



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL APPEAL NO.29 OF 2018

SOUTHERN ENGINEERING CO. LIMITED.....APPELLANT/APPLICANT

VERSUS

HEADY BERGE LIMITED.....1ST RESPONDENT

KOBLEX INVESTMENTS LIMITED.....2ND RESPONDENT

RULING

1. The Applicant Southern Engineering Company Limited through an application brought pursuant to section 80 of *Civil Procedure Act and order 45 Rule 1 of Civil Procedure Rules 2010* seeks the following orders:-

- a. This application be certified as urgent and service be dispensed with at the first instance.
- b. Pending hearing and determination of this application there be and is hereby issued a stay of execution of the ruling and order of this Honourable Court made on 22nd November 2018.
- c. Pending hearing and determination of this application there be and is hereby issued a stay of execution of the judgement and decree issued by the Chief Magistrate's Court at Nairobi on 19th October 2018 in CMCC No. 58 of 2016: Heady Berge Limited & Another Vs. Southern Engineering Company Limited.
- d. The ruling and order of this Honourable Court made on 22nd November 2018 be and is hereby reviewed and varied by substituting thereof by an order that the judgment and decree issued by the Chief Magistrate's Court at Nairobi on 19th October 2018 in CMCC No.58 of 2016: Heady Berge Limited & another Vs. Southern Engineering Company Limited be and is hereby stayed on condition that the entire decretal amount of Kshs. 6,195,525.33 be deposited in an interest earning account in the joint names of the advocates on record with a reputable bank.
- e. The order requiring the Applicant to pay the auctioneer charges be reviewed and substituted with an order that the auctioneer to bear his own costs.
- f. Costs of this application to abide by the outcome of the appeal.

2. The application is premised on the grounds on the face of the application being numbers 1-9. The application is further supported by an affidavit of Chandrasekar Ottiravadi dated 30th November 2018.

3. The application is opposed. The Respondent relies on Replying affidavit dated 10th December 2018 sworn by Kennedy Kobunga, a director of both the defendants.

4. The Applicant herein had through its counsel moved the court on 16th November 2018 for issuance of orders of stay of execution of the judgment and decree issued in Chief Magistrate Court in CMC No.58 of 2016 pending determination of the application. The application was opposed by the Respondents herein through their Replying affidavit sworn by Andrew Ombwayo dated 22nd November 2018; in which it was averred that the Respondents are capable of refunding the decretal amount in case the Applicant's appeal succeeds and an order for repayment is made. Further the said Advocate gave a professional undertaking to refund the decretal sum in case the appeal was successful. It was clearly pointed out an auctioneer had been appointed for the purposes of execution of court's decree.

5. Upon considering the nature of the application and upon hearing both counsel the court on 22nd November 2018 granted stay of execution of the decree issued by the Chiefs Magistrates Court at Nairobi on 19th October 2018 on the following terms:-

- a. The Applicant do pay half of the decretal sum to the Respondents who will give professional undertaking through their Advocate Mr. Andrew Ombwayo within 15 days from today to refund the said sum in case the appeal succeeds and the court orders the sum is refundable.
- b. Balance of the decretal sum be deposited in the Advocates joint account with a bank of Repute in the Advocates names.
- c. The Applicant to pay the auctioneers charges to be agreed or taxed.
- d. No orders as to costs.

6. The Applicant aggrieved by the court's ruling preferred the present application through an unsigned certificate of urgency dated 30th November 2018 and unsigned notice of motion dated 30th November 2018.

7. At the hearing Miss Mwanazimba, learned Advocate appeared for the applicant whereas Mr. Ombwayo learned Advocate appeared for the Respondents. The counsel made their rival submissions for and against granting of the application.

8. I have perused the application, affidavit in support, and replying affidavit and have also considered the opposing oral submissions made before me by both counsel. The issues arising from the pleadings and counsel respective submissions are in my view as follows:-

a. Whether the Applicant's application meets the threshold for reviewing the orders made on 23rd November 2018?

b. Whether the Applicant's unsigned notice of motion is null and void and whether it is curable under Article 159 (2) (d) of the Constitution of Kenya 2010?

A. Whether the Applicant's application meets the threshold for reviewing the orders made on 23rd November 2018?

9. The grounds under which a party can move a court for review are well settled and more specifically set out under order 45 of the Civil Procedure Rules. The grounds for review include discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or made or for any other sufficient reason.

10. The Applicant herein, in seeking order of review contends, that there is an error apparent on the face of the record in that the applicant's application was not heard on merit; that the order requiring the applicant to pay to the Respondent half of the decretal amount will jeopardize the appeal should the appeal succeed as the Applicant will not recover the said amount from the Respondent which companies have no tangible assets that can be sold; that the professional undertaking by Mr. Andrew Ombwayo Advocate is not a guarantee that the Applicant will recover the money if the appeal succeeds as the Advocate will pay the money to client and shall not keep the money; that it is fair if the decretal amount is deposited in a joint account where the successful party can easily access it once the appeal is determined; that the Respondent will not suffer any prejudice if the entire decretal amount is deposited in a joint account; that ordering security pending appeal is to guarantee the decree holder the judgment amount but it is not intended to enable decree holder access and enjoy the decretal sum before the appeal is determined as doing so will defeat the purpose of appeal; that the auctioneer is not entitled to any fees as the proclamation of attachment issued is irregular, unprocedural and illegal as stated under paragraph (i) – (vii).

11. The Respondents oppose the application for review and have in their replying affidavit dated 10th December 2018 averred as follows;- that the filing of this application is a demonstration of the Applicant's unwillingness to comply with the court's order which lapsed 15 days from 23rd November 2018; that the entire application is founded on following, that the Applicant's previous Advocate never addressed court on 23rd November 2018 on the Applicant's application dated 16th November 2018; that the Applicant's application is res judicata as the issues raised were raised and considered by court; that the Applicant is in contempt of court order dated 22nd November 2018 as no amount has been remitted; despite the Respondent's counsel having submitted its professional undertaking and given the details of its Bank and account to the previous counsel as of 29th November 2018. The Respondent avers that the Applicant's application is an abuse of court process.

12. In the case of **Grace Akinyi Vs Gladys Obiri & another [2016] eKLR** quoting with authority the Court of Appeal in Civil Appeal No. 2111 of 1996, **National Bank of Kenya Vs Ndungu Njau**, the Court of Appeal held that:-

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law."

13. Review is a judicial re-examination of the same case by the same Judge in certain circumstances, review can only be granted if the applicant satisfies the court that it is seeking a review arising out of a discovery of a new and important matter or evidence which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when decree was passed or order made or on account of some mistake or error apparent on the face of the record or for any sufficient reason for which a party desire to obtain a review of the decree or order.

14. In the instant application, the applicant's application dated 16th November 2018 was heard and the order sought to be reviewed delivered on 22nd November 2018 in presence of both advocates. The present application is not based on a discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the Applicant or could not be produced by the Applicant, neither is it based on account of some mistake or error apparent on the face of the record. The Applicant in the initial application had under one of the grounds of the application stated;

"The Applicant is ready and willing to give such security as this Honourable court may order for due performance of such order or decree as may ultimately be binding."

15. The prayers sought in the notice of motion dated 30th November 2018 under prayer Nos. 2 & 3 for stay of execution are similar to prayers Nos. 2 and 3 of the application dated 16th November 2018 for which this court granted the orders. The application as regards prayers Nos. 2 and 3 Res Judicata. Secondly the applicant in seeking review has not obeyed the court's order requiring at least half of the decretal sum be deposited in joint interest earning account with the Respondent's counsel. This is a clear case of disregarding court's orders and a party who disobeys court's order should not be allowed to have the same reviewed without having complied with the earlier orders issued by the same court.

16. In the case of *National Bank of Kenya Ltd vs Ndungu Njau* {1996} KLR 469 (CAK) at Page 381 Kwach R.O, Akiwumi A. M & Pall G. S, JJA stated:-

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law".

17. In the court of appeal decision in the case of *Richard Nchapai Leiyangu vs IEBC & 2 others* Civil Appeal No. 18 of 2013 the court expressed itself as follows:-

"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

18. I find that the Applicant has failed to meet the conditions set out for granting review. The Applicant asserted that there was an error apparent on the face of the record, however it has failed to establish any error or mistake or given sufficient reason to warrant review. I find that the Applicant has failed to satisfy the conditions set out under order 45 of the Civil Procedure Rules. It has failed to convince this court that it should review its orders. The Applicant is seeking to set the courts earlier the orders and in doing so I find that in this application is seeking to obstruct or delay the course of justice. The matters raised in the present application were canvassed in the earlier application and cannot be litigated through a disguised application for review.

B. Whether the Applicant's unsigned notice of motion is null and void and whether it is curable under Article 159 (2) (d) of the Constitution of Kenya 2010?

19. In the instant application, there is no dispute that the notice of motion dated 30th November 2018, the basis of this application, is not signed by the Applicant's counsel. Both Advocates at the time of hearing perused the notice of motion in the court file and confirmed the same is unsigned and were allowed to submit on the same.

20. Order 2 Rule 16 of the Civil Procedure Rules provides as follows:

"Every pleading shall be signed by an advocate, or recognised agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person."

21. A pleading is very important in any matter before court simply because it is the bridge in which a party crosses before approaching the court. **Order 2 Rule 6 of Civil Procedure Rules** is framed in mandatory form and is a requirement of signing of pleadings. That is the position of the law and failure of signing the pleading is not only a question of who the marker of the document is but a question of whether the document is genuine and valid.

22. In *Regina Kavenya Mutuku & 3 Others vs. United Insurance Company Limited Nairobi (Milimani)* HCCC No. 1994 of 2000 [2002] 1 KLR 250, Justice A. Ringera stated;

"An unsigned pleading has no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody. It is a nullity".

23. In *Atulkumar Maganlal Shah vs. Investment & Mortgages Bank Limited & 2 Others* Civil Appeal No. 13 of 2001 consolidated with *Vipin Maganlal Shah Vs. Investment & Mortgages Bank Limited & 2 Others* Civil Appeal No. 19 of 2001 [2001] 1 EA 274; [2001] KLR 190 the Court of Appeal was of the following view:

"Where a pleading is not signed the same would be struck out rather than being dismissed...A pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognised agent and this is meant to

be a voucher that the case is not a mere fiction...The failure to sign the service copy of the statement of claim if the original is signed is not fatal...The position in England is that a pleading must be signed either by counsel or the party in person or the party's recognised agent...In Kenya where a record of appeal is signed by a suspended advocate who is an unqualified person is incurably defective and struck out...The position in India is that the failure to sign a plaint is merely a matter of procedure and the Court may allow a plaintiff to amend the plaint by signing the same...The object of the legislature in requiring that a plaint be signed by either the counsel or the party suing is to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or the pleading...In Kenya a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law".

24. The Applicant counsel urged that failure to sign the pleading is not fatal as it is cured by Article 159 2(d) which provides:-

"159 (2) (d) In exercising judicial authority, the courts and tribunals shall be guided by the ... (d) justice shall be administered without undue regard to procedural ..."

The counsel for the Respondent could not agree and submitted further to sign a pleading was not a procedural matter but it was a substantive issue going to the root of the pleadings.

25. The major issue for consideration is whether the authentication or ownership of the pleadings by pleader is a mere procedural technicality to lead to invoking of Article 159 (2) (d) of the Constitution of Kenya 2010. In **Cheraik Management Ltd vs National Social Security Services Fund Board of Trustees & Another [2012] eKLR** the court held, that the tenets of the constitution is that parties must be treated equally in the eyes of the law and none of the parties should be accorded undue advantage in the legal profession.

Therefore, Article 159 2(d) of the Constitution and even the inherent jurisdiction of the court or the overriding objectives of the law cannot be resorted to by a party whose act is declared a nullity under the law.

26. Would the mistake of the advocate be visited on the client?

It has been contended that the mistakes of advocates should not be visited on clients. In certain cases that position may be true. However, in certain cases where an advocate contemptuously institutes legal proceedings, it may be prudent for the said advocates to shoulder the consequences of such actions. In **John Onger Mariaria & 2 Others Vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** it was held that;

"Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent"

27. Further in the case of **Kiptoo Arap Korir Salat v IEBC & others Civil Application 228/2013 Nairobi - Ouko, Kiage, and Mohamed JJA**: held that;

"Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is the even handed and dispassionate application of the rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

"The above analysis draws us to the conclusion that where a pleading is not signed the same should be struck out."

28. In view of the above mentioned authorities, it is clear that a party to the pleading must have the pleadings signed by himself or his Advocate. The requirement to have a pleading signed is a mandatory requirement and it is not a procedural technicality but is a substantive issue going to the very root of the pleadings. The object of the statute requiring the pleading to be signed by the pleader or his counsel is to make a party signing or filing any of the pleading take ownership and responsibility for the contents of the pleading. The Kenyan position is well settled by myriads of authorities. That a party who files an unsigned pleading has no case that is properly before court. The so called motion before this court is a nullity and ought to be struck out for non-compliance with the law. In this application the unsigned notice motion is a nullity for all purposes and intention.

29. Having come, to the conclusion that I have I find the notice of motion dated 30th November 2018 without merit. I proceed to make the following orders:-

a. The Notice of Motion dated 30th November 2018 is dismissed for want of merit.

b. In the alternative to (a) above the Notice of Motion is a nullity and is struck out.

c. The court's orders of 22nd November 2018 remains as ordered.

d. Costs of the application to the Respondent.

Dated, signed and delivered at Nairobi this 24th day of January, 2019.

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J .A. MAKAU

JUDGE