REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 86 OF 2012

ROY MACKENZIE...PLAINTIFF/RESPONDENT

-V E R S U S-

CARTRACK KENYA LIMITED (T/A CARTRACK GROUP)......DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. The Application before court is the Notice of Motion dated 8th October 2013 (hereinafter "**the Application**"). Originally, the Application was for the following orders (reproduced verbatim):

   1. That the application be certified urgent and heard exparte in the first instance.
   2. That the Honourable Court be pleased to grant a stay of execution pending the determination of the this application.
   3. That the Honourable Court do reinstate the application dated 17/10/2012.
   4. That costs be in the cause.

2. On 25th November 2013, when the Application came up for hearing, counsel for the Defendant/Applicant, without objection from the Plaintiff/Respondent's counsel, amended prayer 3 above to include application dated 20/11/2012. That prayer therefore now reads:

   > **"That the Honourable Court do reinstate the applications dated 17/10/2012 and 20/11/2012."**

3. Briefly, the facts herein are that the Plaintiff/Respondent filed this suit on 3rd May 2012 seeking damages from the Defendant/Applicant following the injuries he claims to have sustained on 30th November 2011, while traveling in a motor vehicle he claims to be owned by the Defendant/Applicant. The Plaintiff subsequently requested for and obtained judgment against the Defendant on 20th September 2012.

4. The Defendant/Applicant then filed an application dated 17/10/2012 seeking the setting aside of the said judgment. The Defendant/Applicant also filed another application dated 20/11/2012 in which it sought two orders: that the firm of S.W. Ndegwa & Co. Advocates be given leave to

come on record for the Applicant; and that the time within which to file defence be enlarged. The first prayer for leave to come on record was effectively achieved on 9/10/2013, when the court, acting on a consent dated 21/11/2012 allowed the firm of S.W. Ndegwa & Co. Advocates to come on record for the Defendant/Applicant in place of C.B. Gor & Gor Advocates.

ANALYSIS

Whether the Application dated 17/10/2012 should be reinstated

5. It is not in dispute that the Application dated 17/10/2012 was withdrawn by the Defendant/Applicants on 21/11/2012. The explanation given by counsel for the Applicant for the said withdrawal is that the application did not have a prayer for leave to come on record and that following the consent allowing the Applicant's advocates to come on record, the application should now be reinstated. Order 9 Rule 9 of the Civil Procedure Rules Provides that:

   “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

   (a) upon an application with notice to all the parties; or

   (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

6. Pursuant to the said Rule 9, the firm of S.W. Ndegwa & Co. Advocates was under legal obligation to seek an order of the court before replacing the firm of C.B. Gor & Gor Advocates who were then acting for the Defendant/Applicant, as judgment has already been entered.

7. In deed, an order was made by the court on 21/11/2012 that the way to proceed is by first hearing the application dated 20/11/2012 to come on record before any other proceedings. That, however, in my opinion, did not imply that the Applicant had no option but to withdraw the application dated 17/10/2012. There was an option of holding the application in abeyance until the issue of representation was resolved. Although this has not been raised here, one may argue that the said application was defective *ab initio* as it was filed by an advocate who was not properly on record. My opinion is that withdrawing the same and reinstating it after representation has been regularised does not cure that defect since reinstatement will only reintroduce the application in its original form as defectively filed. Reinstatement does not make an application that was irregularly filed by an advocate who is not properly on record compliant. But that is for another forum. I find it an abuse of the court process for the Applicant to have voluntarily withdrawn the application then seek to reinstate it without a valid reason.

8. Secondly, the order allowing S.W. Ndegwa & Co. Advocates to come on record was made by this court on 9th October 2013. The Application seeking to reinstate the application dated 17/102012 is dated 8/10/2013, a day before the order allowing the firm of S.W. Ndegwa & Co. Advocates to come on record was made. It is therefore not true that reinstatement was sought after an order for leave to come on record had been made.

9. It is therefore my view that the application dated 17/10/2012 should not be reinstated.

Whether the Application dated 20/11/2012 should be reinstated

10. A careful look at the instant application reveals that the Applicant is proceeding as though it is the application dated 17/10/2012 that was dismissed on 19/9/2013. Despite the amendment to include the application dated 20/11/2012 in the prayer for reinstatement, the Application does not make further reference to the application dated 20/11/2012 elsewhere on its face or even in the supporting affidavit. At paragraphs 5, 6 and 7 of the Supporting Affidavit of Samson Wambugu

Ndegwa, he depones as follows:

"5. THAT we finally obtained a date herein for 10/9/2013 for hearing of our application dated 17/10/2012.

6. THAT however the same was inadvertently not brought to my attention as it was not diarised.

7. THAT all along we believed that the matter was coming up for directions herein."

11. The crux of the Application and the Supporting Affidavit is that the failure to attend court on 10/9/2013 was due to the fact that the date of 10/9/2013 was inadvertently not put down in the Applicant's advocate's diary. I, however, find the averments at paragraph 7 (quoted above) that the Applicant's advocates had all along believed that the matter was coming up for directions contradictory. Does it mean that when a matter is coming up in court for directions then the attendance of the advocate is dispensed with? It can only mean one thing – that the Applicant's advocates had all along been aware of the date of 10/9/2013 but chose not to come to court. Even if the matter was coming up for directions, the advocate was under obligation to attend court for those directions. By his own admission, the advocate was all along aware of the hearing date but chose not to attend court, allegedly because the matter was coming up for directions.

CONCLUSION

11. I therefore find that no sufficient reason has been given to warrant the setting aside of the dismissal order. It is my considered opinion that the application should fail. The Notice of Motion dated 8th October 2013 is therefore dismissed with costs.

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE