



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**(MISCELLANEOUS CIVIL APPLICATION NO. 223 OF 2019)**

**MAINA MARY.....APPELLANT**

**-VERSUS-**

**URBANUS NZUVE NDUVA**

**DORCAS MBULA NDAMBUKI (Being**

**Administrators of the Estate of the**

**Late PETER NDUVA – Deceased).....1<sup>ST</sup> RESPONDENT**

**KINATWA SACCO.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 3<sup>rd</sup> April, 2019 when the application dated 21<sup>st</sup> March, 2019 came up before me, and there being no serious objection to the application save that the respondent sought that the same be granted conditionally, I granted the applicant leave to appeal out of time and directed that the memorandum of appeal be served within 10 days and that the Record of Appeal be filed and served within 45 days. I further directed the applicant to pay to the Respondents Kshs 1.5 million within 30 days and that the balance be deposited in a joint interest earning account in the names of the advocates for the respective parties within 30 days.

2. By an application dated 29<sup>th</sup> April, 2019, the applicant sought that this court reviews, sets aside or varies the conditional order for stay and the default clause.

3. According to the applicant, the respondent had since received Kshs 3,000,000/- being decretal sum from the applicant's insurers but the applicant was unable to raise the balance of the decretal sum amounting to Kshs 3,781,050/-. It was therefore sought that the amount received by the Respondent should be deemed as both adequate security and advance payment as ordered by the court. The applicant also disclosed that she had already filed and served the appeal in compliance with the said order which appeal was at a risk of being dismissed.

4. The said application came up for hearing on 29<sup>th</sup> May, 2019. It is not in doubt that the respondent's counsel was notified of that date. However, the respondent's counsel was absent when the matter was called out for hearing and **Mr Nyawara**, Learned Counsel for the applicant informed the Court that he had not been served with any replying affidavit. Upon perusal of the Court filed I confirmed that there was no replying affidavit on record. Having considered the application, I allowed the same and directed that there be a stay of execution pending the determination of the said appeal.

5. By application dated 30<sup>th</sup> May, 2019, the subject of this ruling, the respondents now seek that the orders issued on 29<sup>th</sup> May, 2019 be set aside. The application was supported by a six paragraph affidavit the contents of which I set out as hereunder:

**1. That we are 1<sup>st</sup> Respondents herein well versed with this matter and would wish to state as follows:**

**2. That we are advised by our Advocates on record that the Application date 29<sup>th</sup> April 2019 came for inter parties hearing on 29<sup>th</sup> May 2019 and was mistakenly heard ex parte.**

**3. That the said Application was opposed as there was a replying affidavit sworn on 28<sup>th</sup> May, 2019 already in the court file.**

**4. That it is in the interest of justice and fairness that the ex parte orders issued on 29<sup>th</sup> May, 2019 be set aside and the Application be heard inter partes.**

**5. That the Applicants will suffer no prejudice if the Application is heard inter partes.**

**6. That what is deponed herein is true to the best of our knowledge, information and belief.**

6. The application was opposed by way of both the grounds of opposition and a replying affidavit. The main grounds for doing so were that there was no opposition to the application despite the same having been served 22 days earlier contrary to Order 50 rule 14 of the **Civil Procedure Rules**; that though the application was to be heard at 9.00 am, when the case was called out at 9.30 am, the 1<sup>st</sup> Respondent was absent hence the accusations levelled against the court are reckless and in bad taste. It was deposed that though the respondent contends that a replying affidavit was filed on the hearing date, no cash deposit receipt was exhibited to show the time when it was paid for and there was no reason given by the 1<sup>st</sup> Respondent why they were not in court when the matter was called out for hearing.

7. It was therefore contended that the failure to disclose the reason for non-attendance amounted to non-disclosure of material facts and lack of candour hence the application ought to be dismissed.

8. The said averments were regurgitated by the parties before me during the hearing of this application.

#### **Determination**

9. I have considered the application herein, the affidavits in support thereof and the submissions made.

10. In the instant application the applicant seeks this court's exercise of discretion in setting aside the order made due not only to non-attendance but also as a result of the omission of the replying affidavit on record.

11. It is clear from the affidavit in support of the application that the applicant has not even attempted to give any reason for non-attendance when the application was called out for hearing. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the applicant for such orders. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

12. The Court of Appeal in **Stallion Insurance Co. Ltd. vs. Rosemary Olao Civil Appeal No. 85 of 1998 held** under the then Order 9 rule 20 which was later amended to be Order 9B rule 8 [ and now 12 rule 7] of the **Civil Procedure Rules** the discretion of the Court is perfectly free and the only question is whether upon the facts it should be exercised. The Court proceeded to reiterate the position that the discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. Accordingly, the Court appreciated that it cannot interfere with exercise of discretion unless the trial Court erred in principle or unless it is shown that the trial Court is plainly wrong. To the Court, the nature of the defence must be looked at and the reasons for failure to attend Court must be given.

13. Although the applicant/respondent contends that the application was mistakenly heard ex parte as the same was opposed, as rightly pointed out on behalf of the applicant, there is no indication as to when the said affidavit was filed. The affidavit in support of the instant application does not disclose this crucial information and the cash deposit receipt itself has not been exhibited. As stated above, at the hearing of the application there was no such affidavit on record.

14. Most importantly, there is completely no explanation as regards the absence of the counsel for the respondent at the hearing of the application whose orders they seek to set aside. In the absence of the reasons for non-attendance, this Court can only conclude that the present application is designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice. The respondents knew that the matter was coming up for hearing but for some undisclosed reasons failed to attend court. They similarly failed to ensure that their replying affidavit, which was itself filed way out of time pursuant to Order 50 rule 14 of the **Civil Procedure Rules**, assuming that it was filed before the matter was called out for hearing, was on record and no attempt has been made to explain non-compliance with the said procedural rule. From the record the Court cannot therefore find with certainty that there was in fact a replying affidavit on record at the time when the matter was called out for hearing.

15. In the foregoing premises I find that the application dated 30<sup>th</sup> May, 2019 falls short of the standards required for favourable exercise of discretion. It fails and is hereby dismissed but with no order as to costs as the appeal has already been filed and parties ought to concentrate their efforts in disposing of the same.

16. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 24<sup>th</sup> day of June, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Mburu for Mr Nyawara for the Applicant**

**CA Geoffrey**