



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. E022 OF 2020

URITHI HOUSING CO-OPERATIVE SOCIETY LIMITED.....1ST PLAINTIFF/APPLICANT

SAMUEL NGUNDO MAINA.....2ND PLAINTIFF/APPLICANT

-VERSUS-

SUSAN WANJA USING PSEUDONYM AS FREEDOM

BECOZ OF BRAVE (URITHI SCAMS GROUP).....1ST DEFENDANT/RESPONDENT

NATION MEDIA GROUP.....2ND DEFENDANT/RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 12th November, 2020 brought by the 1st and 2nd plaintiffs/applicants herein and supported by the grounds set out on its body and the facts stated in the affidavit of **Peter Mwenda Njagi**. The applicants sought for the orders hereunder:

i. Spent.

ii. THAT upon hearing and determination of the application interparties, this Honourable Court be pleased to review, vary and set aside the dismissal order issued in online court on 12th November, 2020.

iii. THAT upon the hearing and determination of the present application, this Honourable Court be pleased to issue an order reinstating the applicants' notice of motion application dated 14th July, 2020 together with the interim orders that exist therein.

iv. THAT upon hearing and determination of the present application, this Honourable Court be pleased to order that the reinstated temporary injunction application in High Court Civil Suit No. E022 of 2020 be expeditiously set down for hearing on a priority basis.

v. THAT the costs of the application be provided for.

2. To oppose the Motion, the 1st respondent put in Grounds of Opposition whereas the 2nd respondent put in the replying affidavit sworn by **Sekou Owino** on 25th October, 2021.

3. When the Motion came up for interparties' hearing before this court, the parties' respective advocates made brief oral submissions reiterating the averments made in the respective affidavits and Grounds of Opposition.

4. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion, the Grounds and the brief oral arguments.

5. A brief background of the matter as seen from the record is that the applicants filed a defamation claim against the respondents herein and sought for various reliefs arising therefrom.

6. The claim was accompanied by the application dated 14th July, 2020 wherein the applicants sought for the issuance of interlocutory injunctive orders against the respondents pending the hearing and determination of the suit.

7. When the said application came up for hearing on 12th November, 2020, the court noted that the advocate for the applicants was absent from court and therefore dismissed the application for non-attendance at the request of the advocate for the respondents.

8. The aforementioned dismissal order has prompted the filing of the Motion now before this court.

9. In his affidavit supporting the instant Motion, advocate Peter Mwenda Njagi states that on the material date, he was unable to attend court since he was attending another matter at Kiambu Chief Magistrate's Court namely Kiambu CMCC NO. 288 OF 2020 and that by the time he was finally able to log in to the virtual court session for hearing of the application dated 14th July, 2020 the matter had been called out and the dismissal order made.

10. The advocate also states that he was not aware that the aforementioned application had previously been placed before the court.

11. In his oral arguments, the advocate urges this court not to punish the applicants for the mistake of counsel.

12. In retort, the 1st and 2nd respondents separately state that the advocate for the applicants had been absent from court on more than one occasion and that he did not bring any evidence to show that he was attending to another court matter on the material 12th November, 2020 and that the respective respondents stand to be prejudiced if the orders sought in the instant Motion are granted.

13. The above sentiments were reiterated in the oral arguments made by **Kariuki** and **Wanjohi**, advocates for the 1st and 2nd respondents respectively.

14. The court record shows that the application dated 14th July, 2020 was placed before the court on 22nd July, 2020 during which time the court granted interim injunctive orders pending the interparties hearing of the application on 21st September, 2020.

15. The record shows that subsequently, the application came before the court on 5th October, 2020 and 13th October, 2020, on which dates the applicants' advocate was not in attendance.

16. On the latter date, the record shows that the court had directed that the parties attend court on 12th November, 2020 and that the applicants' advocate be served with a hearing notice to that effect. Upon my perusal of the record, it remains unclear whether the advocate was served as directed.

17. Suffice it to say that the court dismissed the application dated 14th July, 2020 on the abovementioned date for non-attendance on the part of the applicants' advocate.

18. It is observed that the above application was subsequently placed before this court on 16th November, 2020 and that interim orders were granted pending interparties hearing of the same. It is apparent that the dismissal order had not been brought to the attention of this court at the time of making the said orders.

19. Upon considering the foregoing, it is clear that the inadvertence was on the part of the applicants' advocate for not attending court for the hearing of their application on the dates listed hereinabove.

20. It is a matter of legal principle that the mistake of an advocate ordinarily ought not to be visited upon a client. This was the position taken by the Court of Appeal in the case of **Ahmed v Highway Carriers (1986) LLR 258 (CAK)** when it held that:

"...a litigant should not suffer for his advocate's mistakes; if the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant's rights."

21. In view of the foregoing circumstances, I am of the view that it would be an injustice for the applicants herein to be punished for the fault of their advocate. Furthermore, I am of the view that the respondents have not brought any credible evidence to show the prejudice they stand to suffer if the orders sought are granted. I will therefore accept the explanation given and exercise substantive justice in favour of the applicants.

22. The upshot therefore is that the Motion dated 12th November, 2020 is allowed in terms of prayer (ii), (iii) and (iv) giving rise to the following orders:

i. The dismissal order made on 12th November, 2020 is hereby set aside and is substituted with an order reinstating the plaintiffs'/applicants' Notice of Motion dated 14th July, 2020 together with the interim orders that exist therein.

ii. The plaintiffs/applicants shall set down the Notice of Motion dated 14th July, 2020 for hearing at the earliest opportunity and shall prosecute the same within 60 days from today failing which the application shall be dismissed and the interim orders in place shall automatically lapse.

iii. In the circumstances, the parties shall bear their own costs of the instant Motion.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS

26TH DAY OF NOVEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st and 2nd Plaintiffs/Applicants

..... for the 1st Defendant/Respondent

..... for the 2nd Defendant/Respondent