



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 117 OF 2011

MOHAMMED MALIK.....PLAINTIFF

-VERSUS-

MENLOW FASHIONS.....1ST DEFENDANT

JAMES MWANZIA NZAU.....2ND DEFENDANT

AND

EUNICE NDILA KIMEU.....1ST OBJECTOR

WILSON MWANDWA.....2ND OBJECTOR

RULING

1. There are three applications before the Court for determination. The first one is the Defendants' Notice of Motion dated **9th May 2012** and filed in Court on even date. The second application is the Plaintiff's Notice of Motion dated **3rd December 2012** filed on even date while the third and last one is the Notice of Motion dated **8th June 2012** by the Objectors and filed on even date. I will deal with the applications in that order.
2. The first application seeks to set aside the *ex parte* Judgment entered on **18th April 2012** against the Defendants together with all consequential orders and decree. The application is based on the grounds stated therein and is supported by the affidavits of EDWARD ATIANG' ROMBO and JAMES MWANZIA NZAU both sworn on **9th May 2012**.
3. The current case proceeded for hearing on **28th March 2012** in the absence of the Defendants. Subsequently an *ex parte* Judgment was entered against the Defendants on 18th April 2012 and a decree issued for the sum of Kshs. 8,292,450/-. It is the Defendants' case that the failure to attend the hearing was due to an omission of the case from the day's cause list.
4. In his supplementary supporting affidavit sworn on **11th May 2012**, Counsel for the Defendants avers that he noted that the last correspondences and notices dated 2nd November 2011 served on him indicated the case number of the suit as 177 instead of 117. It is his contention that this is the reason he was not able to find the case listed on the cause list. It is therefore the Defendants' case that the failure to attend the hearing was by honest mistake and the same should not be visited upon the innocent Defendants.
5. The application was opposed by the Plaintiff who filed a Replying affidavit sworn on **21st May**

- 2012 on even date. It is the Plaintiff's contention that the Defendants were fully aware of the hearing date. This is because the Defendants were served with a hearing notice which indicated the hearing date to be **28th March 2012**. It is the Plaintiff's case that the Judgment entered by the Court was regular and binding having been made on the merits of the case. It is further the Plaintiff's case that the Defendants have not given sufficient reasons to set aside the said Judgment.
6. I have considered the application, the affidavits on record as well as the written submissions.
 7. The principles governing the exercise of the judicial discretion to set aside an *ex parte* Judgment have been restated in several case laws. In **Patel Vs EA Cargo Handling Services [1974] EA 75** the Court observed that there are no limits and 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 said discretion is intended to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought to obstruct or delay the Course of justice. See; **Shah Vs Mbogo [1967] EA 116 at 123B**.
 8. The Defendants' main contention is that there was confusion in the numbering of the current case. Counsel for the Defendants contends that on 28th March 2012 when this case was coming up for hearing he could not trace case No. 177 in the cause list. It is later on that he came to realise that the hearing notice he was served with indicated Case No. 177 instead of Case No. 117. It is not in dispute that the hearing Notice indicating the hearing date to be 28th March 2012 referred to Case No. 177 instead of Case No. 117. It is obvious that there was some confusion in the case numbering in a few of the Court documents. However the cause list for 28th March 2012 was in order in terms of the case number.
 9. To my mind, when looking for a case listed on the cause list one should not only be keen on the case number but also the name of the parties. From Counsel's argument it seems he was only keen on looking for the case number. It appears that Counsel for the Defendants was not vigilant in diarising his matters. If he was, he should have noted that the indication of Case No. 177 on some of the documents including the hearing Notice was only but an error. From the documents on record, it is clear that the Defendants had already been informed that the case was fixed for hearing on 28th March 2012 even before they were served with the hearing Notice.
 10. That notwithstanding, I wish not to belabour on the circumstances surrounding the non-attendance of the Defendants or Counsel's fault for not being keen on the name of the parties. I suppose this is what would count as a mistake. In the circumstances, this Court is inclined to give the Defendants the benefit of doubt for failing to attend the hearing. In the case of **Phillip Chemowolo & Another v Augustive Kubede [1982-88] KAR 103 at 1040 Apalo JA** (as he then was) posited as follows:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

In this case, any prejudice caused to the Plaintiff can be compensated by way of costs.

11. In view of the foregoing, the Defendants' Notice of Motion dated **9th May 2012** and filed in Court on even date is allowed. With regard to costs, the order that commends itself to this Court is that the Defendants pay thrown away costs to the Plaintiff within 15 days from the date hereof and in default execution to issue.
12. The second application is the Plaintiff's Notice of Motion dated **3rd December 2012** filed on even date. It is taken out under **Order 51 Rules 1, 4 and 10** of the **Civil Procedure Rules** as well as **Sections 1A, 1B and 3A** of the **Civil Procedure Act**. The application seeks for one main order that the Defendants do provide security for performance of the decree herein in the sum of **Kshs. 8, 292, 450/=**.
13. The application is based on the grounds stated therein and is supported by the affidavit of the

- Plaintiff sworn on **3rd December 2012**.
14. It is the Plaintiff's contention that the Defendants' application for setting aside Judgment is meant to delay the Plaintiff from enjoying the fruits of judgment. It is also the Plaintiff's contention that the Defendants have disposed off and removed the proclaimed goods thereby leaving the Plaintiff in a precarious position.
15. The application is opposed vide the Replying affidavit of the 2nd Defendant sworn on **11th December 2012**. It is the 2nd Defendant's averment that the application was meant to delay their application dated **9th May 2012**, already considered in this ruling. It is the 2nd Defendant's contention that the Plaintiff's claim that they have disposed off or removed goods proclaimed is not backed by any evidence.
16. I have considered this application, the affidavits on record as well as the written submissions. At this point, I think it is obvious that this application has been overtaken by events. This is because the Defendants' application to set aside the Judgment entered herein has been allowed. It therefore means that the Defendants have a second chance and the case will be heard on merits. Subsequently, there will be no execution and I do not see any reason to order the Defendants to provide security for performance of a Decree that is no longer in existence.
17. This will also apply to the third application, whereby the Objectors are seeking that the proclamation of attachment dated **4th May 2012** against them be lifted. It was the Objectors' main argument that they were not privy to the contract between the Plaintiff and the Defendants and that the goods proclaimed did not belong to the Defendants. Having set aside the Judgment of **18th April 2012**, it follows that there will be no execution and subsequently the proclamation of any goods is hereby nullified.
18. In view of the foregoing, the following are the orders of this Court:-
- a. **The Defendants' Notice of Motion dated 9th May 2012 and filed in Court on even date is allowed. The Defendants shall pay the Plaintiff costs assessed at Kshs.10,000/= within 15 days from the date hereof and in default execution to issue.**
 - b. **The Plaintiff's Notice of Motion dated 3rd December 2012 and filed on even date is hereby dismissed with no order as to costs.**
 - c. **The Objectors' Notice of Motion dated 8th June 2012 and filed on even date is also dismissed with no order as to costs.**

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 3rd Day of October 2014.

E.K.O OGOLA

JUDGE

Present:-

Absent for Applicant

Absent for Defendant

Teresia – Court clerk