REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 166 OF 2017

STAR TOURS AND TRAVEL.....PLAINTIFF/RESPONDENT

-VERSUS-

KENNEDY GICHUHA CHEGE.....1ST DEFENDANT/APPLICANT

DEBONAIR TRAVEL LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. For determination is the **Applicant's/1st Defendant's motion dated 26/06/2025** filed pursuant to S**ection 1A, 1B, 3, 3A** of the **Civil Procedure Rules (CPR)** and **Order 12 Rule 2** of the **Civil Procedure Rules (CPR)** seeking as against **Star Tours & Travel** *(hereafter the Plaintiff)* and **Debonair Travel Ltd** *(hereafter the 2nd Defendant)* the following orders-;

a) Spent

b) Spent

c) Spent

d) That the Honorable Court be pleased to set aside the ex parte judgment and decree given on 23/09/2024 as against the 1st Defendant/Applicant.

e) That the Honorable Court be pleased to allow the 1st Defendant to defend himself in these proceedings.

f) That the Honorable Court be pleased to grant the 1st Defendant leave to amend his defence and comply with Order 11 of the Civil Procedure Rules.

g) That the costs of the application be provided for.

2. The **motion is premised on grounds** found at the supporting affidavit sworn by **Kennedy Gichuha Chege**, **on an even date**. The gist of his deposition is that the instant suit was dismissed for want of prosecution and reinstated without his knowledge as his previous counsel on record did not inform him of the same. That the matter thereafter proceeded *ex parte* on 23/04/2024 whereas his erstwhile counsel failed to notify him of the hearing date and as such did not take part in the hearing despite being desirous of being heard on his defence.

3. He goes on to state that judgment in the matter was delivered on 23/09/2024 and he only became aware of the same on 24/06/2025. He argues that he has an arguable and triable defence to the Plaintiff's claim and thus ought to be allowed to defend himself in the matter. He concludes by stating that he is apprehensive that the Plaintiff may proceed with execution at any time, thereby defeating the application, as such it is in the interest of justice that the motion be allowed as prayed.

4. **The Plaintiff opposes the Applicant's motion** by way of a **grounds of opposition dated 16/09/2025** and a **replying affidavit** deposed by **Joan G. Ngugi**, on even date, who cites being a director of the Plaintiff. She takes issue with the Applicant's deposition by stating the latter who is the sole director of the 2nd Defendant has always been actively involved in the matter therefore the allegation that he was not aware of proceedings is spurious.

5. She further states that the Applicant has no arguable defence whereas the instant motion is an abuse of the Court process, intent to delay and frustrate the Plaintiff from enjoying the fruits

of litigation. That in any event, the 1st Defendant is availed of the remedy of suing erstwhile counsel for professional negligence which option will occasion the least amount of prejudice, injustice and or hardship upon the Plaintiff. In summation she urges the Court to dismiss the 1st Defendant's motion with costs.

6. Directions were taken on disposal of the motion by way of written submissions. Only the Applicant complied. That said, the Court has duly considered the rival affidavit material and submission on record, to wit, the Court postulates that the issue(s) presenting for determination as can be garnered from the rival material **concerns -:**

a) Whether the Court ought to set aside the ex parte judgment and decree given on 23/09/2024 as against the 1st Defendant?

b) Whether the Court ought to grant the 1st Defendant leave to amend his defence and comply with Order 11 of the CPR?

c) Who ought to bear the costs of the motion.?

Whether the Court ought to set aside the ex parte judgment and decree given on 23/09/2024 as against the 1st Defendant?

7. In presenting the instant motion the 1st Defendant cites **Section 3A** which specifically reserves *"the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court"*, to wit, this Court's inherent powers was judiciously addressed by the Court of Appeal in **Rose Njoki King'au & Micugu Wagathara v Shaba**

Trustees Limited & City Council of Nairobi [2018] KECA 216 (KLR) and requires no restatement.

8. Alongside the above provision, the Applicant, I believe equally intends to rely on **Order 12 Rule 7** of the **CPR**, and not Rule 2 as cited in the motion. It necessitates mentioning that **Order 12 of the CPR** concerns "*Hearing and consequence of Non-attendance*". That said, **Rule 7 of the Order** provides that-;

> *Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.*

9. It is since settled that the power to grant or refuse to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly. The rationale for the discretion to set aside conferred upon the Court was spelt out in the case of **Shah –vs- Mbogo and Another [1967] E.A 116**:

> *"The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."*

10. The events leading up to the instant motion have been captured in part, in the rival affidavit material. However, for the benefit of the Court and parties hereto, it necessitates setting out the same in brief, in order to contextualize the disputation presently for consideration before the Court.

11. The Plaintiff filed the instant suit in 2017 whereinafter the Defendants entered appearance and filed defence, through the firm of **Messrs. Wesonga, Mutembei & Kigen Co. Advocates. On 04/11/2021**, the Plaintiff's suit was dismissed with costs by Meoli, J. for want of prosecution pursuant to **Order 17 Rule 2 of the CPR.** The Defendants thereafter moved to file a bill of costs, which was taxed in their favour on 24/11/2022. Subsequently, the Defendants successfully moved to have the said certificate of taxed costs converted into a judgment of the Court, which application was allowed on 02/05/2023. Shortly after, the Plaintiff moved the Court vide a motion dated 26/06/2023 seeking inter alia to have the dismissal order of 04/11/2021 set aside and suit reinstated to be heard on merit, which motion was allowed on 26/01/2024, with directions from the Court that the Plaintiff ought to prosecute the suit within 90 days from the date thereof.

12. The suit eventually came up for hearing before this Court on 23/04/2024, wherein despite counsel for the Defendants being present when the suit was initially called out, the latter did not participate in the hearing of the suit when it proceeded at 10.34am, to wit, the hearing proceeded ex parte. Thereafter, final judgment on the matter was rendered on 23/09/2024. It is on the premise of the above events, that the 1st Defendant has now moved this Court seeking to set aside the ex parte judgment and decree given on 23/09/2024.

13. With the above facts in reserve, this Court concurs with the rendition of **Mativo, J. (as he then was) in Wachira Karani v**

Bildad Wachira [2015] KEHC 1850 (KLR), while discussing the applicable principles and the legal threshold for the Court's exercises of its discretion in favour of an applicant seeking to set aside ex parte proceedings. Stating inter alia that:

"Also relevant is the case of **Ongom vs Owota** where the court held inter alia that the court must be satisfied about one of the two things namely:-

a) either that the defendant was not properly served with summons;

b) or that the defendant failed to appear in court at the hearing due to sufficient cause.

14. It's important for me to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before me:-

"Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.

15. Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the

advocate's default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions"

16. The applicant is required to satisfy the court that he had a good and sufficient cause. What does the term *"sufficient cause"* mean? **The Court of Appeal of Tanzania** in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others[9]** discussing what constitutes sufficient cause had this to say:-

> *"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant".*

17. In Daphene Parry vs Murray Alexander Carson, the court had the following to say: -

> *'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy,....." (sic)*

18. The Court concluded by stating that:

> *".....I again repeat the question what does the phrase "sufficient cause" mean.*

The Supreme Court of India in the case of **Parimal vs Veena** observed that:-

> *"Sufficient cause" is an expression, which has been used in a large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a curious man. In this context, "sufficient cause" means that a party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." ...(sic)*

19. Similarly, in this case, it was imperative for the 1st Defendant to demonstrate sufficient cause to unlock the Court's exercise of judicial discretion. The facts leading hereto have been set out in the earlier in this ruling. What I garner to be the 1st Defendant's explanation is that upon the suit being dismissed on 04/11/2021 for want of prosecution, he was unaware of the reinstatement. As earlier, noted the Applicant's through counsel upon dismissal of the suit actively pursued costs. Now, the 1st Defendant claims he was unaware of reinstatement and only became aware of the judgment on 24/06/2025.

20. It is quite interesting that when the suit came up for hearing on 23/04/2024, one Mr. Mutembei, counsel for the Defendants,

was present in Court however as when the matter proceeded for hearing at 10.34am, he was nowhere to be seen. The record of the latter date further indicates that counsel appearing for the Defendants, then, had intimated to the Court that he had filed an application seeking stay of proceedings pending an appeal, of which, the Court observed and noted that no such application was on record whereas the Plaintiff had been granted 90 days to prosecute the suit which was to expire on 26/04/2024.

21. Later at 10.15am. Counsel for the Plaintiff, Mr. Njoroge, told the Court that he was yet to pay throwaway costs to the Defendants counsel as ordered by the Court in its reinstatement ruling rendered on 26/01/2024, to wit, the Court directed that the matter would proceed at 10.30am. The latter thus brings us to 10.34am when counsel for the Plaintiff confirmed having paid the Defendants counsel throwaway costs through Mpesa, however the latter was a no show thus leading to suit proceedings *ex parte.*

22. As earlier observed, setting aside a dismissal order involves exercise of discretion. The Court of Appeal in **Daqare Transporters Limited v Chevron Kenya Limited [2020] KECA 309 (KLR** in considering the discretion of the Court under the provisions of **Order 12 Rule 7** of the **CPR** restated the principle spelt out by its predecessor in **Shah v Mbogo** (supra), namely, that: *"The discretion under Order 12 Rule 7 is exercised so as to avoid injustice as a result of inadvertent or excusable mistakes and errors. Therefore, a court needs to satisfy itself as to whether the reason given by the appellant was excusable……"* As

concerns the 1st Defendant's explanation, the Court takes great exceptions to the same.

23. Firstly, there is no material on record either by way of a letter of inquiry or protest letter, by the 1st Defendant to erstwhile counsel, concerning his failure to inform and or notify the 1st Defendant on proceedings of the matter or a hearing of the same. Secondly, other than for the explanation of mistake of counsel being offered, the Applicant's eschewed to evince any affidavit material from erstwhile counsel, explaining the happenings leading up to suit proceedings *ex parte*.

24. Thirdly, it is quite peculiar that the 1st Defendant erstwhile counsel attends to the matter when it comes up for hearing, receives throw away costs however fails to attend to suit when the hearing actually proceedings later that morning on 23/04/2024.

25. Fourthly, this Court has held time without number that cases belong to litigants who file them, so that onus was on the Applicant to evince and or demonstrate attempts he made at finding out the obtaining position over his matter and not just waiting on counsel to inform him on the progress of the suit. Given that he was a defendant in the matter, it was in his interest to keep apprised of the matter knowing all too well that a finding in favour of the Plaintiff would have consequential effects. Lastly, it is not until 26/06/2025 that the 1st Defendant moved this Court vide the instant motion.

26. An application of this nature involves discretion, hence good and sufficient cause must be shown and where delay is manifest, it

must be satisfactorily explained before the Court can exercise its discretion. Undoubtedly, the total delay in this matter is inordinate and insufficient explained, in any event. While keen to absolve himself of any blame, the Applicant has not justifiable evinced his efforts and endeavor to keep apprised of the matter. Meanwhile, the delay in presenting the motion when seen in the light of the history of the matter does not portray the 1st Defendant or his erstwhile counsel as acting with diligence.

27. The Court of Appeal in the case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR** held that**:**

> *"While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in **Mwangi v Kariuki [1999] LLR 2632 (CAK)) Shah, JA. Ruled** "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude." The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned."*

28. The above notwithstanding this Court must also apply itself within the prism of the overriding objective introduced more recently through **Section 1A** and **1B** of the **CPA** and the present reality that Courts are weighed down by the exponential increase in litigation. Hence, the Courts can no longer afford any party

the luxury to litigate at their leisure. In **Karuturi Networks Limited & another v Daly & Figgis Advocates [2009] KECA 8 (KLR)** the Court of Appeal had the following to say concerning the overriding objective in **Section 1A** and **1B** of the **CPA**: -

> *"The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court".*

29. While the Applicant is entitled to be heard on the merits of his case, he squandered the opportunity through lethargy and indolence on his part. Auxiliary to the above the Plaintiff is equally entitled to a speedy resolution of the suit and enjoy the fruits of successful litigation. It would be a travesty of justice and prejudicial in the circumstances of the case to make the Plaintiff pay the price for the Applicant's indolence and or his erstwhile counsel blundering and indifferent conduct that borders on negligence.

30. The suit was filed almost nine (9) years ago any continued delay not only works prejudice against the Plaintiff in terms of legal

costs, inter alia, but also progressively diminishes the possibility of a fair trial being eventually conducted.

31. **In my considered and firm view, no sufficient cause has been shown to justify the Court's exercise of its discretion in the Applicant's favour. The justice of the matter lies in bringing closure to the matter by dismissing the motion dated 26/06/2025. It is dismissed with costs to the plaintiff.**

It is so ordered.

Delivered Dated and Signed at Nairobi this 19th day of February, 2026.

.....

JANET MULWA.

JUDGE