REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 621 of 2000

IN THE MATTER OF APPLICATION BY:

1. **SAMUEL MUCHIRI W'NJUGUNA**
2. **NGUGI NJOROGE**
3. **JOSEPH KARIUKI MUTUA**
4. **SAMUEL MURIMI KINENE**
5. **AYUB ABUGI**
6. **JAMES KIMUNUA MIANO**
7. **GETRUDE WAIRIMU MURUIKI**

AND

IN THE MATTER OF THE MINISTER FOR AGRICULTURE

AND

IN THE MATTER OF THE TEA ACT (ELECTIONS) REGULATIONS 2000

AND

IN THE MATTER OF THE TEA (ELECTIONS) REGULATIONS 2000

AND

45 (KTDA MANAGED) TEA FACTORY COMPANIES.....1ST INTERESTED PARTIES

TEA BOARD OF KENYA.....2ND INTERESTED PARTY/APPLICANT

THE MINISTER FOR AGRICULTURE.....3RD INTERESTED PARTY

RULING

1. The present application is dated 13th December, 2012 and it seeks primarily to set aside the orders made on 13th December 2012 dismissing the applicant's application dated 9th July 2012 for non-attendance.

2. The Motion is based on the following grounds:

a. The application seeks to set aside the order issued on the 13th December 2012 by Githua J dismissing for non- attendance the 3rd interested Party/Applicant's application dated 9th July 2012 for the apportionment of party and party costs and reinstate the same back to hearing on the merits.

b.The Counsel for the applicant was not in court at 11.00 am when the matter was called out for hearing for reasons that he was engaged and help up before other courts in the same high court building.

c. It is for the reasons above that when the matter was called out at 9.00 am for time allocation, the time for hearing of the application for apportionment of costs was set at 11.00 am.

d. The Ex-parte Applicants/Decree holders had indicated in their Grounds of Objection dated and filed on the 16th July 2012 that they will not oppose the application for appointment of costs.

e. The dismissal for non-attendance is therefore contrary to Order 12 Rule 3(2) of the Civil Procedure Rules in so far as the Decree-holder had no objection to the application for apportionment of costs.

f. The 1st interested party, the Minister for Agriculture also did not oppose the application for apportionment of costs.

g. With the ex-parte dismissal, the execution of the party and party shall proceed as against the Applicant who will be compelled to bear a higher amount of costs in that the party and party costs will be apportioned to three (3) interested parties and not forty seven (47) interested parties as it is supposed to be the 3rd interested party is to pay; from Kshs. 131,096.80 to a whooping Kshs. 2,053,840.

h. It is in the interest of justice and the dignity of this court for this application to be certified urgent and the ex-parte order issued to stay any execution of costs as against the Applicant pending the hearing of this application that if successful will ensure that there is a determination on the merits of the correct apportionment to all the Forty Seven (47) parties.

3. The application is supported by an affidavit sworn by **Tim Agufana Liko**, the applicant's advocate on 13th December 2012 in which the grounds forming the basis of the application were reiterated.

4. In opposition to the application, the respondents filed grounds of opposition.

5. In his submissions in support of the application **Mr Liko**, learned counsel for the applicant contended that since the decree holder in the grounds of opposition filed in respect of the application sought to be reinstated did not oppose the prayer for apportionment of the costs but only opposed the prayer for stay. In counsel's view, the application ought not to have been dismissed in light of the provisions of Order 12 rule 3(2) of the Civil Procedure Rules. Since the application for reinstatement was made the same day the earlier application was dismissed, counsel contends that there is no delay. His failure to attend the Court, it is submitted was due to the fact that he was before another High Court within the premises. Unless the dismissed application is reinstated, the applicant contends that it will be burdened with the payment of costs which ought to be paid by other parties who have not opposed the orders for apportionment of the costs. It was further submitted that since the orders sought in the dismissed application could only be available after the determination of the references, the applicant cannot be blamed for the delay that occurred prior to the determination of the said references which references were in the applicant's view legitimate.

6. On his part Mr. Aketch, learned counsel for the ex parte applicant submitted that since the date was fixed by consent of counsel the engagement of counsel for the applicant in other courts was not warranted and does not arise. He, however, urged the Court, in the event that the Court is minded to reinstate the

dismissed application to do so on terms that the entire costs be deposited in a joint account in the names of counsel for the parties since there will be no prejudice and that the applicant be penalised in costs of the present application as well as the dismissed application.

7. **Mr Riunga**, was contented to rely on the grounds of opposition on record.

8. In his rejoinder, **Mr Liko** stated that to order the applicant to deposit the entire costs would amount to burdening it with the costs which ought to be shouldered by other parties. He was however prepared to provide security for the payment of the said costs.

9. The court, no doubt has inherent powers to make such orders as may be necessary for the ends of justice. Inherent power, it must be stressed is not donated by Section 3A of the Civil Procedure Act.In **Ryan Investments Ltd & Another vs. The United States of America[1970] EA 675** it was held that section 3A of the Civil Procedure Act is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.

10. Dealing with inherent powers of the Court it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.

11. The applicant's advocate has stated on oath that when the matter was ripe for hearing he was before another Court of concurrent jurisdiction. This contention has not been seriously contested since the respondents have not sworn affidavits to the contrary. The argument that the applicant ought not to have fixed other cases on the same day is not realistic. Advocates do not choose before which Judge their matters are to be fixed so that they can arrange to be before a particular judge in respect of all their matters. It is true that where an advocate finds himself in a situation where his matters are fixed before different courts he should get a colleague to hold his brief and inform the court of the fact. However, the mere fact that this was not done does not necessarily bar the Court from making orders that are meant to ensure that the ends of justice are met. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

12. In considering whether or not to set aside an order of dismissal in default a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the order, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an *inter partes* hearing, than the judge who acts *ex parte*. Moreover the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in circumstances as disclosed the applicant's case is not frivolous and ought to be heard on merits. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the *ex parte*

judgement. See **Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647.**

13. The Court however recognises that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. The broad approach is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline.

14. Whereas I agree with the respondents that the effect of reinstating the dismissed application would inevitably lead to some delay it is my view that since no serious prejudice is likely to be occasioned to the respondents who had not manifested a clear intention to oppose the application the delay that is likely to be occasioned thereby must be weighed against the denial of an opportunity to the defendant to put forward its case on merits. That delay, in my considered view, may be compensated by an award of costs. It has been said that seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

15. Taking into account all the circumstances of this case I am satisfied that the justice of the case mandates that the application be heard on merits since a court of justice, it has been held, has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya**

Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.

16. In the result the order that commends itself to me is that the dated 13th December, 2012 is allowed with the result that the application dated 9th July 2012 is reinstated to hearing.

17. In setting aside, the Court is however, required to do so on terms that are just. The terms in question must not only be just to the defendant but to the plaintiff as well. The condition that commends itself to me is that the applicant deposits a sum of Kshs 1,000,000.00 in a joint interest earning account in the names of the applicant herein and the decree holder within 21 days.

G V ODUNGA
JUDGE

Dated and Delivered at Nairobi this 8th day of February 2013.

J B HAVELOCK
JUDGE

Delivered in the presence of: