



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC MISC CIVIL APPL. NO. 57 OF 2017

JOSPINE NDANU MATEE.....PLAINTIFF/RESPONDENT

-VERSUS-

RANDA COACH LTD..... DEFENDANT/APPLICANT

RULING

1. By Notice of Motion dated 18/05/2018 the Applicant seeks orders;

1) Spent.

2) That the Honourable Court do please to grant interim stay of execution against the Judgment in Kilungu SRMCC No. 12 of 2016 and subsequent proclamations and warrants of attachment issued by Sadique Auctioneers and/or in the alternative maintain the status quo pending the hearing and determination of the Application inter-parties.

3) That the Honourable Court do grant Orders reinstating the Application dated 2nd November 2017.

4) That costs be in the cause.

2. The same is supported by grounds on the face of the same and the affidavit of Erick Koku sworn on 18/05/2018 and a further affidavit by the same deponent sworn on 25/06/2018.

3. The parties agreed to canvass the same via submissions which they filed and exchanged.

APPLICANT'S SUBMISSIONS

4. The applicant submits that, on the slated 11/04/2018 the Applicant was engaged in Mombasa ELC Case No. 99 of 2018 under a Certificate of Urgency and inadvertently failed to attend court as he forgot to carry its diary. As a result the Applicant was of the notion that the matter had not been reached.

5. The applicant states that, it was not until the 14/05/2018 that proclamations and warrants of attachment were served upon the Applicant Company that it was brought to its attention that the aforementioned date had since lapsed.

6. The Applicant hence prays that a mistake committed by a counsel should not be visited upon a client.

7. ***He relies on the provisions of*** Article 159(2)(d) of the Constitution of Kenya enunciates and contends that justice shall be administered without due regard to technicalities.

8. He argues that, Section 3A of the Civil Procedure Act also confers upon the court the jurisdiction to grant discretionary orders based on the peculiar circumstances of each case to serve the interest of justice to both parties.

9. He relies on the case of **Branco Arabe Espanol –Vs- Bank of Uganda [1999] 2 EA 22**, in which court stated:-

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.”

10. The Applicant also prays that the Honourable Court to consider that a mistake purely committed on the side of the counsel should not be visited upon the client.

11. In CMC Holdings Limited –Vs- Nzioki [2004] 1 KLR 173 the deciding judge held as follows:-

“That discretion must be exercised upon reasons and must be exercised judiciously..... in law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.... The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate.”

12. All this factors were considered in deciding the case of Lucy Bosire –Vs- Kehancha Div Land Dispute Tribunal & 2 Others [2013] eKLR:-

“.....in which the court concluded that in the result, having considered and the reasons advanced for none attendance on behalf of the Applicant, I find merit in the Application dated April, 2013 which I hereby allow and set aside with no orders as to costs. It follows that the order that leave granted do operate as stay is similarly reinstated.....”

RESPONDENT SUPPLEMENTARY SUBMISSIONS

13. The Respondent submits that the applicant has not discharged the burden of proof on the evidence it wishes to rely on and thus relies on Section 107(1) of the Evidence Act.

14. Respondent contends that, Parties are bound by their pleadings and the Applicant cannot plead that they communicated with a stranger to hold their brief in this matter yet not provide any proof of the same.

15. The Respondent argues that, Applicant has further contented that on 11/04/2018 the Applicant’s Advocate was engaged in Mombasa ELC No. 99/2018 under certificate of urgency and inadvertently failed to attend court, but no proof of the alleged Mombasa ELC No. 99/2018 has been produced to the Honourable Court to show that there is even the Mombasa ELC No. 99/2018 or that the Applicant’s Advocate is the one engaged in the matter.

16. The Respondent further argues that, Applicant’s Advocate has further not even provided any evidence on record to show that on 11/04/2018 the Applicant’s Advocate was in fact in Mombasa in Mombasa ELC No. 99/2018. The Applicant’s Advocate has not provided any hearing notice or even a copy of the court proceeding of 11/04/2018 to show that the Applicant’s Advocate was engaged in Mombasa ELC No. 99/2018.

17. He relies on the case of Machira T/A Machira & Co. Advocates East Africa Standard (No. 2) (2002) KLR 63 in which the court stated that;

“..... The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

18. After going through materials before me, I find the issues are;

a. Whether the application has merit?

b. What is the order as to costs?

19. The applicant admits that, on the subject application was slated for hearing on 11/04/2018 but the Applicant was engaged in Mombasa ELC Case No. 99 of 2018 under a Certificate of Urgency and inadvertently failed to attend this court as he forgot to carry its diary. As a result the Applicant was of the notion that the matter had not been reached.

20. The statement does not make sense as it does not separate party and the advocate and leaves the court to do guesswork.

21. The court agrees with respondent submissions that, the Applicant’s Advocate has not provided any evidence on record to show that on 11/04/2018 the Applicant’s Advocate was in fact in Mombasa in Mombasa ELC No. 99/2018. The Applicant’s Advocate has not provided any hearing notice or even a copy of the court proceeding of 11/04/2018 to show that the Applicant’s Advocate was engaged in Mombasa ELC No. 99/2018.

22. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled.

23. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court. See **Machira T/A Machira & Co. Advocates East Africa Standard (No. 2) (2002) KLR 63.**

24. That discretion must be exercised upon reasons and must be exercised judiciously..... in law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. See **CMC Holdings Limited –Vs- Nzioki [2004] 1 KLR 173.**

25. The applicant must provide the court with credible material to persuade the court to exercise discretion in his favour. The error or mistake of the advocate must be proved with materials to be excusable not bare allegations.

26. Thus the court finds no merit in application herein and makes the following orders;

a. The application is dismissed.

b. Costs to the respondents assessed at Kshs. 10,000/=.

SIGNED, DATED AND DELIVERED THIS 23RD DAY OF JANUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE