REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS APPLICATION NO. 24 OF 2018

IN THE MATTER OF JAVAN KITOGHO MWAKIO (DECEASED)

JANE WAWUDA KITOGO.....1ST APPLICANT

ESTHER SARU KITOGHO.....2ND APPLICANT

VERSUS

JOSEPH GATHUKU & CO. ADVOCATES.....RESPONDENT

RULING

1. By the Motion before me dated 30.1.19 the Applicants seek the setting aside of the Orders of this Court of 21.1.19 dismissing their Reference dated 13.12.18 and leave to prosecute the said Reference so that the Court makes a determination thereon on merit.

2. The grounds are that Kennedy Kithinji advocate held brief for Applicants' advocate Mr. Muli erroneously indicated that the matter had been adjourned to 31.1.19 instead of 21.1.19. Their advocate diarised that the matter was coming up for hearing on 31.1.19. The Applicants only came to learn about dismissal when a clerk by the name Moses Chirchir while attending other matters in the precincts of the Court saw the matter in the cause list for 21.1.19. The Respondent has served them with a certificate of costs. The Applicants have been condemned unheard and if the orders are not granted, they risk losing substantial amount of money and property without being accorded an opportunity to be heard. The Applicants state that it is only just and fair for them to be given an opportunity to be heard. They further assert that no prejudice will be suffered by the Respondent if the orders sought are granted.

3. The Respondent in his replying affidavit sworn on 11.2.19 avers that the Applicants' application dated 13.12.18, seeking *inter alia* stay and setting aside of the taxing master's decision dated 30.11.18 was listed for hearing on 24.12.18. Directions were given that the application do proceed by way of oral submissions on the 21.1.19. Mr. Anangwe advocate was present holding brief for the firm of Kimathi Wanjohi Muli Advocates for the Applicants. On 21.1.19, the Respondent appeared but neither the Applicants nor their advocate was present. The Application was therefore dismissed with costs. The Respondent asserts that it is not true that Mr. Kennedy Kithinji held brief for Mr. Muli and there is no way of confirming that the exhibited text messages are indeed between the two advocates or the exhibited diary relate to this matter. He averred that he reiterates and adopts his notice of preliminary objection, grounds of objection and replying affidavit filed in response to the application dated 13.12.18.

4. According to the Respondent, there is no reference pending before this Court as would merit the staying of execution of the taxing officers' decisions. To the Respondent, execution for costs is a normal judicial process which is applicable in situations like where the parties like the Applicants herein adamantly refuse to pay taxed costs. He further stated that the Applicants are well to do with vast investments under their control a fact well known to the Court. The incessant applications by the Applicants are prejudicial to him as they have denied him the fruits of his judgment and for no good reason. The Respondent further asserts that Mr. Kithinji advocate has not sworn an affidavit that he misheard the hearing date as 31.1.19. He further states that there is clear admission that the clerk knew of the hearing date of 21.1.19 and therefore the allegation that Mr. Kithinji mistakenly diarised the date as 31.1.19 is false. The Applicants do not deserve the prayers sought as their intention is to delay paying his costs.

5. In their oral submissions the Applicants' counsel and the Respondent in person reiterated their respective positions as set out in their pleadings. I have given due consideration to the parties' respective positions as deposed and submitted. The record shows that when the application dated 13.12.18 came up for hearing on 24.12.18 Mr. Anangwe and not Mr. Kithinji, as alleged by the Applicants, held brief for the firm of Kimathi, Wanjohi and Muli advocates. The Court therefore agrees with the Respondent in this regard. The Court then directed that the application dated 13.12.18 be heard on 21.1.19 by way of oral submissions. On 21.1.19 the Respondent attended Court but there was no appearance by the Applicants nor their advocate. Upon the Respondent's application, the application dated 13.12.18 was dismissed with costs for non-attendance by the Applicants. This is what provoked the filing of the present application by the Applicants.

6. Order 12 Rule 7 of the Civil Procedure Rules provides:

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just".

7. The Orders sought herein are discretionary. The Applicants must therefore satisfy the Court that they are deserving of the exercise of its discretion in their favour. The reason proffered by the Applicants for not attending Court on 21.1.19 is that Mr. Kennedy Kithinji had erroneously informed their advocate that the hearing date was 31.1.19 and he diarised accordingly. It is clear to my mind that a mistake was made by the Applicants' advocates which led to the dismissal of the application dated 13.12.18. The question this Court must ask itself is whether the mistake is pardonable or whether the door of justice should be closed to the Applicants. In answer, the Court is guided by Madan, JA (as he then was) in Belinda Murai & 9 others v Amos Wainaina [1979] eKLR) where he stated:

A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

8. The failure to attend Court on 21.1.19 led to the dismissal of the application dated 13.12.18 with the result that the same was not heard on merit. This was purely a mistake of the Applicants' counsel. The door of justice ought not to be closed to the Applicants because of the inadvertence on the part of the lawyer who held brief for the Applicants' advocate. As has been stated times without number, mistake of counsel should not be visited upon their clients. The interests of justice dictate that the application dated 13.12.18 be heard and determined on merit. In arriving at this conclusion, the Court will safeguard the Applicants' right to a fair trial as guaranteed by Article 50(1) of the Constitution of Kenya, 2010 which provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

9. In the premises I allow the Applicants' Application dated 30.1.19 and set aside the Order of this Court of 21.1.19 dismissing the application dated 13.12.18 and order that the same be and is hereby reinstated to be heard not later than 14 days from today. I award costs of this Application to the Respondent.

DATED, SIGNED and DELIVERED in MOMBASA this 22nd day of February 2019

M. THANDE

JUDGE

……for the Applicants

.....for the Respondents

.....Court Assistant