



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL CASE 587 OF 2005

IAN THOMAS FERNANDES.....PLAINTIFF

VERSUS

THE STANDARD NEWSPAPER GROUP LTD & 2 OTHERS.....DEFENDANTS

RULING

1. The application before court is the defendant's chamber summons dated 7.11.2008. The application which is brought under sections 3A and 63(e) of the Civil Procedure Act, Order IXB Rule 8 of the Civil Procedure Rules and all other enabling provisions of the law seek orders **THAT:-**

1. ***This application be certified as urgent and service thereof be dispensed with in the first instance;***
2. ***Pending the hearing and determination of this application inter partes, there be a stay of proceedings vis-à-vis the plaintiff's Notice of Motion dated 13th June 2008;***
3. ***This Honourable Court be pleased to set aside the orders issued on 7th November, 2008 dismissing the defendants' application dated 31st October, 2008 for non-attendance and/or want of prosecution.***
4. ***Upon the grant of prayer number 3 above, the application dated 7th November, 2008 be reinstated for hearing on a priority basis.***
5. ***The costs hereof to (sic) abide in the cause.***

2. The application is premised on 7 (seven) grounds on the face thereof, namely that:

- (i) **The defendants' Notice of Motion dated 31st October 2008 was dismissed with costs on 7th November, 2008 due to non-attendance by counsel for the defendants/applicants.**
- (ii) **The defendants' counsel arrived in court after the said dismissal and indicated to the court the reasons for his delayed arrival;**

- (iii) The defendants' counsel was prevented by sufficient cause from being present in court at the time the application was called out for hearing and the same was not intentional;**
- (iv) Counsel for the applicant was well prepared for the hearing and, as no papers in reply to the said application had been filed and/or served upon him, the said application may (sic) have proceeded ex parte in any event;**
- (v) The said counsel for the applicant mentioned the matter before the Trial Judge immediately on learning of the dismissal orders;**
- (vi) This application has been presented in good faith and without delay immediately upon learning of the said orders of dismissal;**
- (vii) No prejudice shall be occasioned upon the respondent as no papers in reply to the application have yet been filed and an award for costs will adequately compensate respondent for any inconvenience caused by this application.**

3. The application is also supported by the sworn affidavit of **Elias Masika**, advocate, dated 7.11.2008. The deponent acknowledges that his absence from court on the morning of 7.11.2008 led to the dismissal of the applicants' application dated 31.10.2008. He explains the absence by saying that he had to take his daughter to hospital after she developed a sudden fever and as a result got delayed by the heavy traffic jam in and around Nairobi. The deponent says that when he finally arrived at the court, he appeared before the court for a mention of the matter and brought his predicament before the court. He says that his absence from court on the morning in question was not deliberate, and that no prejudice will be occasioned to the respondents if the orders sought are granted.

4. The application is opposed. The plaintiff/respondent filed grounds of opposition dated 20.01.2009 and says:-

- 1. That the application herein is misconceived.**
- 2. That no grounds have been put forward to demonstrate that the application to set aside this (sic) orders of this Honourable Court made on the 7th day of November 2008 have been brought in good faith.**
- 3. That the conduct of the defendants and/or their advocates does in fact demonstrate that the application has been brought in bad faith.**
- 4. That the application has been brought to circumvent the course of justice.**
- 5. That application has been filed for the purposes of delay.**

5. The background to this application is that the plaintiff filed suit on 17.05.2005 alleging that his contract of employment with the defendants had been wrongfully and unlawfully terminated and as a result thereof, the plaintiff prayed for judgment against the defendant jointly and severally for:-

- (a) the sum of Kshs.20,148,860.00;**
- (b) Costs of this suit.**
- (c) Interest on (a) and (b) above at court rates and**
- (d) Any other or further relief as this Honourable Court may deem fit and just to grant.**

6. After close of pleadings the plaintiff filed his Notice of Motion application dated 13.06.2008 seeking an order for summary judgment in the sum of Kshs.20,148,860.00 costs of the suit and interest. On the

31.10.2008 the applicants filed their application by way of Notice of Motion seeking to be heard before the plaintiff's application dated 13.06.2008 and also sought the following other orders:-

- ***THAT this Honourable Court be pleased to enlarge time within which to file and serve written submissions as per this Honourable Court's orders dated 4.11.2008.***
- ***THAT this Honourable Court be pleased to enlarge the time within which to comply with leave of Court given to file and serve defendants amended defence and counterclaim.***

It is this application dated 31.10.2008 that was dismissed by the court on 7/11/2008 for non appearance on the part of the applicants. The dismissal order of 7/11/2008 is the mother of the instant application.

7. The parties prosecuted this instant application by way of written submissions. The defendants/applicants put forth the following grounds:-

- (a) ***That the applicants are acting in good faith in bringing this application and that this is clear from the fact that the contents of the supporting affidavit have not been controverted by the plaintiff/respondent.***
- (b) ***That granting the orders sought will not prejudice the plaintiff/respondent in any way; that in fact as at 7.11.2008 the plaintiff/respondent had not filed any replying affidavit or grounds of opposition to the applicant's application dated 31.08.2008 and that in any event the plaintiff/respondent has the liberty to file a replying affidavit or grounds of opposition thereto.***
- (c) ***That the absence of counsel for the defendants/applicants on the morning of 7.11.2008 was inadvertent and excusable.***

To support their arguments learned counsel for the defendants/applicants cited **Shah – vs – Mbogo & Another [1967] EA 116** where the court restated the principles to be applied when considering applications of this nature: Harris J said the following at p.123 of the judgment:-

“I have fully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside the judgment obtained ex parte. This discretion is intended so to be exercised 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.”

Learned counsel urged to grant the orders sought on the basis of the above principles.

8. The plaintiff/respondent contends that this Honourable Court can only set aside the dismissal orders of 7.11.2008 if the defendants/applicants can demonstrate that this application is brought in good faith and within reasonable time. The plaintiff further contends that the conduct of the defendants in this case shows clearly that the defendants/applicants are using delaying tactics to distract the plaintiff/respondent from prosecuting his application for summary judgment and that in the circumstances this application should not be allowed. The plaintiff/respondent also says that though the defendants have time and again indicated that they were willing to settle this case amicably, they have failed to honour their promise to do so. That in the circumstances, the court should not exercise its discretion in the defendant's favour. Learned counsel for the plaintiff/respondent also says that the reasons given by learned counsel for the defendants/applicants for failure to attend court on time on the due date are not solid because he could have asked another advocate from their firm to appear on his behalf and handle the matter. In brief, learned counsel for the plaintiff/respondent says that this application lacks merit and should be dismissed with costs to the plaintiff/respondent.

9. I have considered the application and the grounds upon which it is premised. I have also considered the grounds raised in opposition thereto. I have also considered the law which is to the effect that the exercise of the court's discretion to set aside a judgment or order obtained ex parte is intended to avoid

injustice or hardship resulting from accident or excusable mistake and that such discretion is not intended to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice. After considering all the above, I am of the view that the application is merited for the singular reason that learned counsel for the applicant was prevented from attending court on time due to sudden illness upon a young member of his family; a fact that has not been controverted by the Plaintiff/Respondent. I am also satisfied that the defendants/applicants filed this application timeously and without undue delay after the dismissal orders were made.

10. In the result, I allow the applicant's application dated 7.11.2008. I set aside the dismissal orders issued by this Honourable court on 7.11.2008 and reinstate the defendants' application dated 31.10.2008 for hearing. The said application shall be fixed for hearing on priority basis. The plaintiff/respondent shall have the costs of this application to be agreed or taxed and paid before the application dated 31.10.2008 is set down for hearing.

11. These are the orders of the court.

Dated and delivered at Nairobi this 15th day of May 2009.

R. N. SITATI

JUDGE

Delivered in the presence of:

..... for the Plaintiff

..... for the Defendant

Court clerk -