



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL SUIT NO. 71 OF 2020

STANDARD GROUP PLC.....1ST PLAINTIFF

ORLANDO LYOMU.....2ND PLAINTIFF

VERSUS

CYPRIAN NYAKUNDI.....DEFENDANT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 18th October 2021 brought by the defendant/applicant herein and supported by the grounds set out on its body and the facts stated in the affidavit of Ochiel J Dudley. The applicant sought for an order that the court to vacate its order of 4th October 2021 dismissing Cyprian Nyakundi's Motion of 7th July 2021 and the court to reinstate the Motion for hearing on the merits.
2. In opposing the said Motion, the respondent filed the replying affidavit of advocate Fidelis Marabu Limo, to which Ochiel J Dudley rejoined with his supplementary affidavit sworn on 9th November, 2021.
3. When the Motion came up for interparties hearing before this court, the parties respective advocates chose to rely on the averments made in their respective affidavits.
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 and the brief oral arguments.
5. In brief, the Defendant/applicant claims that the Plaintiffs set the date for this matter unilaterally on October 4, 2021, which proved inconvenient, and that the matter went undefended because his advocate was involved in two other matters, one of which was a Supreme Court case and the other of which was a hearing before Justice Makau J of the Constitutional Court.
6. The Defendant claimed that the reason this matter remained unattended and was dismissed for non-attendance was due to counsel losing sight of this matter while covering the Supreme Court case.
7. The Defendant seeks to have the Application for stay be reinstated for hearing on merits as opposed to dismissal order and that incase the court is inclined to it then throw away costs order in the sum of Kshs.10,000/= would compensate the Plaintiffs adequately for their inconvenience.
8. In response, Ms. Fidelis Marabu Limo stated that the court record will bear her witness that previously the contemnor's advocate to appear on his behalf and seek adjournments which were granted.
9. The Plaintiff/Respondents avers that there is no statute stating that a case scheduled for Mention in the Supreme Court before the Deputy Registrar has precedence over a High Court Judge hearing of an application.
10. The Respondents say that there is no evidence that counsel appeared before the High Court or Supreme Court, and that his counsel was previously represented by someone else.

11. Upon considering the rival positions above, it is clear that the inadvertence was on the part of the applicant’s advocate who had two matters both in the Supreme and High Court which made her not to attend Defendant’s matter.

12. The court has a very wide discretion and that restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: *Patel v EA Cargo Handling Services Ltd [1974] EA 75, 76 BC*.

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

13. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: *Shah v Mbogo [1969] EA 116,123 BC Harris J*. his discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

14. 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”.

15. The fact also that the applicant had matters before two other courts is reason enough for the court to grant this application since it is not entirely his fault.

16. The actions deprived the Applicant an opportunity to be heard and was therefore condemned unheard. For the above reasons I am satisfied that the motion has merit and must succeed.

17. The right to be heard was underscored by the Supreme Court of India in *Sangram Singh v Election Tribunal Kotah 1955 AIR 425* thus;

“There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”

18. Consequently, the application dated 18th October 2021 is hereby allowed. The court reinstates the Motion dated 7th July, 2021 dismissed on 4th October, 2021 and Defendant to pay Kshs.7,000/= being thrown away costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st Plaintiff

..... for the 2nd Plaintiff

..... for the Defendant