



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLICATION NO. 119 OF 2015

INTEX CONSTRUCTION CO. LTD.....APPLICANT

VERSUS

FLORA MARIGU..... 1ST RESPONDENT

GIANT AUCTIONEERS.....2ND RESPONDENT

RULING

1. This is a ruling on an application dated 16/10/2015 seeking for orders that the court be pleased to set aside the orders of 6/10/2015 dismissing the plaintiff's applications for non attendance. The applicant also seeks that the court be pleased to reinstate the applications. The application is supported by the affidavit of Hinga Waiyaki, an advocate of the High Court of Kenya on record for the applicants.
2. The respondents were represented by the firm of Njeru, Nyaga & Company Advocates who filed grounds of opposition dated 12/11/2015 in which it was argued that the prayers sought in the application had been overtaken by events. A replying affidavit sworn by one Mugambi Rutere, the counsel for the 1st respondent was filed on 1/10/2015.
3. The applicant's counsel in the supporting affidavit depones that he is in conduct of the matter and hence versed with the facts of the case. He states that ex parte judgment was entered in favour of the 1st respondent and a decretal sum of Kshs.463,090/= issued in CMCC No. 166 of 2012. This was after the 1st respondent failed to serve the applicant with summons to enter appearance.
4. The 2nd respondent proceeded to attach the applicant's motor vehicle registration No. KBJ 321 J which was sold by public auction of 6/6/2015. On 11/6/2015 a temporary injunction was issued against the 2nd respondent restraining them from transferring possession the said vehicle to a 3rd party pending inter parties hearing on 22/9/2015. Before the said hearing the respondent proceeded to attach another motor vehicle KBQ 652 J belonging to the applicant which prompted the applicant to file the 2nd application in Misc. Civil Application No. 123/2015.
5. An order restraining the respondents from auctioning and transferring the 2nd motor vehicle was issued in Misc. Civil Application No. 123/15 in respect of motor vehicle No. KBJ 652 J pending hearing and determination of the application dated 6/10/2015. Both orders were duly served upon the respondents. The applicant also made an application in Misc. Application No. 123/15 amending the registration number of the vehicle from KBJ 562 J to KBJ 652 J which application was allowed. On 22/9/2015, the application No. 123/15 came up for hearing, the respondents had not filed a replying affidavit and their advocates made an application to have the two applications in the respective files be heard together. The court allowed the said application and requested that the matters be mentioned on 6/10/2015 to see whether the parties had reached out of court settlement as they had proposed.
6. When the matter was mentioned on 6/10/2015, the applicant was absent and the court dismissed

- the applications for non attendance. The reason given was that the staff at the advocate's office failed to diarize the mention date hence the reason for non attendance. The applicant had tried to initiate negotiations on settlement. The respondents' advocates filed a replying affidavit indicating that the vehicle registration No. KBJ 321 J had already been sold. The applicant submits that he has an arguable case with high chances of success and it is in the best interest that the applications be reinstated. He further states that the right to fair trial will not be exercised if the applications are not heard inter partes due to the mistake of counsel.
7. The respondents filed grounds of opposition dated 12/11/2015 stating that the application lacks any legal basis and is frivolous. It was further argued that the court would also be acting in vain as the order sought has already been overtaken by events.
 8. The 2nd respondent filed a replying affidavit sworn on 1/10/2015 by one Mugambi Rutere. He stated that on 22/4/2015 he received instructions to execute a judgment in respect of CMCC 166 of 2012. On 24/4/2015 he proceeded to proclaim motor vehicle KBQ 652 J and KBJ 312 J. On 22/5/2015 he attached vehicle registration No. KBJ 321 J, advertised it for sale and sold it by public auction on 6/6/2015. The sale realized Kshs.300,000/= which amount was not enough to satisfy the decretal amount. The 2nd respondent issued a notification for sale for motor vehicle KBQ 652 J on 9/6/2015.
 9. The sale was advertised on 16/6/2015 and it took place on 23/6/2015 and realized Kshs.380,000/=. On 23/6/2015, his office was served with a court order restraining the respondent from attaching, re-possessing and selling by public auction vehicle registration No. KBJ 652 J. At the time the court order was served motor vehicle registration No. KBQ 652 J had already been sold. The court order referred to motor vehicle KBJ 562 J double cabin which was never proclaimed or attached. By the time the court orders were issued on 18/6/15 the vehicle registration NO.KBQ 652 J had already been sold.
 10. Both parties agreed to dispose of the application by way of written submissions.
 11. The applicant in its submissions stated that the 1st respondent failed to serve the applicant with summons to enter appearance according to the rules of service. The applicant's advocate argued that he had not slumbered as alleged by the respondent. Mistakes of counsel should not be visited upon the client who was not a party to the misadventures. The mistake was not intentional and was not meant to obstruct the course of justice. The advocate acted with alacrity upon discovering the mistake by seeking to correct it. The right to fair hearing has been protected under the constitution as was held in the case of **RICHARD NCHARPI VS I.E.B.C & 2 OTHERS [2013] eKLR** where the court held that the right to fair hearing has always been a well-protected right in the Constitution and is also the cornerstone to the rule of law. This position was also held by the High Court in the case of **BURHANI DECORATORS & CONTRACTORS VS MORNING FOOD LIMITED [2014] eKLR**.
 12. The applicant also cited the following cases:-
 - (a) **EDNEY ADAKA ISMAIL VS EQUITY BANK LIMITED [2014] eKLR** where it was held that in exercising discretion, the court should always opt for the lower rather than the high risk of injustice.
 - (b) **CLEMENT KORAT VS KIPLAGAT CHERUTICH [2014] eKLR** where it was held that it is important for parties to be given their day in court and be heard on merits.
 - (c) **KHALDUN MOHAMMED VAED & 4 OTHERS VS SULEIMAN H.S HAMED & 2 OTHERS [2012] eKLR** where it was held that mistake of counsel should not be visited upon the innocent litigant.
 13. The respondents in their joint submissions stated that before exercising its discretion, the court should consider the excuse for non attendance. It was argued that the applicant does not deserve discretion in his favour as he has not come to court with clean hands. Further that the advocate cannot blame his staff for failing to attend court on 22/9/2015 as the record clearly indicates that he was present when the case was adjourned to 6/10/2015.
 14. In the file Misc. Application No.119 of 2015, there is an affidavit of service sworn on 12/6/2015 by James Thuo a process server indicating that the court order dated 11/6/2015 was served upon

he 2nd respondent on 12/6/2015. The court order restrained the 2nd respondent from transferring possession of KBJ 321 J Ford Ranger pending inter parties hearing and determination of the application dated 10/6/2015. The hearing was scheduled for 22/9/15 but the sale had taken place 6/6/2015. This means that the order was served six days later.

15. There is evidence that the order in respect of registration No. KBJ 562 J was served on the respondent by one James Thuo a process server on 23/6/2015. The applicant later amended its application and corrected the registration number of the vehicle to read KBQ 562 J. The order was extracted and served on the 2nd respondent on the same day who declined to accept service. The amended order indicates that the respondents were restrained from selling motor vehicle KBJ 652 J Ford Ranger pending inter parties hearing on 6/10/2015. The said order also set aside the orders issued on 17/6/2015.
16. In the case of **TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY VS JEREMIAH KIMIGHO MWAKIO & 3 OTHERS [2015] eKLR** the court cited the case of **KETTEMAN & OTHERS VS HANSEL PROPERTIES LTD [1988] 1 ALL ER 38**; in which Lord Griffith stated that;

“Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings.”

17. The court thus held that "to our mind, this is the most proximate way to balance out the competing interests of both parties to the suit. That the conduct complained of in this case was committed by a clerk is immaterial, for it is the law of agency that the principal should be bound by the acts of his agent. (see **Ahmed v. Highway Carriers [1986] LLR 258 (CAK)** and also **(Myers v. Elman [1939] 4 ALL E.R 484)** As stated by Viscount Maughan in the Myers's case,

“...the jurisdiction may be exercised where the solicitor is merely negligent, it would seem to follow that he cannot shelter himself behind a clerk for whose actions within the scope of his authority he is liable.... My conclusion is that Elman (the solicitor) cannot dissociate himself from the acts and defaults of Osborn (the clerk) and in what follows, I shall generally omit any reference to him and shall treat his acts as being those of his principal.”

18. The court concluded by finding that "Hence, the mistakes of Mr. Mouko's clerk became the mistakes of Mr. Mouko....."
19. As noted in the **TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY VS JEREMIAH KIMIGHO MWAKIO & 3 OTHERS [2015] eKLR** the court has a duty of balancing competing interests of parties in a suit. In the instant case, the 1st respondent was a diligent litigant who keenly pursued his case and as such should not be punished due to the indolence on the part of the applicant.
20. The court cannot issue orders in vain. In the case of **NICHOLAS MAHIMU VS NDIMA TEA FACTORY LTD & ANOTHER [2009] eKLR** the court held that the court has a duty to ensure that its orders are at all times effective.
21. It is clear from the record in Misc. Application No. 123 of 2015 that the applicant obtained an order to restrain the respondent from selling and disposing of vehicle registration No. KBJ 562 J which vehicle was never proclaimed or attached. The order was obtained on 17/06/2015. The application was later amended and the registration number corrected to read KBJ 652 J. The amended order was obtained on 23/06/2015 and served the same day. At the time of service of the two orders, the vehicles had already been sold which evidence is not disputed.
22. The applicant and his advocate did not take the necessary action to prevent the sale of the vehicle on time. When the application was filed, it had the wrong particulars of the vehicle. In effect, the order served on the respondent after the sale has no effect and it has no benefit to the applicant. The reinstatement of the applicant's application in the two court files will not serve any useful purpose. The applicant alleges that it was not served with summons to enter appearance in CMCC

- 166 of 2012. The remedy would have been to apply to set aside the judgment before the trial court.
- 23.The applications were dismissed for non-attendance of the applicant's counsel after the date was taken by consent. I am not satisfied that the applicant's counsel has given satisfactory reasons for his non-attendance. He stated that his clerk failed to diarize the matter but there was no affidavit from the clerk. The applicant having bungled with his application and having failed to explain the non-attendance, does not deserve the discretion of this court.
- 24.The plaintiff's application has been overtaken by events as the motor vehicles have already been sold to third parties. It would be futile to grant the orders sought in this application bearing in mind that the court shall not issue any orders in vain.
- 25.I find no merit in this application and it is hereby dismissed with costs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 23RD DAY OF MARCH, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muthoni for Njeru Nyaga for respondent