



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO.78 OF 2011

GEORGE JOSEPH MOGAKA MASESE.....PLAINTIFF/RESPONDENT

VERSUS

MITCHELL J. B. MENEZES.....1ST DEFENDANT/APPLICANT

APA INSURANCE COMPANY LTD.....2ND DEFENDANT/APPLICANT

RULING

1. By an application dated 6th March 2015, the Defendants/Applicants sought orders that:

1. **This Honourable Court be pleased to set aside the proceedings of 11th February 2015 and all the other orders consequential thereto.**

ALTERNATIVELY

2. **This Honourable Court be pleased to allow the Defendants to cross-examine the Plaintiff and thereafter present the defence case.**
3. **The costs of the application be provided for.”**

2. The applicants said application was brought under **Order 51 Rule 1** and **15** of the **Civil Procedure Rules** and **Section 1A, 1B** and **3A** of the **Civil Procedure Act**.

3. The application was supported by grounds set out on the body of the Notice of Motion application and the affidavit of **ZHRABANU JANMOHAMED** sworn on **6th March 2015** in which the applicants' counsel while admitting that they were duly served with a hearing notice for the hearing that took place on 11th February 2015, stated that they did not attend court on the said date due to a mistake on the part of their advocate M/S Janmohammed whose office did not convey the hearing date to her associates as she was then allegedly out of the country at the time.

4. The applicants counsel deponed that the applicants would be greatly prejudiced if they were not granted an opportunity to cross-examine the plaintiff or call witnesses in support of the defence case as the matter was pending judgment after the hearing proceeded in their absence of 11th February 2015.

5. The respondent opposed the application.

6. The applicants' application was heard on 23rd September 2015 when counsels for both the applicants and the respondents made their oral submissions in court.

Applicants' submissions:

7. Mr. Maganga, counsel for the applicants submitted and sought prayers Nos.1, 2 and 3 of the said application which was basically to set aside the proceedings of 11th February 2015 and consequential orders or alternatively, that the applicants be allowed to cross-examine the plaintiff before presenting their defence. The applicants also sought the costs of the application.

8. The applicants' counsel, in his submissions basically regurgitated the averments contained in the affidavit in support of the application by stating that Miss. Janmohamed who had received the hearing notice for the hearing of 11th February 2015 was out of the country for treatment and that due to an inadvertence on her part, the matter was not brought to the attention of her associates on time or at all thereby leading to the respondent's case proceeding ex-parte. The applicant submitted that mistake of the counsel should not be visited on the client. The applicant relied on the decision in the case of **Muniu –vs- Giovanni [1995-98] IEA 218** in which under similar circumstances, the Court of Appeal held that:

“Unless and until a court had pronounced judgment on its merits or by consent, it had the power to revoke the expression of its coercive power where it had been obtained only by a failure to follow any rule of procedure. In this case, the appellants' counsel was an advocate with an impeccable record and the explanation given by her as to why she failed to attend the suit's hearing should have persuaded the judge to exercise his discretion in her favour.”

Respondent's submissions:

9. Mr. Oguttu, counsel for the respondent opposed the application while stating that both the applicants and the respondents are trained advocates of the High Court of Kenya whose conduct in court proceedings should be above the conduct of other ordinary litigants. Mr. Oguttu argued that the mistake of counsel, which the applicant stated should not be visited on her clients, had not been explained in a manner that could convince the court to exercise its discretion in favour of the applicant.

10. Mr. Oguttu took issue with the applicant's previous conduct in these proceedings which he submitted was wanting and he spoke of a deliberate attempt to delay the respondents' case. Mr. Oguttu gave details of previous instances when the applicants' counsel had acted in a manner that showed that they intended to scuttle or stall the hearing and finalization of the respondent's case.

11. Mr. Oguttu maintained that if indeed the applicants' counsel had gone for treatment abroad on the date slated for hearing as she had alleged, then the least she could have done was to submit a copy of her stamped passport in court or her treatment documents as testimony to her said averments. Failure to do so, Mr. Oguttu submitted, showed that the applicants' counsel lacked the honesty and candour that was expected from an advocate seeking discretionary orders from court.

12. Lastly, Mr. Oguttu contended that the applicants delayed in filing this instant application and he urged the court to invoke the provisions of **Article 159(2)(b)** of the **Constitution** and **Section 1A** and **1B** of the **Civil Procedure Act** and find that the conduct of the applicants did not augur well with the interest of justice.

Analysis and Determination:

13. The applicants' application is basically founded on their advocate's alleged failure to attend court despite having been duly served with the hearing notice. The applicants' counsel has admitted failure on their part to perform the very duties for which the applicants had engaged them in this case.

14. Failure, on the part of the applicants' counsel led to the matter proceeding for hearing ex-parte which

case is currently pending judgment. The applicants' counsel has alleged that the reason for their failure to attend court was because she had gone for treatment abroad. This court finds that if indeed, this was the case, then nothing would have been easier than for the advocate to exhibit her passport and treatment documents before this court in support of her allegations.

15. I fully agree with Mr. Oguttu's submissions on this point that the applicant's counsel is dishonest and clearly taking this court for granted and therefore, is not entitled to the orders sought.

16. I note that this is a fairly old case dating back to the year 2011 and as such, Mr. Oguttu's assertion that the applicants have from the inception of this case not been keen to have the case determined is not without merit.

17. While it is to some extent true to say that mistakes of an advocate should not be visited on the party, it is equally true that when an advocate as an agent is vested with authority and trust to perform some duties for his client as a principal, and does not perform it surely such principal should bear the consequences otherwise he would never learn from his mistake.

18. Once a client appoints an advocate, he grants the said advocate the general power to do everything for him in respect to the particular case. The advocate then becomes the one through whom all communication is addressed either from the court or the opposite party.

19. The advocate then goes to court to file any pleadings, attends mentions or hearings of the case and is supposed to appraise the client on the goings-on.

20. This court has a discretion to allow or not to allow this instant application but before exercising this discretion sufficient grounds should be laid by the applicant. Quite unfortunately this has not been done. I am very reluctant to exercise my discretion in favour of the applicant.

21. However, in view of the fact that the court had not pronounced judgment on the merits of the main suit at the time the instant application was filed, the court will allow only prayer 2 of the application dated 6th March 2015.

22. The applicant will pay to the respondent the costs of this application and thrown away costs of attendant to the proceedings of **11th February 2015**, assessed at **Kshs.10,000/=** to be paid before the next hearing date. Hearing on 9th February 2016 the respondent to serve the applicant.

It is so ordered.

Dated, signed and delivered in open court this 11th day of December 2015

HON. W.OKWANY

JUDGE

In the presence of:

- Ochwangi for the Plaintiff/Respondent
- No Appearance for Applicant
- Ogega: Court clerk