



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 69 OF 2013

CITY COUNCIL OF NAIROBI.....APPELLANT

-VERSUS-

BERNARD KARANJA KINGARA.....RESPONDENT

RULING

This ruling seeks to determine the Notice of Motion dated 17th June, 2015 filed by the Appellant under the provisions of sections 1A,1B, 3, 3A of the Civil Procedure Act and order 51 of the Civil Procedure Rules seeking orders;

- (a) THAT the Honourable Court be pleased to set aside the order by justice Ougo made on 27th November, 2013 dismissing the appellant's application dated 12th February, 2013
- (b) THAT the appellant application dated 12th February, 2013 together with all consequential orders be re-instated and fixed for hearing inter partes.
- (c) THAT the costs of this application be provided for.

The application is based on the grounds on the face of the application and the Supporting Affidavit of **TIMOTHY JAMES ILAKO**, the Appellant's Advocate in conduct of the matter. The grounds in support of the application are that the Advocate was not aware of the hearing date of 27th November, 2013 as the date was not fixed in court and did not appear in his diary and that the omission was inadvertent and not deliberate. It was also deponed that the Appellant should not be made to suffer because of the mistake of the counsel.

The Respondent filed Grounds of Opposition dated 16th September, 2015 and an undated Replying Affidavit. The Respondent deponed that the Applicant does not warrant the orders sought. That the Appellant's Advocate were served with the hearing date for 27th November, 2013 vide a Hearing Notice dated 20th May, 2013. The Respondent has annexed a copy of the duly served Hearing Notice and an Affidavit of Service to that effect and urged that the averment that the Counsel inadvertently omitted to attend court is no good reason. The Respondent urged the court to dismiss the application.

The Application was canvassed by way of written submissions. In the submissions dated 15th February, 2017, the Applicant submitted that in the interest of justice and fairness, the Appellant should not be made to suffer for the inadvertent and excusable omission of his Counsel. In support of his case, the Applicant relied on the case of **Shamsudin Jiwan Mitha vs Abdulazziz Ali Ladak [1960] E.A. 1054** where the court stated that

“where a party who is called out and does not appear when the suit was called out must show sufficient cause exactly what happened to him as he was coming to court as to cause his delay in coming to court, the said learned judge allowed an application to set aside the ex parte order but awarded the Plaintiff throw away costs in the sum of Kshs 15,000/=.”

The Applicant also relied on **Philip Chemwolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040** where the court held as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

The Respondent filed his submissions dated 8th March, 2017 and submitted that the Applicant is guilty of inordinate delay as the application was filed 19 months after the orders were issued. He relied on the case of **Alcon Holdings Ltd Vs. Kenya Commercial Bank (2012) eKLR** where the court found that a delay of 30 days in filing an application to reinstate the suit was inordinate. It was the Respondents submission that the Applicant did not produce the said diary to support his claim that the hearing date was not diarised and having failed to do so, the Appellant has not placed sufficient material before the court for the Advocates failure to attend court. The respondent relied on case of **Shah V Mbogo (1967) E.A 116** that ***“applying the principle that the court’s discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the cause of justice, the motion should be refused.”***

I have considered the application, Affidavits and submissions of both parties.

The Applicant has not given an explanation for the delay in filing the Application. Neither has he substantiated his allegations that the date was not diarised. The delay is inordinate. The argument that the Appellant should not be punished for the mistake of the counsel does not hold water in this case. The Applicant owns his case and it is incumbent upon the applicant to follow up on the same with the Advocate. The orders sought herein are discretionary orders which can only be granted judiciously and upon the Applicant establishing a sufficient cause. It is my finding that the Applicant has not established a basis for the orders sought and as such the application is dismissed with costs.

Dated, Signed and Delivered at Nairobi this 19th Day of March, 2018.

.....

L. NJUGUNA

JUDGE

In the Presence of

.....*For the Applicant*

..... *For the Respondent*