

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1267 of 2002

NYORO CONSTRUCTION CO. LTD.....PLAINTIFF

VERSUS

NYAYO TEA ZONES DEVELOPMENT CORPORATION...DEFENDANT

AND

SPARETECH CO. LTD.....OBJECTOR

RULING

On 13th November 2007, this court dismissed the plaintiff's suit with costs. The defendant's costs were taxed at Kshs.1,465,105.79. The defendant instructed Mssrs Gallant Auctioneers to attach the plaintiff's loose assets in satisfaction of the costs awarded to the defendant. The said auctioneers visited the premises of the plaintiff. It proclaimed several properties. On 24th July 2008, the objector, Sparetech Co. Ltd commenced objection proceedings challenging the said attachment. The objector lay claim on all the properties that were proclaimed by the auctioneer. On 28th July 2008, the defendant notified the said objector that it would proceed with the said attachment. The objector filed an application seeking the lifting of the said attachment on the grounds, *inter alia*, that the said properties were its properties and not the property of the plaintiff. The defendant filed a replying affidavit together with grounds of objection in opposition to the application. The application was listed for hearing on 25th March 2009 before this court. When the matter was called for hearing, a Mr. Mwangi holding brief for Mr. Wachira informed the court that Mr. Wachira was before another court but would be ready to proceed with the application. When he was notified by the court to proceed with the application, he informed the court that he had no instructions to proceed with the same. Miss Odari for the defendant, who was ready to proceed with the application, urged the court to dismiss the application with costs for want of prosecution. The court duly obliged and dismissed the said application with costs for want of prosecution.

On 27th March 2009, the objector applied to this court seeking the setting aside of the said order of dismissal. The application is supported by the affidavit of Simon Wachira, the advocate of the objector. In the said affidavit, he depones that he was prevented from attending court on the date fixed for the hearing of the application because he was before the Hon. Justice Osiemo for mention of a matter which was 3rd on the cause list. He deponed that due to delay in the mention of the matter, he was unable to attend court in time for hearing of the application. He concedes that he appeared before this court at 10.30 a.m after the application had been dismissed for want of prosecution. He urged the court to exercise its discretion in favour of the objector so that the objector's case may be heard on its merit. The defendant filed grounds in opposition to the application. It stated that the application to reinstate the dismissed application was fatally defective as it was predicated on the wrong provisions of the law. The defendant states that the application had no merit as the objector is undeserving of the orders in question on account of indolence.

At the hearing of the application, I heard the rival submissions made by Mr. Madala for the objector and by Mr. Munyu for the defendant. I have carefully considered the said submissions and the pleadings filed by the parties herein in support of their respective opposing positions. Has the objector made a case for exercise of discretion by this court to set aside the said order of dismissal? I do not think so. The

excuse given by counsel for the objector for its failure to attend court does not hold water. The said counsel knew or ought to have known to schedule his briefs so that he could make the necessary arrangements to be present in court during the hearing of the application which had been scheduled for hearing. It is not an acceptable excuse that the objector's counsel was held up in another court. There is no proof that the said advocate appeared before the Judge in question at the time he claims he did.

I have perused the proceedings of the court after the filing of the said application by the objector. At no time has Mr. Wachira personally appeared before this court to prosecute the application. Since the application was filed, one counsel or the other has held brief for the said Mr. Wachira. The excuse that he was in another court and therefore could not be present before this court during the hearing of the said application is therefore, in the circumstances untenable. Nothing would have been easier than for the said Mr. Wachira to give instructions, as he previously religiously did, to another advocate to hold his brief and prosecute the application. This court is of the view that the said counsel for the objector appears to be economical with the truth in explaining his failure to attend court on the date that the application was scheduled to be heard. This court has taken into account the previous proceedings that have taken place in the file after the defendant's costs were taxed and hold that it would be unfair to prejudice the defendant who has always been diligent in proceeding with the hearing of the application.

In the premises therefore, I find no merit with the objector's application dated 27th March 2009 and proceed to dismiss it with costs.

DATED AT NAIROBI THIS 26TH JUNE 2009

L. KIMARU

JUDGE