



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 194 OF 2012

GOLBO CONSTRUCTION CO. LTD. PLAINTIFF/RESPONDENT

VERSUS

NATIONAL WATER CONSERVATION

& PIPELINE CORPORATION DEFENDANT/APPLICANT

MOHAMOUD IBRAHIM INTERESTED PARTY/RESPONDENT

R U L I N G

1. Before the Court is an application by the Defendant/Applicant dated 9th May, 2013, brought pursuant to the provisions of **Order 22 Rule 52** and **Order 51** of the *Civil Procedure Rules, Sections 3, 3A and 63(e)* of the *Civil Procedure Act*. The Applicant seeks for the reinstatement of the orders for stay of execution issued by Mutava, J on 4th July, 2012. The application is based on the grounds as set out in the application that the Court issued an inter-parties hearing date on 19th January, 2013 which fell on a Saturday. The Applicant attempted to file an application on 18th January, 2013 for a further hearing date for its application dated 3rd July, 2012 to set aside the judgment entered on 16th May, 2012 but the Court file could not be traced. It maintained that it would suffer substantial loss should the said orders not be reinstated.
2. The application is supported by the Affidavit of **Alfred Ochieng'** sworn on even date. The deponent avers that the Court issued an inter-parties hearing date for 19th January, 2013 but in relation to which no extension of interim orders was issued. Further, the deponent contends that despite trying to file an application on 18th January, 2013 for the extension of the same so as to get a further hearing date, the Court file could not be traced and subsequently the orders issued lapsed. It is the deponent's averments that he had made efforts to trace the file but to no avail up until 8th May, 2013, when the Applicant was served with a Proclamation of Attachment of Moveable Property by the Plaintiff/Respondent dated 8th May, 2013. It is the deponent's contention that the application dated 3rd July, 2013 would be rendered nugatory and that the parties should be allowed to canvass the said application as the Respondents would not suffer any prejudice should the orders issued by reinstated.
3. The application is opposed. In the Affidavit in reply sworn on 21st May, 2013 by **Adan Intalo Ali**,

- the Director of the Plaintiff, it is contended that indeed there was an application dated 3rd July, 2012 which the Applicant had failed to/or make any attempt to prosecute, being over one year since it was filed. It is the Respondent's averment that the Applicant has never made any attempt to invite it to fix a date for the hearing of the application, neither has it tendered any evidence to show to the Court that the Court file allegedly went missing or misplaced.
4. For the determination of the Court therefore, is whether the application filed on 3rd July, 2012 has merit and whether the orders for stay issued therefrom, should be reinstated. It is the Applicant's plea that the date set for the hearing of the matter fell on a Saturday i.e. 19th January, 2013, to which he had attempted to file an application for a further date on 18th January, 2013 but to no avail as the file was allegedly missing from the Registry. However, from the Court records, there is no evidence that the Applicant attempted to make any effort to locate the file, or to show that fervent attempts, as it alleges, had been made to locate the file. The Applicant only seems to have been roused out of its indolence by the Respondent's actions in applying for warrants of attachments and serving upon the Applicant, the Proclamation of Attachment dated 8th May, 2013.
 5. The Orders issued by the Court on 4th July, 2012 by Mutava, J were to facilitate the stay of the execution of the judgment entered on 16th May, 2012. From the Court records, the stay orders were extended quite a number of times: on 16th July, 2012, 19th September, 2012, 15th October, 2012, 12th November, 2012 and 5th December, 2012. From the record on the last date, it is evident that Mr. Muchiki was present on behalf of Mr. Omwenga for the Plaintiff and Mr. Ochieng' for the Defendant and, therefore, the date of 19th January, 2013 was taken in the presence of both parties. It would have been prudent for the advocates present to inform the Court that it had erroneously given a weekend date but, for whatever reason, none of the parties took cognizance of the issue. It is only when the Applicant noticed this anomaly that it sought to file an application, as it alleges on 18th January, 2013, to seek a further date for the hearing of the application dated 3rd July, 2012. No evidence has been placed before this Court to show that the Applicant tried to file its application or that the file was missing.
 6. The duration between the filing of the application dated 3rd July, 2012 and the present application for reinstatement dated 9th May, 2013 is almost a year. The Applicant has not given any cogent reason as to why the delay. It has taken almost a year to prosecute the application. This delay is inordinate, unexplained and allowing the reinstatement of the Orders issued on 4th July, 2012 would not only be prejudicial to the Respondent but also deny it the opportunity of enjoying the fruits of its judgment. In the case of **Tema Home Cares Co. Ltd v Dismas Opande Ogot & 3 Others** [2005] eKLR, Osiemo J on the Court's exercise of its discretion to do justice held *inter alia*:

“The main concern of the court in the exercise of its discretion is to do justice between the parties. (Patel v E.A Cargo Handling Services Ltd [1975] E.A. 75). The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. (Shah v Mbogo [1967] E.A. 116). In exercising the discretion, the court should consider, among other things, the facts and circumstances both prior and subsequent, and all the respective parties. The question as to whether the affected party can reasonably be compensated for by costs for any delay occasioned by setting aside the judgment should be considered and it should be always remembered that to deny a person a hearing should be the last resort of the Court.”

7. In my opinion, the inordinate delay by the Applicant has not been explained and therefore, inexcusable. The stay Orders issued by the Court were to subsist pending the hearing and determination of the application dated 3rd July, 2012. These discretionary orders that had been issued in favour of the applicant has been abused by it and the Court has been given no sufficient

and explicable reason as to why the same should be reinstated. The application dated 9th May 2013 stands dismissed with costs to the Respondent.

DATED and delivered at Nairobi this 31st day of July 2013.

J. B. HAVELOCK

JUDGE