



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 46 OF 2008**

**BROWN O. AMUKHUMA.....APPELLANT**

**VERSUS**

**VALLEY BAKERY LTD.....RESPONDENT**

**RULING**

By the Chamber Summons dated 30/6/2010, the respondent/applicant, Valley Bakery Ltd seeks the following orders; that the court do set aside the ex-parte proceedings of 2/7/2009 and all its consequential orders; that the court do set aside its order of 2/7/2009 dismissing the application dated 23/4/2013 and reinstate the same for hearing. The application is premised on grounds found in the body of the application and an affidavit sworn by Paul Murimi Kiongo, the counsel for the applicant. He averred that the respondent/applicant's case was dismissed on 2/4/2009, following which the appellant filed an appeal on 9/4/2009; that though the appellant has filed an appeal, he has not paid the applicant's costs and considering the appellant's economic status, the respondent is apprehensive that he might not be able to pay the respondent's costs in the event the appeal is unsuccessful. It is due to this apprehension of the appellants inability to pay costs that the respondent filed the application dated 23/4/2009 which came up for hearing on 2/7/09 but was dismissed for non appearance by the respondent's counsel. Counsel deponed that failure by counsel to attend court on the said date was due to inadvertence on his part and his office which diarized the matter on 2/7/2009 and 12/7/09. The counsel annexed a copy of the diary for the two dates. It was the respondent's contention that the application that was dismissed raises pertinent issues and if reinstated, the appellant will not suffer any prejudice.

The application was opposed and the appellant's counsel, Mr. Githiru, filed a replying affidavit dated 26/5/2011. According to Mr. Githiru, the application is an afterthought, premature, defective, bad in law, frivolous and an abuse of the court process. He deponed that he was served with the application dated 23/4/09 on 23/6/09, he filed grounds of opposition on 25/6/09 and served on the respondents. His associate attended court on 2/7/09 but there was no appearance and the applicant was dismissed when the applicant failed to attend. Mr. Githiru disputed the allegation of wrong diarisation of the application and that the respondent is merely fishing for dates that match to suit his allegation; that the respondent's counsel has not told the court the reason for his failure to attend court as required of him; that the respondent has filed an appeal and if the respondent wants to recover its costs, there is a laid down procedure; that there is no law that requires an appellant to demonstrate their financial ability before filing an appeal and lastly, that there is no application dated 23/4/03 that was dismissed and thus the order sought cannot be granted.

I have considered the rival arguments. I have noted prayer 3 of the Chamber Summons. There is no application on record dated 23/4/2003. As explained by counsel for the respondent, it may be a mere typographical error. The application that was dismissed was dated 23/4/09 and it is what is sought to be reinstated.

In the application dated 23/4/2009, the applicants were seeking an order that the appellant do furnish security for costs of the respondents based on the reasons that if the appeal did not succeed, the appellant may not be able to pay the respondent's costs in the lower court. The averments in the respondent's affidavit are that the respondent inadvertently failed to attend court due to alleged misdiarising of the hearing date in the diary. The application was dismissed on 2/7/2009 and from that date, the instant application was filed about a year later on 30/6/2010. If the respondents were serious about prosecuting their application, they should have moved with alacrity to have their application reinstated. The respondent has not offered any explanation as to why they filed this application to set aside the order of

2/7/09 a year later. There is unexplained, inordinate delay and the respondents are guilty of laches.

I have seen the annexures of the diary that was allegedly misdiarized. It is clear that this application was properly diarized as coming up for hearing on 2/7/09. There is no explanation as to why counsel did not attend the court that day. The entry on 12/7/09 is questionable. It comes last on the list of the cases diarized on that date. One wonders whether it was added later. There is no good explanation why the advocate failed to attend court on 2/7/09.

This appeal was filed in 2008. Not much has taken place since. The appeal is not yet filed. The application if granted would have the effect of delaying this matter further. I find no merit in the application for reasons given above and it is hereby dismissed with costs to the appellant. It seems that the appellant has not done much to prepare this appeal for hearing. I direct that the appellant do move speedily and have this appeal ready for admission and hearing within the next 6 months, in default the court should have it dismissed.

**DATED and DELIVERED this 19<sup>th</sup> day of July, 2013.**

**R.P.V. WENDOHO**

**JUDGE**

**PRESENT:**

Mr. Odhiambo holding brief for Mr. Tombe for the applicant

Ms Mukenga holding brief for Mr. Githiru for the respondentt

Kennedy – Court Clerk