REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO 547 OF 1999

KENYA BUS SERVICES (MOMBASA) LTD.....PLAINTIFF

VERSUS

CMC MOTOR GROUP LIMITED.....DEFENDANT

(BY ORIGINAL ACTION)

CMC MTOR GROUP LIMITED.....PLAINTIFF

VERSUS

KENYA BUS SERVICES MOMBASA LIMITED.....1ST DEFENDANT

MOHAMED HUSSEIN JAFFER.....2ND DEFENDANT

AMRITLAL PURSHOTTAM DEVANI.....3RD DEFNDANT

MRS BEERSHEBA OTIENO.....4TH DEFENDANT

MUJTABA MOHAMED JAFFER.....5TH DEFENDANT

MANOJ JAYANTILAL SHAH.....6TH DEFENDANT

(BY COUNTERCLAIM)

RULING

1. The defendant/counterclaimant has approached the court by a Notice of Motion dated 16.01.2020, filed under certificate of urgency on the next day and prayed for the setting aside of the court order of 25.11.2019 dismissing its application of 23.05.2019 and that the said application be heard on the merits. There was also a prayer that the court makes orders it deems just and expedient to grant and that the costs be provided for.

2. The grounds advanced to support the application and disclosed on the face of the application itself and the Affidavit in support sworn by Mr Fred Adhoch, Advocate, were that; the registry staff had indicated to the applicants counsel that the file would be placed before Chepkwony J, that the matter was never listed in the list but was placed before me but when counsel inquired he was told that the file was not in court only to come later having finished with other courts and be told that the file had been called out and application dismissed. On such basis the applicant maintain that its counsel was indeed in court at the appropriate time to prosecute the matter but was misled by the registry staff and failure to have the matter listed and that the counterclaim in the colossal sum of Kshs 138,718,699 was solid which would be denied the right to be heard unless the dismissal was set aside.

3. The same grounds were reiterated in the affidavit in support but with a variation that the counsel on being instructed on the material day that the file would be before Chepkwony J, proceeded to court 5, inquire from the cause list of the judge and the court assistance which indicated the file was not before that court. With that position counsel says that he then proceeded to the registry where he discovered from the division cause list that the matter was indeed listed before this court. He went on to state that he indeed appeared in open court before me, inquired from the court assistant who told him that even though listed the physical file was still being looked for and would be availed. For that reason the counsel deponed that he proceeded before the Chief magistrate for only ten minutes only to come back and be told that the

matter had been called out and dismissed for want of attendance. The firm position taken was that the failure to be in court when the matter was called out was not deliberate but due to mix up explained in the affidavit it being reiterated that there was no delay in bringing the application and that the applicant had the right to given an unconditional leave to prosecute the counterclaim

4. The application was opposed by the plaintiff /defendant to the counterclaim by the Replying affidavit sworn by Michael O Oloo, its counsel. The Affidavit asserts that the application which was dismissed on the 25.11.2019 was served by the applicant on 5.7.2019 and a replying affidavit filed and served on the 7.10.2019 but the applicant never attended court leading to its dismissal. Counsel then asserted, and no rebuttal was offered, that he personally attended the appropriate court without any difficulty because the matter was indeed cause-listed and the list posted not only on the judiciary website but also hard copies on the court's notice board. On that basis he averred that it was incredible for Mr Adhoch to allege mix-up and non-availability of the file. He asserted having been in court all along, did not see Mr. Adhoch who also being aware that he was on record did not inquire from him on the file. On those ground counsel urged the court to find that the application lacks merit and should be dismissed.

5. The application was urged by oral submissions offered by the two advocates who had filed the two rival affidavits. For the applicant, Mr Adhoch did rely wholly on the affidavit in support, without placing reliance on any decided case and even after Mr oloo offered his submissions and cited to court some three decisions, Mr Adhoch chose to make no comment of those submissions. His submissions however departed from the affidavit in that he invoked mistake of counsel for not attending court and pleaded that it be not visited upon the litigant. He however maintained as in the affidavit that the application sought to be reinstated was meritorious and should be so reinstated to accord the right to be heard to the applicant and finally that the delay between the date of dismissal and the date of moving the court was not inordinate.

6. For the Respondent, Mr Oloo opposed the application on what he termed factual events and explanation of what transpired in court on the material day underscoring the fact that the matter was indeed cause-listed and that Mr Adhoch had not appeared in court when the file was called and dismissed. He then stressed the fact that the suit having been dismissed in 29014, no steps were taken to prosecute the counterclaim leading to its dismissal. He also pointed out that the question of mistake of counsel and mistake on the face of the record were not alleged in the application and could not be introduced in the submissions. He then cited to court and submitted copies of the decision in **Gideon Mose Onchwati vs Kenya Oil Co ltd [2017]eKLR** in which excerpts of previous decisions on setting aside (*Esther wamaitha Njihia vs safaricom, Patel vs EA cargo Handling services ltd, Shah vs Mbogo and Ongom vs Owota, among others*)were cited for the proposition of the law that the discretion to set aside is designed to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake but never to aid a person who has deliberately sought to obstruct or delay the cause of justice. The decision in **Alice Nyambura Kinuthia vs samwel Karanja Miumi [2019]eKLR** was cited for the position of the law that litigants own their cases and that inaction by counsel can only is excusable when seen in the light of a vigilant litigant. **Neeta Gohil vs Fidelity Commercial bank ltd [2019]eKLR** was cited for the same proposition with an addition that the acts of an advocate with express or ostensible authority is never devoid of consequences on the principal. With the law set out, counsel emphasised the tenure of this matter in court since 1999 and recited the mantra that litigation must come to an end. He urged for the dismissal of the application to let the matter rest.

7. I have had the benefit of reading the affidavits on record and the proceeding recorded on the submissions offered by counsel and the only issue for my determination is whether the application meets the threshold of court's discretion being exercised in the applicant's favour. While addressing that sole question, I have taken due regard of the fact that every litigant owes it to the court to be candid and forthright in the materials availed so as to inspire in court the desired honesty in the administration of justice by all concerned.

8. The application finds its substratum on the grave allegation that the file was destined for hearing before Chepkwony J but was never placed before the judge nor was it listed in the day's cause-list but was sneaked before me and counsel misled by the court assistant for the counsel to walk into another court only for the application to be called out and dismissed. That to this court is a very serious accusation on any public servant and alleges gross misconduct. One would have expected that in making such allegation, an effort should have been made to get a copy of the day's cause-list and show that indeed the matter was not cause-listed before me. That was never done and even when the contrary was asserted in the replying affidavit, no effort was made to contest or answer to those fact. Instead, in urging the application, counsel then deviated and departed from the position of the application to now rely on mistake of counsel as being no basis to deny a party his day in court. That submission to this court should not have arisen at all because submissions are never pleading and cannot substitute nor supplement the pleadings. An application must be determined on the facts and averments made on its face and on the affidavit in support. That notwithstanding, in arguing his mistake the alleged mistake was never isolated and explained. It was, as it were, a wild card just thrown about without explicitly denouncing the written accusation on the court staff. That is the ambivalence that would deprive the application and submissions offered the expected honesty and credibility. I hold the view that a party who owns up to a mistake and seeks to undo such mistake is likely to attract court's favourable discretion as opposed to him who passes the buck and does so dishonestly

9. I am however prepared to ignore the ambivalence and want of candour, because the respondent took his time to respond and thereby availed the issue for consideration by the court. I would ask the question if any mistake has been disclosed and if the same is excusable. The nature of the mistake was not explained. All there is from both sides is that Mr Adhoch was not in court when the matter was called out. It is also indisputable from the cause list I have retrieved from the website that that cause was indeed listed before me under applications for hearing as **number 8** in the day's list. With such factual position it would be a travesty of the notion of excusable mistake to hold that a diligent advocate failed to see the cause list took a detour to court 5 and the registry. I do find that there was no excusable mistake but maybe outright negligence in failing to be diligent in establishing where his matter was listed.

10. Having failed to find that the advocate was misled or that he committed any excusable mistake I am left with no reason to exercise my discretion in the favour of the applicant. Without a valid explanation for failure to attend court, if I were to set aside it would be gratis thus injudicious and otherwise capricious. In short the application was founded upon falsehood and cannot succeed without the court passing as glorifier and rewarder of lack of forthrightness. In such circumstances the court would have lost the purpose of the remedy to set aside and promoted otherwise tardy conduct and strategy.

11. The upshot is that the application is devoid of merits and therefore dismissed with costs to the Respondent.

Dated and signed at Mombasa this 27th day of March 2020

P J O OTIENO

JUDGE

Signed and delivered in open court this 23rd day of April 2020

E. Ogola

JUDGE