



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISCELLANEOUS APPLICATION NO. 41 OF 2019

DIMMS INVESTMENTS COMPANY LTD.....APPLICANT

VERSUS

HMD (Minor suing through his father & next friend) MDS RESPONDENT

CORAM: Hon. Justice R. Nyakundi

IRB Mbuya Advocates for the Applicant

Kariuki Gathuthi Advocates for the Respondent

RULING

The applicant has applied to this Court in terms of Article 159 of the Constitution Section 1A, 1B 3 and 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders:

(1). That the Honourable Court be pleased to set aside the orders made on 11.11.2019 dismissing the applicant's application dated 28.10.2019 for want of prosecution.

The application is supported by an affidavit of one **Richard Mbuya**. Taking into account the circumstances of the dismissal order and other factors I rely on the decision of the Court of Appeal in the case of **Philip Chemuto & another v Augustine Kubinde {1982 – 1988} 1 KAR 103**. Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merit. The broad equity approach to this matter is that unless there is fraud or contention to overact, there is no error or default that cannot be put right by payment of costs.

The Court as is after said, exists for the purpose of deciding the rights of the parties and not for purposes of imposing discipline on the assessment of affidavit evidence.

I am satisfied that the applicant in exercise of the discretion of this court is entitled to a remedy in terms of prayer no. 2 and 3 of the notice of motion.

Further, the notice of motion dated 28.10.2019 is hereby allowed in the following terms:

(1). That the applicant is hereby allowed to file leave out of time.

(2). The relief on stay of execution of the Judgment delivered in Kaloleni PMCC No. 206 of 2016 is hereby granted pending the outcome of the intended appeal.

(3). That pursuant to stay of execution, the applicant do deposit the decretal sum of Kshs.774,200 in the joint earning interest account of both counsels in a preferred financial institution within forty (45) days from today's date or in the alternative within the same period to deposit the decretal sum with the Deputy Registrar of the High Court, Malindi.

(4). The costs of this application do abide the outcome of the intended appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF MAY 2020

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R. NYAKUNDI

JUDGE