REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 573 OF 1986

ALIMOHAMED HAJI SULEMAN BODY BUILDERS LTD…….APPLICANTS

VERSUS

JIVRAJ & ANOTHER……....……..RESPONDENTS

RULING

This application is brought by Chamber Summons under Order IXB rule 8 and O XXI rule 22 Civil Procedure Rules. The applicants are the defendants in the suit. The plaintiff company, Alimohamed Haji Suleman Body Builders Ltd., is the respondent. Three orders are sought. Firstly that the judgment which this court pronounced on 10th March, 1989, after an *ex parte* trial, be vacated. Secondly, that there be a stay of the intended execution of the decree in this suit until further order of this court. Thirdly, that provision be made for the costs of the application.

The applicants essentially beg this court to exercise its judicial discretion in their favour. The main ground upon which the application has been based is that they were not served with a hearing notice informing them of the date of trial. This suit was fixed to come for a hearing on 2nd March, 1989. The hearing date was fixed during an annual call over which was held between 11th and 14th January, 1989. The applicants/defendants were not represented during the call over. Consequently it became necessary to issue and serve upon them a hearing notice. The notice was issued on 18th January, 1989, and was dispatched to the applicants' advocate on record, A L R Shah, of PO Box 44983, Nairobi, by prepaid registered post, on 18th February, 1989.

Mr A L R Shah, deponed in the affidavit in support of this application that he did not receive the hearing notice. He deponed that it reached Nairobi, when he was out of the country and was returned undelivered by the post office. Mr Kishor Nanji, counsel on record for the respondent company conceded that the hearing notice was returned undelivered, but long after the judgment sought to be vacated had been delivered. Mr Kishor Nanji opposed the application principally on the ground that his firm and the plaintiff having done all that they were required to do under the law to set the suit down for a hearing and to notify the defendants as to the time and place of trial, the court's discretion should not be exercised in favour of the defendants when it is clear that their counsel was in default. The default Mr Nanji complained about was the failure by Mr Shah to make necessary arrangements for the receipt of his mail and the handling of his cases while he was away in UK.

It is quite clear from the affidavit evidence before me and the record that the applicants were not personally to blame for their non-appearance and non-representation at the trial of this case. Mr Shah invited me to exercise my judicial discretion in their favour on that ground.

The exercise of judicial discretion to set aside, or not to set aside is unlimited provided it is exercised judicially. Discretion is judicially exercised when it is based on concrete facts not on whims. The court is vested with the discretion so that in the exercise of it injustice or hardship resulting from accident, inadvertence, or excusable mistake or error may be avoided (*Shah v Mbogo* [1967] EA 116).

Mr Shah is not admitting there was any inadvertence, accident or excusable mistake or any mistake, committed or arising from any omission on his part or on the part of his clients, the applicants. His contention and submission was that he did not have notice of the time and place of trial. Service of court processes by post to advocates after appearance is provided for under Order IX rule 7 (1) Civil Procedure Rules. On the date trial counsel for the plaintiff produced for my perusal a slip to show the hearing notice had been delivered to the defendants' advocate on record. The hearing notice had been dispatched to the postal address which was given on the memorandum of appearance the advocate had filed in court on 8th December, 1986. Service by post is deemed to be effective if the process is not returned undelivered or unclaimed within a reasonable time. The reasonableness of such time varies from one case to another depending on various factors. Among those is the distance from the place of posting to the place of intended delivery.

The hearing notice was sent by prepaid registered post. It was posted at Mombasa for delivery at Nairobi where the applicants' advocates ordinarily practices as such advocate. Postage was effected on 18th February, 1989. In the ordinary course of postage, the process would have been received within 7 days. It wasn't received. Nor was it returned until after a month since it was posted. By the time it was returned undelivered judgment had been pronounced. The judgment was in the circumstances regular. The process was not returned unclaimed within a reasonable time. Service of it was deemed to have been effectual.

But now we know that the process was not delivered. Evidence has been tendered to that effect. Is a court entitled to presume that service was effected and leave an *ex parte* judgment undisturbed even when there is stark evidence that the defendants did not have notice of the hearing. The court deems service of process by registered post to have been effected in absence of any evidence to the contrary. Where however, as in this case, it comes to light later that the process was not delivered and there was no fault of an inexcusable nature to attach to the defendant it will be an affront to equity to have an *ex parte* judgment undisturbed.

Mr Shah was at fault to have left the country and remained away for such a long time without any adequate arrangements as to the conduct of his cases, and the receipt of his mail during his absence. That was however fault attributable to imprudence. It is the type of mistake which a court can excuse in order to do justice to the parties in a particular case. Mr Shah offered to compensate the plaintiff in costs. In effect all he was saying is that his clients would compensate the plaintiff. However in absence of express deponment by any of his clients to that effect it was improper for him to say so. He was personally to blame and he should bear the blame and the resultant consequences. Advocates should not leave their practices to go out of jurisdiction without adequate and appropriate arrangements as to the handling of their clients' affairs, as happened in this matter. To my mind advocates who do that must be made to personally incur costs arising from any act done to the disadvantage of his client and which is referable to that advocate's omission in that regard.

In the foregoing circumstances and in deference to Mr Nanji's submissions I am inclined to exercise my judicial discretion in favour of setting aside and will mulct Mr Shah personally to pay the costs of the plaintiff and its advocate from the date of trial to date and also the costs of this application. The costs to be taxed if not agreed. The second prayer does not now arise.

Order accordingly.

Dated and Delivered at Mombasa this 10th July, 1989

S.E.O. BOSIRE

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JUDGE