



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 606 OF 2012

VISARO CONSTRUCTION COMPANY LTD.....APPLICANT

-VERSUS-

HELLO PROPERTY DEVELOPMENT COMPANY LTD....RESPONDENT

-AND-

IN THE MATTER OF THE ARBITRATION ACT, CHAPTER 49

VISARO CONSTRUCTION COMPANY LTD.....CLAIMANT/APPLICANT

-VERSUS-

HELLO PROPERTY DEVELOPMENT COMPANY LTD.....RESPONDENT

**R U L I N G**

**INTRODUCTION**

1. The application before the court is a **Notice of Motion** dated **23rd October 2014** and filed in court on 3rd November 2014 by the Claimant/Applicant.

2. The application seeks to secure the following orders:-

***1. That the court be pleased to set aside the orders made on the 29th day of January 2014 dismissing the Plaintiff's application dated 1st October 2013***

***2. That the court be pleased to reinstate the Plaintiff's application dated 1st October 2013 for the re-hearing on its merits.***

***3. That costs of this application be costs in the cause.***

***4. That such other or further directions as may be apt in the circumstances of this case.***

3. The Applicant's case is that on 29th January 2014 this court dismissed the Applicant's application dated 1st October 2013 for want of prosecution for failure by the Applicant's advocates to be in court in time to prosecute the application. That dismissal was erroneous as the Applicant's advocate soon entered court to find that the application had been dismissed. The Applicant's case is that if the dismissal is allowed he will suffer serious loss as the application was brought to court for leave of court to have directors of the Respondents be cross-examined on the assets of the Respondent Company available to satisfy the decree herein.

4. The application is supported by the of **Vishram A. Gujipara** sworn on 21st October 2014, and by a supplementary affidavit of **Wilfred Akhoya Mutubuwa** filed in court on **16th February 2015**. Mr. Mutubuwa's aforesaid supplementary affidavit has as its annexure an affidavit by **Sylvester Ngacho Mukele** dated **13th February 2014** in which Mr. Mukele who was the Applicant's

advocates when the aforesaid application was dismissed, explains the circumstances leading to the aforesaid dismissal.

5. The application is opposed by the Respondents vide a replying affidavit by Ashton Towler dated 9th February 2015. The Respondent also filed a Notice of Preliminary Objection on 30th January 2015.

#### **THE APPLICANT'S CASE**

6. The Applicant's case is that when the application dated 1st October 2013 came up for hearing on 29th January 2014, the Applicant's advocate was unable to attend the court, and instead instructed an advocate by the name Kandere, who, however, went to court after the court had recorded quorum and the court declined to listen to him, and in fact dismissed the matter with costs in his presence. Mr. Sylvester Mukele, the advocate then on record for the Applicant deponed to the facts causing him not to attend the court on the 29th January 2014, which facts were that he had to attend his daughter's school to solve a problem. He nonetheless made arrangements for Mr. Kandere to hold his brief which unfortunately, did not take place. The Applicants state that the said dismissal, if allowed to stand will prejudice the Applicant, hence this application.

#### **THE RESPONDENT'S CASE**

7. The Respondent opposes the application firstly on the basis of the Notice of Preliminary Objection filed in court on 30th January 2015 in which it states the Applicant has not paid costs awarded to the Respondent in the application dated 1st October 2013 which application was dismissed on 29th January 2014 for non-attendance. It is also alleged that the Applicant has not paid costs awarded to the Respondents in the application dated 13th February 2014 which application was withdrawn on 28th March 2014 by the Applicant. In the exercise of the authority bestowed upon this court by Order 25 Rule 4 of the Civil Procedure Rules, 2010, the application dated 23rd October 2014 should be stayed until the said costs are paid in full.

8. In his replying affidavit, the Respondents counsel disputes the fact the Applicant's advocate had good reasons for failing to come to court. He also raises issue with the fact that the Applicant had withdrawn a similar application dated 13th February 2014 without giving reason and for this reason the Respondent believes the Applicant is not acting in good faith and is abusing the process of this court.

#### **CONSIDERATION AND DISPOSITION**

9. I have considered the application and the submissions of the parties. The only issues I wish to raise is whether or not this court can exercise its discretion to allow the application.

10. In my view Mr. Mukele has adequately explained in his affidavit attached to the supplementary affidavit of Mr. Mutubwa the reason why he failed to turn up in court. Those are good reasons. He had to attend to an urgent situation at the school his daughter attends. To do that, he also made adequate arrangements for a counsel to hold his brief, and have the file placed aside for hearing at 10.00 a.m. Unfortunately, the counsel, Mr. Kandere, came to court a minute too late, and the said application was dismissed in his presence.

11. Clearly, the predicament faced by Mr. Mukele was excusable, and the counsel he instructed to hold his brief was in court. I can hardly find this an appropriate case to condemn an advocate, leave alone condemning his client for such an omission I am satisfied that acceptable explanation has been given as to why the advocate for the Applicant came to court late leading to the dismissal orders aforesaid.

12. As for the submissions by the Respondents that this application should not be allowed because the Applicant has not paid costs awarded for the aforesaid dismissed application and the aforesaid withdrawn application, I have perused the court record and I have not seen an order of costs which was to be paid within a limited period of time. That being the case, costs can be paid as agreed between the parties, failing which the same may be taxed.

13. In the case of **Avanti Company Limited – Vs – Barclays Bank of Kenya Limited [2009]**, e KLR , the Court held that:-

***“The court’s discretion to set aside orders, especially where a party has been shut out from being heard, is wide and unfettered. That discretion should be exercised in order to avoid injustice or hardship which may result especially in circumstances where it is clear party’s Advocates committed an error or mistake leading directly to the hardship or injustice the subject of such an application.”***

In **Johnson Ndung’u B Njoroge v George Waweru Muchai [2014]** eKLR, the Court of Appeal in setting aside its own orders and reinstating a suit opined:-

***In conclusion, denying the appellant a forum to ventilate his grievances ousts him from the seat of justice. His timeous action to reinstate the suit is a clear indication that he has not been hell-bent to frustrate the course of justice. Furthermore, it has not been shown that any prejudice will be suffered by the Respondent if the dismissed suit is reinstated and heard on merit.***

14. Persuaded by the above authorities, I make the following orders:-

a. ***The Notice of Motion dated 23rd October 2014 is allowed.***

*b. The application dated 1st October 2013 is re-instated for hearing on its merits.*

*c. Costs shall be in the cause.*

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF MAY 2015

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. E. L. Lubulellah for the Applicant

Mr. Wawire for the Respondent

Teresia – Court Clerk