



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPL. NO. 235 OF 2017**

**SKYLINE SKELTER LIMITED.....APPLICANT**

**-V E R S U S -**

**ADVENTIS INHOUSE AFRICAL LIMITED.....RESPONDENT**

**RULING**

1) The subject matter of this ruling is the motion dated 2/10/2017 in which Skyline Shelter Ltd, the applicant herein is seeking for the following orders:

- 1. THAT the proposed appellant be granted leave to appeal out of time against the whole ruling of the Hon. Mrs. Nyaloti the Resident Magistrate, delivered on 31<sup>st</sup> November 2016 at Milimani.***
- 2. The said leave do operate as a stay of proceedings.***
- 3. THAT the honourable court be pleased to stay the execution of the decree and or ruling herein delivered by Hon. Mrs. Nyaloti the Resident Magistrate, on 31<sup>st</sup> November 2016 at Milimani pending the hearing and determination of this application.***
- 4. THAT the honourable court be pleased to stay the execution of the decree herein against the ruling of honourable Hon. Mrs. Nyaloti the Resident Magistrate, delivered on 31<sup>st</sup> November 2016 at Milimani pending the hearing and determination of the intended appeal.***
- 5. THAT the notice of appeal and memorandum of appeal annexed hereto be deemed as duly filed and served.***
- 6. THAT the costs of this application be provided for.***

2) The motion is supported by the affidavit of Lydia Nyamiaka Atuya. When served, Adventis Inhouse Africa Ltd, did not deem it fit to file a response to the motion.

3) When the motion came up for interpartes hearing, learned counsels from both sides were given a chance to attempt an out of court settlement over the motion but they failed to reach at a consensus. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting affidavit. Though the applicant has not specifically sought on the face of the motion, the order for reinstatement of the motion dated 12.6.2017, it is clear in my mind that if this court issues the order to set aside the order dismissing the motion dated 12.6.2017, then it means that the aforesaid motion will have been automatically reinstated. In paragraph 9 of the supporting affidavit, M/s Lydia Nyamiaka Atuya beseeched this court to reinstate the dismissed application. The learned advocates aver that the applicant

is ready and willing to abide by any conditions imposed by this court.

4) It is not in dispute that the motion dated 12.6.2017 was dismissed on 2/10/2017 for want of attendance on the part of the applicant. M/s Lydia Atuya avers that on the aforesaid date she had gone to appear before the Hon. Mr. Justice Onguto over Nairobi H.C.C.C. no. 380 of 2017 and that when she later appeared before this court, she found that her matter had been dismissed for want of attendance on the part of the applicant. This fact is not controverted by the respondent. This court has no reason to doubt the veracity of the assertion that the learned advocate was in another court. The learned advocate should have taken steps to request a colleague to hold her brief to have the matter placed aside. In my view, the learned advocate made a genuine mistake which should not be used to punish the client.

5) In the end, I find merit in the motion. I issue an order setting aside the order dismissing the motion dated 12.6.2017 for want of attendance. Consequently, the aforesaid motion is reinstated and is fixed for interpartes hearing on 15.11.2017. An interim order for stay in terms of prayer 2 of the aforesaid motion is issued to subsist until then.

6) Each party to meet its own costs of this application.

**Dated, Signed and Delivered in open court this 31<sup>st</sup> day of October, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Applicant

..... for the Respondent