



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JR. MISC. CIVIL. APPLICATION NO.170 OF 2011

IN THE MATTER OF THE INDUSTRIAL PROPERTY

BETWEEN

REPUBLICAPPLICANT

AND

THE INDUSTRIAL PROPERTY TRIBUNAL.....RESPONDENT

EX-PARTE

SANITAM SERVICES (E.A.) LTD.

RULING

By a Notice of Motion dated 26th October 2011 and filed in court on even date, the Exparte Applicant has moved this court seeking *inter alia* to set aside this court's order issued on 25th October 2011 dismissing the Exparte Applicant's application by way of Notice of Motion dated 15th August 2011 for want of prosecution and praying that the same be reinstated for hearing. The Exparte Applicant (*hereinafter referred to as the Applicant*) also prays that costs of the application be provided for. The other prayers in the application are already spent and there is no need to enumerate them in this ruling.

The application is supported by an affidavit sworn by counsel for the applicant, Richard Mutiso on 26th October 2011 and the annexure thereto.

In the supporting affidavit, Mr. Mutiso has given an explanation why he was not in court on 25th October, 2011 when the exparte applicant's application dated 15th August, 2011 was called out for hearing. He has deponed that when he checked on the High Court's Electronic Cause list for 25th October 2011 at about 8 a.m., he found that though the case was listed before this court, there was a notice preceding matters listed before this court indicating that the said matters will be mentioned before J. Majanja at 9 a.m. in Court 3. That following directions in the said cause list, he proceeded to J. Manjanja's court and waited for the matter to be reached in vain and on enquiry

J. Majanja informed him that this court was sitting and he was not mentioning any of the matters listed before this court. This is when he came to this court and found that his application had already been

dismissed for want of prosecution. He annexed a copy of the electronic cause list to his supporting affidavit marked RMMI.

The application is opposed by both the Respondent and the Interested party though only the Interested party filed a replying affidavit sworn by its advocate Mr. Muli Mutua.

In the said replying affidavit, Mr. Mutua did not contravert the reasons given by Mr. Mutiso for his absence in court on time on 25th October 2011 but chose to question Mr. Mutiso's wisdom in not comparing the electronic cause list against the hard copy issued by the High Court for its accuracy. He concluded by deponing that the instant application is an abuse of the court process and ought to be dismissed with costs.

Both the Applicant and the Interested party filed written submissions which they highlighted before the court on 7th December 2011 which I have carefully considered. The Respondent associated itself fully with the submissions made by the Interested party.

Having considered the application, the depositions in affidavits sworn herein and submissions by advocates for the Applicant and the Interested party, I find that Mr. Mutiso for the Applicant has given a reasonable and plausible explanation why he was not in court on 25th October 2011 in good time before his matter was reached and dismissed for want of prosecution. The court record shows that Mr. Mutiso appeared in court 10 minutes after the order of dismissal was made and in the presence of Mr. Mbita for the Respondent gave a similar account as that contained in the supporting affidavit explaining that his late attendance in court was caused by an anomaly in the electronic cause list which made him proceed to Court No.3 presided over by J. Majanja instead of coming straight to this court. A copy of the downloaded cause list is exhibited showing the notice referring litigants of matters listed before this court to Court No.3 and though its authenticity was challenged by the Interested party, there is no proof either that the said copy of the electronic cause list for 25th October 2011 did not emanate from the internet.

Considering that Mr. Mutiso personally attended the court that very morning a short while after the dismissal orders were made, I find his explanation both credible and satisfactory. As neither Mr. Mutiso nor his client was responsible for posting the cause list in the internet, I find that none of them can be faulted for the misdirection to litigants in the electronic cause list of 25th October 2011 which was the direct cause for Mr. Mutiso's late attendance in court on that day.

As was held in the case of Shah –vs Mbogo & Another [1967] E.A. 116 the Court's discretion to set aside *ex parte* judgments and by extension other court orders is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person who has deliberately sought to obstruct or delay the course of justice.

In the instant case, the error on the electronic cause list which appears on the face of the copy exhibited in court was the direct cause of Mr. Mutiso's late attendance in court and subsequent orders for dismissal of the applicant's application dated 15th August, 2011 and the applicant's entire case.

Nothing has been exhibited before this court to show that either the applicant or its counsel in not attending court in good time intended to delay or obstruct the course of justice.

In the circumstances and in the interest of justice, I will exercise my discretion in favour of the Applicant and allow the application dated 26th October, 2011.

Consequently, the application dated 15th August, 2011 is hereby reinstated for hearing and all other orders made on 25th October, 2011 are hereby vacated.

Let parties now take a hearing date for the application dated 15th August 2011.

DATED and DELIVERED at Nairobi this 7th day of February, 2011

C. W. GITHUA
JUDGE

Court Clerk - Florence

N/A by all parties though Ruling date was fixed in their presence