



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 92 OF 2019**

*(Being an appeal from the Judgement and Decree of the Chief Magistrate's Court at Mombasa by the Hon. Eric Mutunga (SRM) made on 29<sup>th</sup> September, 2017 in Mombasa SRMCC No. 1571 of 2012)*

**ROUTE CRUISERS LTD.....APPELLANT**

**-VERSUS-**

**KENAFRIC INDUSTRIES LIMITED.....RESPONDENT**

**RULING**

The Notice of Motion Application before me was brought in terms of Section 1A, 1B, 3A of the Civil Procedure Act, Order 22 Rule 25, Order 42 Rule 6(1) and all other enabling provisions of law. The Applicant is seeking an order of stay of execution to stay the proceedings in CMCC NO. 1643 OF 2018 between the Applicant and the Respondent pending hearing and determination of the Appeal.

The application is premised upon several grounds. The Respondent filed a suit against the appellant and obtained judgement ex-parte and proceeded to execute where upon the Appellant made a defence an application for stay of execution and also to file their defence. The appellant states that the said application was made without delay and explanation was given as to the reason why the appellant failed to file its defence within time.

It is averred that after the dismal of its application, it has preferred an appeal which is still pending before this court, that the memorandum of appeal was served to the Respondent hence they are aware of the appeal, that due to the fact that there is not either an order of stay of execution or stay of proceedings against the Respondent, the Respondent has taken out proceedings against the directors of the Appellant with a view to execute against them in their personal capacity as shareholders of the Defendant company.

Further grounds raised by the Applicant are that it stands to suffer irreparable damage and the appeal filed herein will be rendered nugatory; that the appeal raises serious issues hence it ought to be given its day in court and that it would be in the interest of justice and fairness that the orders sought are granted.

The application is supported by an affidavit of **Patrick Njiru Waganagwa** which basically reiterates on the about mentioned grounds of application. A further affidavit was also made by the same deponent added that the Application for stay before the Trial Magistrate Court, the Respondent never raised any issue as regards to order 9 of the Civil Procedure Rules. He deponed that this issue was raised by the court and made a determination on its own motion. Further that the Appellant's application was never decided on merit but on procedural technicality contrary to article 159(2)(d) of the Constitution of Kenya.

The Respondent filed an affidavit in reply sworn by **Symon K. Lariak** who deposed that this matter has a seal of finality since there is judgement entered against the appellants and their two applications to set aside the judgment were dismissed vide the ruling on 15th April 2019.

It is the Respondent's contention that the Appellant is guilty of laches and that justice does not aid the indolent but the vigilant. Further that the application and subsequent appeal is frivolous, vexatious and an abuse of the court process with the appellants having had the chance to appear before the trial court and produce any documents and/or call any witnesses but did not do so. It is averred that the Appellant only filed their memorandum of appearance on 19th December 2018.

The Respondent contends that the applications and the memorandum of appeal filed the appellant are thanks and void ab initio, irregular and in total disregard to the very law that the appellant seeks to recourse from. According to Respondent, this is the position because an advocate is prohibited by law to come on record after a judgement without leave of the court as in this case.

It also the Respondent's contention that the provisions under order 9 rule 9 of the Civil Procedure Rules cannot be wished away, as it is meant to protect advocates from mischievous clients who will wait until judgement is delivered, sack the advocate and replace them with another.

The Respondent is also of the position that the Appellants are stopped from negating the purposes of the overriding objectives by bringing vexatious applications that have already been determined by this court. The Respondent decried its inability to enjoy the fruits of its judgement and they are apprehensive that they won't be able to execute the judgement issued by the trial court if audience is granted to the Appellant and the same would aid them to manipulate this court with impunity.

It is further argued by the Respondent that the instant application is a waste of time and if allowed, it has the effect of inflicting great loss and harm. According to the Respondent, it will constitute an infringement of its constitutional right to property defined in terms of article 40 for the reason that they won't be able to execute the judgement.

The Applicant is represented by **AREBA GISEMBA & COMPANY ADVOCATE** and the Respondent is represented by **MWANGATA KORIR & COMPANY ADVOCATES**. Both Learned counsels filed submissions in support of their respective gravamen. I have taken the same into consideration in my analysis and determination to follow.

### **The Lower Court's Position**

That the Defendants failed to comply with the provisions of Order 9 Rule the Civil Procedure Rules which provides as follows:

*“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court-*

*a. Upon an application with notice to all the parties; or*

*b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”*

The court observed that there was no consent between the firms of **Ogeto & Co. Advocates** and **Areba Gisemba & Co. Advocates** allowing the later to come on record for the Defendant. Further that no leave of court was sought to allow the firm of **Areba Gisemba & Co. Advocates** to come on record for the Defendant. On the basis of the foregoing reasons, the Learned Magistrate dismissed the Defendant's Application to stay execution of a decree pending appeal. He stated that the application by the defendant was incompetent for the failure to comply with the mandatory requirements of order 9 aforementioned.

### **Findings, Analysis and Determination.**

The Applicant's application which necessitated this appeal was dismissed in its entirety on the basis of its non-compliance with the provisions of order 9 rule 9 of the Civil Procedure Rules. According to the Applicant, it had instructed a certain firm to act on its behalf in the instant matter but the said firm failed to file a defense in time leading to the ex-parte judgement. The Applicant maintains that the mistake was purely inflicted by the advocate and he it was not privy to the same at the time. On the other hand, the Respondent is adamant that the Applicant's non-compliance with the provisions of order 9 rule 9 Civil Procedure Rules, 2010.

From my understanding, the provisions in terms of the aforementioned order 9 rule 9, is meant to inter alia protect advocates from mischievous clients who may want to escape payment of costs and to bring orderliness in the court process. By the same token, I do not think that the same rule is meant to cause injustice to clients whose advocates neglect their duties, as in this case.

What then is the position of order 9 rule 9 in terms of substantive provisions encapsulated in the Constitution of Kenya, 2010? Article 48 of the Constitution of Kenya, 2010, provides inter alia that the state shall ensure access to justice for all persons. Article of the same constitution provides for the right to a fair hearing.

In article 50(1), it is provided that every person has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. In sub-article (2), it is provided that every accused person has the right to a fair trial, which includes among other rights, the right to choose, and be represented by, an advocate, and to be informed of this right promptly and to adduce and challenge evidence.

The above-cited provisions fall under the bracket of the right to a fair trial. It is instructive to note that in terms of Article 25 of the same constitution, the right to a fair trial is one of the fundamental rights and freedoms that may not be limited. In the instant case, the evidence on record demonstrates that there was negligence on the part of the legal counsel for the Applicant who failed to prosecute the case on behalf of the Intended Appellant. Without prejudice to the fact that order 9 rule 9 is couched in mandatory terms, is it going to be a master or a servant of justice? Should we sacrifice justice for litigants due to the failure by their advocates to live up to the expectation of their profession? I answer in the negative.

In my view and in respect of the unique circumstances of this case, the order 9 rule 9 has now closed the door for the Intended Appellant to access Courts. If the legislature in its wisdom has intended to consider said rule as a master of justice, it is my view that they could have inserted the same in the main statute. Thus, in my view, the rule should not be elevated to a master of justice only because it is couched in mandatory terms.

The rule must be tested against the provision of the constitution specifically Article 27, 48, 50 and 159. Our jurisprudence seems to have shifted to giving prominence to substantive justice to cut back on over-reliance on procedural technicalities. In the **Law Society of Kenya v. Centre for Human Rights and Democracy & Others**, Supreme Court Petition 14 of 2013, this Court reiterated its earlier decision when it warned itself on a blanket invocation of Article 159 thus:

***“Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] e KLR”.***

In this matter, justice was sacrificed on the altar of procedural technicalities. The case was on decided on merits simply because the then counsel for the Intended Appellant was negligent by his failure to file a defence in time. No man should be condemned unheard. The Applicant should not be directed to pay Kshs. 3 million without being given a chance to present evidence and heard on merits simply because his lawyer did not come through for him. With all due respect, the decision of the Hon. Magistrate and the position of the Respondent do not complement the principle of equality of arms and the very essence of interest of justice. The appellant must be placed in a position of procedural equality in respect of obtaining the attendance of his witnesses and cross examining the witnesses for the respondent. In cases where an exercise of discretion leads to a denial of a fundamental right to access courts and ventilate ones claim on the basis of the rule set to operationalize change of legal representation is in its self-inequitable and prejudicial to the applicant. I am of considered opinion Order 9 Rule 9 of the Civil Procedure ought to be balanced. The principle of the equality of arms and the right to a fair trial.

**The court is clothed with jurisdiction to exercise inherent discretion to ensure that that justice has been served to Kenyans. Njuguna -Vs- Magichu & 73 Others 2003 KLR 507 where court held;**

***“The discretion exercisable ..... is unfettered. The main concern of the court is to do justice between the parties. Nevertheless, the discretion has to be exercised judicially, that is on sound factual and legal basis.”***

In view of the circumstances of this case, the omission herein is capable of being compensated by throw away damages. Therefore since the violation herein touches on the fundamental right to a fair trial, this court is of the opinion that the best way possible for this matter is to direct that it goes back to the lower court for a retrial. In accordance to the above order, the substantive Judgment of the trial Court is set aside. The Chief Magistrate is hereby directed to allocate this matter to another Magistrate to prioritize the hearing and the determination of the suit on the merits. The costs of this appeal to abide the outcome of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MARCH 2020**

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**R NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Ms. Naliaka for Mogaka for the respondent