



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
CIVIL SUIT ELC NO. 455 OF 2012

CHARLES M. KAHARUKAPLAINTIFF

-VERSUS-

WILSON MUGO MWANGI.....DEFENDANT

RULING

The plaintiff by Notice of Motion dated 29th January, 2013 seeks that he court sets aside the order of 4th December, 2012 dismissing the plaintiff's application dated 21st September, 2012 for want of prosecution and to reinstate the same for hearing on merit. The applicant further seeks the extension of the interim orders of 31st July, 2012.

The application is based on the ground that the applicant's Advocate, Mr. Eshuchi in advertently recorded in his diary that the application was to be heard on 5th December, 2012 instead of 4th December, 2012 instead of 4th December, 2012 when it was actually scheduled to be heard and hence the reason for his non attendance on the date of hearing. The advocate has sworn an affidavit in support of the application sworn on 29th January, 2013 explaining that his non attendance for the hearing on 4th December 2012 was because of a genuine mistake and in his filed submissions urges the court not to visit the mistake of counsel on the client. The applicant further contends that no injustice will be occasioned to the respondents if the dismissed application is reinstated to be heard on merits.

The Defendant for his part has filed a replying affidavit sworn on 13th February, 2013 in opposition to the plaintiff application. Under paragraph 3 of the replying affidavit the Defendant states that Hon. Lady Justice Ogo on 27th November, 2012 fixed the applications dated 21st September, 2012 and 27th July, 2012 for hearing on 4th December, 2012. I have reviewed the court record and the following appears to be the position:-

- i. Plaintiff's application for injunction dated 27th July, 2012 in regard to which an interim ex parte injunction was granted on 30th July, 2012 as at 27th November, 2012 was pending hearing interpartes.
- ii. Defendant's preliminary objection dated 27th August 2012 as at 27th November, 2012 was pending hearing.
- iii. Plaintiff's application dated 21st September, 2012 seeking leave to enjoin 2nd & 3rd Defendants equally was pending hearing.

iv. Plaintiff's further application dated 21st September, 2012 seeking the detention of Mr. Timothy Ndutha Mwangi and Mr. John Wanjohi for disobedience of the Order of injunction given on 31st July, 2012 was also pending hearing.

From the record when the parties appeared before Hon. Justice Ougo on 27th November, 2012 it is the 2 applications dated 21st September, 2012 that Hon. Justice Kimondo had on 24th October, 2012 fixed for hearing on that day. Consequently Honourable Justice Ougo directed that the application to enjoin parties dated 21st September, 2012 be heard on 4th December, 2012 when the matter was listed before me. Hence the application that the court would have dealt with on the day was the application to enjoin the 2 additional defendants to the suit and consequently the application dismissed for want of prosecution was the application by the plaintiff that sought to enjoin the new parties.

The application for contempt seeking to commit alleged contemnors to civil jail for alleged disobedience of the court's order made on 31st July, 2012 dated 21st September, 2012 from the record was not scheduled to be heard on 4th December, 2012 and neither was the application for injunction dated 27th July, 2012.

Without going to the merits of the applications for injunction and for contempt referred to above, the court has to be satisfied with the explanation given by the applicant for to exercise its discretion in favour of the applicant and reinstate the dismissed application that sought to enjoin additional parties to the suit.

The applicants Advocate Mr. Eshuchi has laboured to explain why he failed to attend the court on 4th December, 2012 which failure he attributed to his recording the wrong date being 5th December, 2012 in his diary. He states he attended the court on 5th December, 2012 when he found the matter was not listed. He has annexed a court attendance sheet he made on 27th November, 2012 marked "GE1" that shows he marked the next hearing date was to be on 5th December, 2012 instead of 4th December, 2012.

To err is human and I find nothing in the conduct of the Counsel to suggest his non-attendance of the court on 4th December, 2012 was deliberate. There is also the need and requirement of the courts to the extent possible to do justice to the parties who come before them. Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159(2) of the constitution enjoin the courts to administer substantive justice without undue regard to technicalities. Section 1A (1) of the Civil Procedure Act provides:-

"The overriding objective of this Act and the rules made hereunder is to facilitate the just expeditious proportionate and affordable resolution of the Civil disputes governed by the Act".

There is ample judicial authority to the effect that unless a party is shown to have contributed to the mistake, a party ought not to be punished for the mistake of his counsel.

(See GIRO COMMERCIAL BANK LTD VS. JASVINDER SINGH DHADIALLAH [2005] eKLR and SHAH VS. MBOGO & ANOTHER (1967) EA 116)

In the Giro Bank Case (supra) Hon. Kasango while allowing an application to set aside stated:-

"I have gone through the record of this case carefully. I have not found evidence of conduct of the plaintiff or its counsel to suggest that they deliberately sought to obstruct or delay the course of justice. The explanation for counsel's non attendance at the hearing of the plaintiff's application of 17th August 2005 cannot be said to be inexcusable.

Such mistakes do occur in advocate's offices now and again. In this case once the mistake was detected remedial action was taken by filing this application".

I have equally considered the application before me and I do not consider that the counsel's mistake is inexcusable and there is nothing in the conduct of the plaintiff to suggest there was a scheme to frustrate

the ends of justice. I further do not consider that the defendant stands to suffer any injustice if the plaintiff's application is reinstated. The application seeks to enjoin new parties who it is considered are necessary parties for the just determination of the matter.

In the premises I will allow the plaintiff's application dated 29th January, 2013 and set aside my order dismissing the plaintiff's application dated 21st September, 2012 seeking to enjoin the City Council of Nairobi and Timothy Ndutha Mwangi as the 2nd and 3rd Defendants respectively. As the 2nd and 3rd Defendants are yet to become parties to the suit I will extend the interim order of 31st July, 2012 as against the 1st Defendant/Respondent.

The application of 21st September, 2012 to enjoin new parties is ordered fixed for hearing on 10th July, 2013.

The plaintiff to pay the costs of the instant application to the Defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant