



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 378 OF 2008

EXCLUSIVE AFRICAN TREASURES LTD..... PLAINTIFF

VERSUS

AFRICA ECO-CAMPS LTDDEFENDANT

RULING

1. By the consent of the parties, on 14th October, 2011 a hearing date, for the suit was fixed for 5th December, 2011. On 5th December, 2011, the Plaintiff and his Advocate appeared but neither the Defendant nor its Advocates attended. Being satisfied that there were no reasons not to proceed with the trial, the Court proceeded to take the evidence of the Plaintiff *exparte* and reserved the judgment for a later date. On 18th January, 2012, Judgment was delivered in favour of the Plaintiff.
2. On 24th May, 2013, before execution could be levied, the Defendant took out a motion on Notice praying that the firm of P.K. Njiiri & Company be allowed to come on record for the Defendant, that there be a stay of execution of the decree, that the *exparte* judgment and decree be set aside and that the court do review, vary and set aside the said judgment and that consequently the suit be heard on merit.
3. The grounds for the motion were contained both in the motion and the Supporting and Further Affidavits of Azim Jiwa Rajwani sworn on 24th May, and 25th June, 2012 and a Supplementary Affidavit of Sospeter Mukwana sworn on 27th June, 2012 respectively. These were that the Defendant was introduced to one Mr. Makori Advocate by one Lutafali Jiwa Rajwani, who however left Kisii and moved to Nairobi on an undisclosed date. That the Defendant's efforts to trace the said Mr. Makori Advocate at Cargen House failed as the said office belonged to Biwott Korir & CO. Advocates. That due to pressure of work, the Defendant lost track of this case, that it is only in May, 2012 that the Defendant received a letter from its former Advocates indicating that the said Advocates were withdrawing from acting on their behalf for lack of instructions, that on inquiring the Defendant found that the firm of Kimanga & Co. Advocates had an office at Kisumu and not Nairobi. That it is the Plaintiff who owes the Defendant, that it is unjust as the suit was heard *ex parte* for no fault of the Defendant and that the application should be allowed and the suit be heard on merit.
4. In its submissions, it was contended that there was evidence that Kimanga & Company did not have an office at Cargen House, that the Defendant should not be punished for the mistakes of its Advocates. The cases of **Python Waweru Vs Mugiria (1982) KLR 210**, **Nzoia Sugar Co. Vs Fungututu (1996) KLR 401**, **Rose Nyaboke Otondi Vs Tom Murugo NAI No. 109 of 1998** and **Stallion Insurance Vs Rosemary Olao CA No.85 of 1998** were relied on in support of this contention. That the Defendant had a good defence on merit and should be allowed to agitate the

- same. The case of **Tree shade Motors Vs DT Dobie CA No. 38 of 1998** was cited in support of this contention. Counsel urged that the application be allowed.
5. The Plaintiff opposed the application through the Replying Affidavit of Deepa Darbar sworn on 14th June, 2012. The Plaintiff contended that the alleged Mr. Makori Advocate was only one of the Advocates in the firm of Kimanga & Company, who were Advocates representing the Defendant in the suit, that the Plaintiff's Advocates had severally affected service of process upon Ms. Kimanga & Company on the address given in the Memorandum of Appearance which process was at all times received and stamped in acknowledgment of service. One Boniface Kioko Kisauni, a court clerk of the Plaintiff's Advocates, swore an Affidavit indicating that as at 6th June, 2012 the offices of Kimanga and Company Advocates had shifted from Room 315 to Room 412 at Cargen House Harambee Avenue. Mr. Darbar narrated how the Defendants Advocates on various dates had frustrated the prosecution of the proceedings in this case and he expressed doubt as to the inability of the Defendant to trace their Advocates.
 6. In his submissions, Counsel for the Plaintiff submitted that the power to set aside an *ex parte* judgment is discretionary, that the power is not intended to assist a party who has sought to obstruct or delay the course of justice, that it is untrue that the Defendant was unable to trace its Advocates in the declared address, and that the Defendant had not taken any steps to acquit itself of the position of the suit. The cases of **Francis Gichuki Vs Martin Leposo Tamoo HCCCA NO. 530 of 2002 (eKLR)**, **Alfred Momanyi Risasi Vs Robinson Mecha Mabuka (eKLR)** and **NBK Vs Richard K. Serem (eKLR)** were cited in support of the contention that the Defendant was undeserving of the exercise of the discretion of this court in its favour. That there was no explanation as to why the Defendants previous Advocates failed to attend Court on 5th December, 2011 and that therefore this was not a proper case to exercise the court's discretion in favour of the Defendant.
 7. In answer to the Defendant's submissions, Mr. Salvia contended that there being no explanation given for the failure of the Defendant's Advocates to attend the hearing of 5th December, 2011, such failure must have been deliberate and not accidental. That failure by the Plaintiff to apply to strike out the Defendant's Defence did not mean that the same was meritorious Counsel therefore urged that the application be dismissed.
 8. I have carefully considered the Affidavits on record and the submissions of Counsel. This is an application to set aside an *ex parte* Judgment under order 12 Rule 7. There is also a prayer for review under Order XLIV of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. The latter provisions (Order XLIV and Section 80) are in support of Prayer No. 5 of the motion for review and setting aside of the Judgment made on 18th January, 2012. I propose to start with that prayer.
 9. Firstly, it is erroneous for the application to have been sought under Order XLIV of the Civil Procedure Rules. We no longer have such provision in our rules. However, since the application also invoked Section 80 of the Civil Procedure Act. I will overlook that misnomer and consider the application on merit. Under Order 45 of our Civil Procedure Rules, an application for review can only be made on three instances. Firstly, if there is an error on face of the record. Secondly, if there is discovery of new and important evidence which could not have been availed by the applicant at the time the order or decree was made and thirdly, for any sufficient reason.
 10. I have carefully examined the grounds upon which the application was made as well as the Affidavits by the Defendant. There was no allegation that there was an error on the face of the judgment of 18th January, 2012. It was also not alleged that there was any new and material evidence that had come to light that was not in the possession of the Defendant as at the 5th December, 2011 when the trial took place. Finally, I have seen no sufficient reason advanced to warrant the review and setting aside of the Judgment as sought in Prayer No. 5 of the motion.
 11. In any event, I doubt if the prayer for review under Order 45 or for that matter Section 80 of the Civil Procedure Act could properly be prayed for simultaneously with a prayer for setting aside under order 12 Rule 7 of the Civil Procedure Rules. Such a prayer can only be made in the alternative. Be that as it may, I find no merit in that prayer and I decline the same with costs to the Plaintiff.
 12. That leaves the prayer for setting aside of the Judgment and stay. In the case of **Njagi Kanyunguti alias Karingi Kanyunguti & Others Vs David Njeru Karingi C.A No. 181 of**

1994 (UR), the Court of Appeal delivered itself thus:-

“In an application brought either under OIXA Rule 10 or OIXB Rule 8 of the Civil Procedure Rules, the Court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The courts discretion is wide provided it is exercised judicially (See Pithon Waweru Maina Vs Thuku Mugiria (CA No. 27 of 1982) [UR], Patel Vs E. A. Cargo Handling Services Ltd 1974 EA 75). The Court is also enjoined to consider all the circumstances of the case, both before and after the judgment being challenged, before coming to a decision whether or not to vacate the judgment.....

However, it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.” (Emphasis mine).

13. It is clear from the foregoing that in considering the present application, the court has a wide discretion which however has to be exercised on the basis of evidence and sound legal principles. That this court is to exercise its discretion in order to avoid an injustice or hardship arising from an accident, inadvertence or excusable mistake or error.
14. The evidence on record upon which the court is called upon to exercise its discretion is that a firm of Advocates known as Kimanga and company was on record for the Defendant, a date for full trial of the suit was fixed by consent on 14th October, 2011 and that the trial proceeded exparte on 5th December, 2011 and judgment entered in favour of the Plaintiff. That the Defendant sought Mr. Makori Advocate but could not trace him and that at the same time the firm of Ms Kimanga Advocates tried to trace the Defendant but could not trace the Defendant.
15. The Defendant contended that it was introduced to one Mr. Makori Advocate whom its directors met twice. That later the Defendant could not Advocate Makori either at Cargen House Room 315, which was his physical address or telephone number 0725 401 133 which had been given to the Defendant. That the Defendant later learnt that the last time Mr. Makori was heard of was fundraising to take his guardian for treatment abroad. It may well be the case that the Defendants were dealing with Mr. Makori Advocate. However, from the record, the Advocates who entered appearance for the Defendant were Messrs Kimanga & Company and not Mr. Makori Advocate in his individual capacity. Indeed a copy of the letterhead produced by the Defendant as Exhibit “AJR2” shows that Mr. Makori (J.M. Omboga) was listed as one of the Advocates in the firm of Kimanga & Company.
16. The Defendant has not explained what steps it took to consult with that firm after Mr. Makori went missing. I am not satisfied that the Defendant has given any adequate explanation of what it did to defend the proceedings.
17. In any event, the evidence produced by the Plaintiff was that the firm of Kimanga and Company was situated at Cargen House Room No. 315. Indeed there were various Affidavits of service (exhibit “DD2”) showing that on 4/12/2009, 9/2/2011, 31/03/2011 and 8/3/2012 hearing notices were served upon those Advocates at that address and that the same were duly received and stamped with the stamp of that firm. That evidence as well as the Memorandum of Appearance filed in Court on 23rd July, 2008, showed that the address of service for the said Advocates was Cargen House, 3rd Floor Room 315. In any event, whilst the Defendant admits that it met Mr. Makori Advocate on two (2) occasions, it does not indicate where such meeting took place if not at the address given by Ms Kimanga & Company in the Memorandum of Appearance.
18. I have considered the fact that whilst the Defendant went into great detail to show that its former Advocates were no longer at Cargen House Nairobi, the Defendant did not offer any explanation why it did not seek to contact those advocates at their Kisumu offices to be able to offer an explanation for non-attendance in court on 5th December, 2011. It is also to be recalled that in exhibit “AJR2” produced by the Defendant, in the letter dated 25th October, 2011, Mr. Makori Advocate was complaining of not being able to trace the Defendant.
19. In this regard, I have noted that there has been no plausible explanation as to why the Defendant’s

former Advocates or the Defendant itself failed to attend court on 5th December, 2011. The evidence on record does not point towards an injustice or hardship arising out of an accident or inadvertence or excusable mistake or error on the part of the Defendant or its former Advocates. If what is detailed in paragraph 4(K) of the Replying Affidavit of Deepa Darbar sworn on 14th June, 2012, which was not denied by the Defendant, is anything to go by, what comes out is an attempt by the Defendant to evade, obstruct or delay the course of justice. In that Affidavit, the Plaintiff's director swore that out of approximately ten (10) court appearances, none of the Defendant's directors appeared in any one of them. That Mr. Makori Advocate appeared only twice and in all other occasions sent other Advocates to hold his brief for purposes of adjourning the matter.

20.As regards the contention that the Defendant has a good defence on merit, I have examined the same as well as the judgment of 18th January, 2012. In that judgment, the issues which were set out by the court at page 6 were in light of the Defence. I find nothing arguable in the Defence. The contention that it is the Plaintiff who owes the Defendant does not arise as no counterclaim was raised by the Defendant. Even if there was such a claim, the Defendant is still free to lodge the same without necessarily upsetting the otherwise lawful judgment obtained by the Plaintiff.

21.From the foregoing, I have come to the conclusion that the said application is unmeritorious and is hereby dismissed with costs.

22.With the dismissal of that application, the application dated 25th July, 2012 for stay of execution and which was also argued together with the motion of 27th May, 2012 does not fall for consideration. The same is also dismissed with costs to the Plaintiff.

DATED and SIGNED at BUNGOMA this day of.....2014.

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A. MABEYA

JUDGE

DELIVERED and SIGNED at NAIROBI this ..5thdayof.....March.....2014.

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J.B. HAVELOCK

JUDGE