered

on merits.

39. In the **MAINA Vs MUGIRIA** case, Porter J.A. expressed himself thus at page 94;

**“In Gurcharah Singh (s/o Nesar Singh Vs Khudadad Khan t/a Khudadad Construction Co. HCCA No. 1547 of 1969) Hancox J. (as he then was) agreed that the advocate’s mistake (or that of his clerk) should not weigh unduly, and in my view that should be the correct approach on an application of this nature. As I said in Eldoret Hcc Appeal 14 of 1980 (The Municipal Council of Eldoret Vs James Nyakeno):**

**‘the court goes by the principle that such an ex-parte judgement having been entered neither upon merits of the case nor by consent of the parties is subject to the court’s power of revocation at its discretion.**

**It is unfortunate that advocates’ sins and omissions are sometimes visited on their clients, who are left without the remedy they sought, but to sue the advocate for professional negligence but where a litigant shows that his default has been due to the party’s advocate’s mistake in an application of this nature, unless injustice would be occasioned the other party, the court should consider the applicant’s case with broad understanding”.**

40. In this case, the applicant’s advocate took full responsibility for the failure to attend court. It is the advocate who made the mistake of thinking or assuming that the application that was due for hearing was the plaintiff’s advocate’s application to cease acting. The applicant had no role in that mistake.

41. Secondly, I hold the considered view that plaintiff would not be prejudiced if the judgement was set aside. I so find because the plaintiff would still be able to canvass its application for Judgement on Admission.

42. Accordingly, I find merit in the defendant’s application. The judgement entered on 3<sup>rd</sup> June 2010 is set aside forthwith.

43. However, the defendants will meet the costs of their application dated 6<sup>th</sup> July 2010. Those costs will be paid to the plaintiff.

44. If there should be any thrown away costs, in respect to actions undertaken by the plaintiff after the judgement had been granted, the defendants will also pay those costs to the plaintiff. Of course, the actions must have been those undertaken in these proceedings, for them to qualify as thrown-away costs.

45. Finally, for the avoidance of any doubt, the application dated 20<sup>th</sup> December 2005 is reinstated. The parties are at liberty to set it down for hearing.

46. It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 14<sup>th</sup> day of July 2015.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Miss Nyaga for the Plaintiff

Muchieri for the 1<sup>st</sup> Defendant

Muchiri for the 2<sup>nd</sup> Defendant

muchiri. for the 3<sup>rd</sup> Defendant

Muchiri for the 4<sup>th</sup> Defendant

Collins Odhiambo – Court clerk.