



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 242 OF 2002
A. G. PRINTING & PUBLISHING LTD.....PLAINTIFF/RESPONDENT
VERSUS
LIVINGSTONE REGISTRARS LTD.....DEFENDANT/APPLICANT
R U L I N G

1. The **Notice of Motion** application before the court is dated **10th October 2014** filed under Section 3A and Section 80 of the Civil Procedure Act, (Cap 21), Order 45 Rules 1, Order 51 Rule 1 and 3 of the Civil Procedure Rules, 2010.

2. The application seeks the following orders:-

- 1. This application be certified as urgent and heard ex-parte in the first instance;*
- 2. This application be placed for directions and determination before the Learned Mr. Justice Ogola on a priority basis;*
- 3. That this Honourable Court be pleased to review or set aside the orders made on 6th October 2014 by this Honourable court and which orders were inter-a-lia to the effect that the Defendant's case and indeed the entire case was closed;*
- 4. That the costs of this application be provided for.*

3. The application is premised on the grounds set out therein, and is supported by affidavit by **George Muchiri** dated **10th October 2014**.

4. The Applicant's case is that the matter came up for further hearing of the Defence case on 6th October 2014 when this court made Orders marking the Defendant's case as closed and directed parties to file their written submission towards the court's final determination of the suit. The Order marking the Defendant's case as closed was made in light of failure by the Defendant's advocate and the Defendant's witness Mr. Simon Njuguna Mbogo (**the Defendant's witness**) to attend court. The Applicant submits that there are sufficient grounds warranting the review or setting aside of the aforesaid Orders being:-

a. When this matter came up for hearing on 17th July 2014, it was adjourned to allow the issuance of witness summons in respect of the Defendant's witness for his attendance in court to produce the document described as the Certificate of Authentication of emails sworn by himself on 8th May 2012.

b. The Defendant's advocate in personal conduct of the matter Mr. George Muchiri understood and recorded the hearing date given in court as 3rd October 2014.

c. Subsequently, witness summons were extracted and served upon the Defendant's witness who confirmed that he would indeed attend court on the said 3rd October 2014.

d. Mr. George Muchiri and the Defendant's witness were therefore ready to attend court on 3rd October 2014 and proceed with the further hearing of the Defence case but the matter was not listed in the day's cause list.

e. On the afternoon of 6th October 2014, Mr. George Muchiri learnt from the Plaintiff's advocate that the matter had been in court on 6th October 2014 and that following his absence and that of the Defendant's witness, the court had directed that the

Defendant's case be closed and that parties file their written submission within a cumulative twenty eight (28) days from 6th October 2014.

f. All along, Mr. George Muchiri and the Defendant's witness believed that the matter had been fixed for hearing on 3rd October 2014 and they had absolutely no idea that the matter was in fact scheduled for hearing on 6th October 2014.

g. Failure to attend court on 6th October 2014 constituted an inadvertent and innocent failure on the part of the Defendant's Advocate such that his mistake in advising the Defendant's witness of the wrong hearing date resulting in this Honourable court's orders marking the Defence case as closed constitutes a mistake on the part of an advocate which ought not to be visited on the innocent litigant, the Defendant herein.

h. The Defendant has credible evidence in support of its defence and craves for an opportunity to present its witness for examination before this Honourable court.

i. If the application herein is not heard on priority basis the orders sought granted the Defendant stands to suffer irreparable loss and prejudice, to wit:-

i. This Honourable court will proceed to deliver its Judgement in exclusion of the Defendant's witness evidence, the resultant being the condemnation of the Defendant without being given an opportunity to fully ventilate its case;

ii. This Honourable court will in delivering its judgment almost invariably, and as guided by case law, draw negative inference as to the failure by the Defendant to call its witness who had been requested to attend for cross-examination by the Plaintiff. This inference will be drawn despite the fact that the failure to call the said witness was wholly inadvertent.

j. That this application has been made in good faith and without unreasonable delay.

k. That no prejudice will be occasioned on any party to this suit if the Defendant's prayers are granted as this would open the way for this suit to be heard and determined on merits.

5. The application is opposed by the Plaintiff/Respondent vide **Notice of Grounds of Opposition** filed in court on **17th October 2014**. In those grounds of opposition, the Respondent argues that the jurisdiction of the court under Order 45 Rule 1 of the Civil Procedure Rules, 2010 is circumscribed by the grounds set out under the said Order. The grounds of review under Order 45 rule 1 is not the mistake/inadvertence or mis-step of an advocate. The mistake of the Applicant's Advocate highlighted throughout the application is not a sufficient ground warranting the review of the Orders made by this court on 06/10/2014. That the Applicant has failed to meet the threshold set by Order 45 Rule 1 of the Civil Procedure Rules under which it has brought its application. The application is not only incompetent but untenable in law and should be dismissed with costs.

6. The brief history of the application is that the hearing of this suit has been proceeding before this court since March 2012. The hearing is about to be concluded, with the Defendant's first witness having concluded his testimony. The Defendant sought witness summons to issue to its second witness a Mr. Simon Njuguna Mbogo. On 17th July 2014, this court allowed the application for the second witness summons and listed the further hearing of the suit for 6th October 2014. On 6th October 2007 neither the Defendant's Counsel for the said witness came to court, and upon application by M/s Gacheche Njoki for the Plaintiff the court was satisfied that no explanation were provided of the Defendant's absence, and given further negative history about that witness in regard to attending court, and a third time failure by the Defendant to procure that witness, the court directed that the Defendant be deemed to have closed their case, and parties were directed to file submissions. The directions to file submission and closing out the Defendant's final witness is what the Defendant herein now challenges through this application.

7. I have carefully considered the application and opposition to it. I have also considered the affidavit in support sworn by Mr. George Muchiri who is the Defendant's advocate. I am satisfied that Mr. Muchiri is honest in his submission that he was genuinely mistaken and that he recorded in his diary the hearing date as being 3rd October 2014 instead of 6th October 2014. I have also considered the grounds upon which the Respondent opposes the application. While I agree with M/s Gacheche that the application does not satisfy the threshold set by Order 45 Rule 1, of the Civil Procedure Rules under which it is brought, three issues persuade me to allow the application.

8. The first one, which I have already stated, is that I believe the testimony of the Applicant that they misrecorded the hearing date in their diary as 3rd October 2014 and not 6th October 2014, and the said mis recording was the cause of the Applicant on its advocate failure to attend the court on 6th October 2014.

9. The second issue is that the court is required to be extremely cautious in determining matters purely on technicalities of procedure, and that as far as it is possible parties should be given their day in court. These rights are constitutional and are found under Articles 50 of the Constitution which affords every litigant a fair chance of being heard, and Article 159 (2) (d) which requires courts to administer justice without, as far as is possible, relying exclusively to procedural technicalities.

10. Thirdly, and also most important for me, there is need for this matter to move forward. This matter has been in court since the year 2002 when it was filed. The hearing started before me on 14th March 2012 and various witnesses have testified from both sides. To exclude the Defendant's final witness, while the Defendants is keen to produce that witness would not only be unfair at this stage of proceedings, but it may also unnecessarily prolong these proceedings if the dissatisfied party (the Defendant) decides to appeal any Ruling which is not in its favour. I am aware that even the Plaintiff can appeal an unfavourable Ruling, but that would be the Plaintiff unnecessarily prolonging its own case which is almost ending. In the interest of procedural justice and fair play, I will allow the application.

11. In the upshot, the Defendant's application dated 10th October 2014 is allowed. Costs for the same assessed at Kshs.15,000/= shall be for

the Plaintiff/Respondent to be paid within 7 (seven) days from today.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for the Plaintiff/Respondent

Muchiri for the Defendant/Applicant

Teresia – Court Clerk