

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 80 OF 1999

NELSON MUGUKU NJOROGE PLAINTIFF/RESPONDENT

V E R S U S –

FURNCON LIMITED.....DEFENDANT/APPLICANT

RULING

1) The Defendant/Applicant herein, took out the motion dated 18.12.2015 in which it sought for inter alia, an order for review and to set aside the ruling and orders of this court made on 11.12.2015 plus costs. The motion is supported by the affidavit of Solomon Kione. When served Leah Wanjiku Muguku, the administratrix of the estate of Nelson Muguku Njoroge, deceased filed a replying affidavit she swore to oppose the motion. Learned counsels appearing in this matter recorded a consent order to have the motion disposed of by written submissions.

2) I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against. I have also considered the rival submissions. It is the submission of the Defendant/Applicant that it has discovered new and important facts/evidence which were not before the court. It is said that the exhibit memo delivered by the C.I.D to the Defendant's advocate was printed on both sides but due to an inadvertent mistake by the advocates assistant only one side was photocopied and attached to the affidavit leaving the side that had the results of the document examiner. The findings of the document examiner were very crucial to the determination of the two motions dated 27/8/2008 and 01.12.2010. This court was urged not to let the mistakes of counsel to be visited on the litigant.

3) The Plaintiff on the other hand is of the view that the Defendant is abusing the court process by lodging a plethora of applications with a view of delaying the execution process. The Defendant/Applicant was accused of not being diligent in following up the complaint. It is said there is no new facts nor evidence since the contents of the exhibit memo were known to the Defendant/ Applicant and his advocate. The Plaintiff/Respondent also questioned the veracity of the portion of the exhibit memo which had been initially left out. The conduct of the Defendant in the whole saga is said to be misduerous and manifests bad faith.

4) It is not in dispute that on 11th December 2015 this court delivered its ruling dismissing the Defendant's motions dated 28.8.2007 and 01.12.2010. The thrust of the Defendant's application is that its advocate made a mistake. An exhibit memo has been shown which indicates the signatures appended on the documents presented for examination by the document examiner did not tally. In essence it is alluded that those signatures were forged. What the Defendant has done is to use the results of the document examiner to show that some forgery took place to secure the exparte judgment. The Defendant's learned advocate has blamed his office clerk and assistant for failing to attach some portion of the exhibit memo to the supporting affidavit. It is his argument that had that piece of information been presented to this court it would have arrived at a different conclusion. The Defendant's application heavily depended on the credibility of the process server.

5) In its ruling of 11.12.2015, this court made two observations. First, that the Defendant had failed to present to this court the outcome of the C.I.D's report.

Secondly, it also noted that the Defendant had not taken the advantage of the law that allowed parties to summon the deponent of affidavits of service for cross-examination to determine the veracity of their averments.

6) In the application currently before this court, the Defendant has concentrated on the discovery of the copy of the document examiner's report. It has completely failed to address this court on this court's second holding. In my view the presentation of a document examiner's report in the circumstances of this case will not alone settle the dispute. It is the view of this court that had the Defendant been keen in summoning the process server for interrogation, the whole saga could have settled long ago but the Defendant instead took the longer route of engaging the document examiner whose processes take long and are complex in nature.

7) I appreciate that a mistake was committed by the Defendant's advocate. The mistake cannot be said to be the discovery of a new fact. The advocate was simply not diligent. This is one of those cases where the client should be left to suffer for the mistakes of its advocate.

8) In the end and on the basis of the above reasons, I find the motion to be without merit, it is dismissed with costs to the Plaintiff.

Dated, Signed and Delivered in open court this 16th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant