



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 1 OF 2015

PADAM ENGINEERING WORKS LIMITED APPLICANT/PLAINTIFF

VERSUS

NILE HAULIERS LIMITED RESPONDENT/DEFENDANT

RULING

On 21st April 2015 the Plaintiff/Applicant filed a Notice of Motion seeking judgment on admission a sum of Kshs.597,320/= and costs of the suit. The application was scheduled for hearing on 16th September 2015 when only Counsel for the Defendant/Respondent attended. There being no explanation the application was dismissed for non-attendance. By the Notice of Motion dated 22nd September 2015 it is sought to set aside that dismissal order. The grounds for the application as set out in the grounds on its face, in the supporting affidavit and Counsel's submissions are that the non-attendance on 21st April 2015 was inadvertent in that the Advocate was attending to another matter in the Land Court and that mistake of Counsel ought not to be visited upon his client. Further that this application was made without unreasonable delay; That the Respondent will suffer no prejudice and the orders ought to be granted in the interest of justice and equity. Counsel put reliance on:-

- 1. CMC Holdings Limited V. Nzioki [2004] 1 KLR 173;**
- 2. Branco Arabe Espanol V. Bank of Uganda [1999] 2 EA 22;**
- 3. Sections 1A and 1B of the Civil Procedure Act.**

The application was opposed on grounds that no tenable explanation was given for the Advocate's non-attendance on the day the application was fixed for hearing;

that the application is an after thought and that the applicant has not met or established the requirements for granting the present application and the same should not be allowed. Counsel submitted that in failing to attend to prosecute the application the applicant was intent on delaying the expeditious disposal of the suit; That there is no discernible reason why Counsel for the applicant did not request a colleague to hold his brief in the other matter so as to attend the application. The Court was urged to find that the non-attendance amounts to indolence. Further that a case belongs to a litigant and not his Advocate and as such the litigant has a duty to pursue the prosecution of the case and that moreover where an Advocate contemptuously institutes legal proceedings and files an application at their own instance which they fail to prosecute thereby precipitating its dismissal, such Advocate should shoulder such a consequence. Counsel for the respondent relied on:-

- 1. Shah V. Mbogo [1967] EA 116;**

2. Simion Waitim Kimani & 3 Others V. Equity Building Society (2010) eKLR;

3. Saving and Loan Limited V. Susan Wanjiru Muritu [2002] eKLR;

4. John Ongeri Mariaria and 2 Others V. Paul Matundura [2004] 2 EA 163.

The orders sought in this application are discretionary but as always the Courts discretion is to be exercised judicially. As was held in **Shah V. Mbogo** (Suppra) such discretion “is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice”.

The Plaintiff's application was dismissed on 16th September 2015 and this application was filed on 22nd September 2015. To me that does portray a party intent

on delaying his case and the application if heard would definitely bring this suit to an early close. Counsel has given a plausible explanation for not being present when his application was called out and taking all these circumstances into account I find the applicant is deserving of the orders sought. Accordingly this application is allowed and the order made on 16th September 2015 is set aside but with an order that the Plaintiff/Applicant shall bear the costs.

Signed, dated and delivered at Kisumu this 27th day of October 2016

E. N. MAINA

JUDGE

In the presence of:-

Mr. Onyango Charles for the Plaintiff/Applicant

N/A for the Defendant/Respondent

CA: Serah