



IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPL. NO. 401 OF 2010

GATEWAY INSURANCE CO. LTD.....APPLICANT

VERSUS

**SIMON MBUTHIA (Suing as the legal representative
of the estate of Victory Naomi Wanjiku).....RESPONDENT**

RULING

The Notice of Motion dated 14/6/2011 is brought by the plaintiff/applicant seeking the following orders:-

- 2. That pending the hearing of this application inter partes, this Honourable Court be pleased to order stay of execution by way of release of the money already deposited herein by the applicant.**
- 3. That the court be pleased to set aside its orders dated 13/6/2011 dismissing the applicant's Notice of motion dated 4/10/2010.**
- 4. That upon the grant of prayer 2, the court be pleased to reinstate the applicant's notice of motion dated 4/10/2011 for hearing and determination on its merit.**

The Notice of Motion is supported by grounds found in the body of the application and the affidavit of Musyoki Kioko, an advocate from the firm of M. N. Kamau, who are the counsel on record for the applicant.

The application dated 4/10/2010 was due for highlighting of submissions on 13/6/2011 but counsel did not attend. Mr. Rabera, counsel for the respondent applied for the dismissal of the application and discharge of interim orders which the court granted. Counsel avers that on the 13/6/2011, he left Nairobi about 6.30 a.m. by public transport but the vehicle was stopped by police between Naivasha and Gilgil and arrested. That forced him to look for alternative means as a result of which he arrived in Nakuru late. He tried in vain to get in touch with the office of the respondent's counsel. He arrived in court at 10.20 a.m. but by then, the application had been dismissed. He avers that the omission in failing to attend court in time was not intentional and is regretted and should not be visited on his client; That the applicant was desirous of prosecuting the application as both parties had filed submissions and were ready to highlight issues. The applicant had complied with all the conditions that the court had set and is still ready to abide by any conditions that the court may set because if the application is not reinstated, the applicant stands to suffer injustice.

The application was opposed and the respondent swore a replying affidavit dated 30/6/2011. He avers that the application is made in bad faith and intended to delay the realization of the respondent's fruits of the judgment in CMCC No. 635/09 as the applicant has never been ready to proceed since the application was filed under certificate of urgency on 5/10/2010. That the application was called out about 11.00 a.m.

and dismissed for non attendance; That he filed suit against the applicant' insured in CMCC 783/2004 where judgment was rendered in his favour on 7/8/2008. A declaratory suit was filed in CMCC 635/09 and judgment was in his favour and soon after the judgment, the applicant filed an application dated 29/9/2010 but it was dismissed. The applicant then filed the application dated 4/10/2010 and that is why the respondent views the applicant's conduct as an intention to frustrate the respondent from enjoying the fruits of his judgment.

The order sought to be set aside was made on 13/6/2011 and the applicant did move with alacrity and filed this Notice of Motion seeking to set aside the order of the court and appeared before this court on 16/6/2011 under certificate of urgency.

The application dated 4/10/2010 was filed on 5/10/2010. The court directed that it be heard inter partes on 21/10/2010. On 21/10/2010, the respondent's counsel was said to be indisposed and the court adjourned the matter to 14/12/2010. On that date, Mr. Rabera, counsel for the respondent asked for adjournment to enable the parties to file submissions. It was adjourned to 2/3/2011. Court 3 in which it was scheduled to be heard was not sitting. Mr. Njomo, counsel for the applicant was present but not the respondent's counsel. It was put off to 4/4/2011. By then, the respondent had not yet filed submissions and that is when the court allowed the respondent more time to file submissions for hearing of the application on 13/6/2011. The record speaks for itself. The applicants were always ready to prosecute the application. On two occasions, the respondents were not ready to proceed, whilst the applicants were. There is no evidence that the applicants have been delaying in having the application dated 4/10/2010 prosecuted.

The reasons that have been given by the applicant's counsel for his failure to attend court on 13/6/2011 when the adverse orders were made squarely fall on the counsel. It is not disputed that the counsel arrived in Nakuru though he did so late. The client had no role to play in counsel's lateness. The court is being called upon to exercise its discretion on whether or not to set aside its orders. In **SHAH V MBOGO & ANOTHER (1967) CA 116**, the court laid down some of the guiding principles on when ex-parte orders can be set aside or not to set aside ex-parte orders. The court said:-

“The discretion of the court to set aside an ex-parte judgment is wide and flexible and is exercised upon terms that are just. 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 omission or otherwise, to obstruct the course of justice.”

In the instant case, I find no shred of evidence that the applicant is deliberately trying to avoid or obstruct the course of justice. It is evident that the applicant has been keen to prosecute the application and the mistake of counsel should not be visited on the applicant. The prejudice that may be suffered by the respondent can be compensated for by way of costs. In the end, I hereby allow the application dated 14/6/2011 with the effect that, the dismissal order of 13/6/2011 is set aside, and the Notice of Motion dated 4/10/2010 is reinstated. The applicant to pay the respondent thrown away costs. The Notice of Motion dated 4/10/2010 be set down for hearing forthwith and the applicant will also bear costs of this application.

DATED and DELIVERED this 30th day of September, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Nasinyu for the applicant.
Mr. Rabera for the respondent.
Kenned - Court Clerk.