JOHN GACHIRI KARIUKI T/A GACHIRI KARIUKI ADV.....APPLICANT

VERSUS

BLUE SHIELD INSURANCE LTD.....RESPONDENT

R U L I N G

Blue Shield Insurance Co. Ltd, the applicant, by this application expressed to be brought under Order IXB rule 8 of the civil procedure rules and section 3A of the civil procedure Act and all other enabling provisions of the law seeks in the main an order that this court be pleased to set aside the orders of 16th February 2009 dismissing the application dated 7th January 2009 and that the said application be re-instated for hearing on merits. The applicant too prays for costs.

The grounds upon which the application was made are that the applicant's counsel arrived in court at 9.13 a.m. shortly after the matter had been dealt with, his failure to attend court in time was inadvertent and uncalculated. The application dated 7th January 2009 raises triable issues and the applicant should be afforded an opportunity to be heard on merits, no prejudice will be suffered by the respondent if the orders sought are granted that cannot be compensated with an award of costs and finally that the application had been made expeditiously and without undue delay.

In support of the application, two affidavits were sworn by **Paul Mugambi** and **David Kirimi** respectively. On his part, **Paul Mugambi** who is an advocate of this court and counsel for the applicant deponed that the application dated 7th January 2009 was fixed for hearing on 16th February 2009. On that date he arrived in court at about 9.13 a.m. only to find that the application had been dismissed for want of attendance. The reason why he arrived late was that he had been held up in the court registry in the process of filing the supplementary affidavit sworn by **David Karimi**. He had unfortunately not detailed some other advocate to stand in for him and apply that the matter be placed aside. Finally he deponed that **David Kirimi**, the head of legal department of the applicant had advised him that the parties in this suit had actually recorded a consent order in Mombasa High Court Misc. application number 11 of 2009 (O.S) to stay the execution of all fees enforcement suits until 3rd March 2009 when the substantive motion would be heard. In the event that execution was not stayed in this suit, it will greatly prejudice the applicant.

On his part, **David Kirimi** deponed that the respondent had not accounted for the monies paid to him on account and as such, it had not discharged its duty as to the client/advocate relationship under the law. That in some instances even where he had raised fee notes for legal work completed and fees paid, the respondent had proceeded to re-open the said matters and filed fresh bills for taxation. That the applicant had since filed in Mombasa High Court Misc. application No. 11 of 2009 (O.S) seeking orders that accounts be taken between the respondent and the applicant to provide a clear picture of the amount owed to the respondent and the same was scheduled for hearing on 3rd March 2009. In the said suit the court had issued temporary orders that there be stay of execution and court proceedings in all fees enforcement suits filed in Mombasa, Nairobi and Nyeri. In the premises it would be unjust for the respondent to be allowed to proceed with the execution levied in this matter, whereas it is claiming consolidated balance of these fees in the Mombasa suit.

John Gachiri Kariuki T/A Gachiri Kariuki & Co. Advocates, the respondent, responded to the application through an affidavit sworn by one, **Wachira Mahugu**, also an advocate of this court. He deponed that it was his considered view that the application lacked merit, was an abuse of the court process and calculated to delay the fruits of justice. The applicant had been ordered to file and serve the supplementary affidavit within five (5) days from the date of service of the replying affidavit. The applicant failed to comply with the said order. The applicant had no explanation why its counsel was not in court in good time. The application was a blatant abuse of the court's process as the applicant had filed other applications in Mombasa High Court seeking to stay the matters before this court. The applicant was therefore hell bent on frustrating the respondent from enjoying the fruits of his judgment.

In his oral submissions in support of the application before **Kasango J**, **Mr. Mugambi** merely reiterated and expounded on the grounds in support of the application as well as what had been deponed to in the two affidavits in support of the application. The only addition being that though he was meant to file a supplementary affidavit within 5 days, he had failed to do so because the deponent was away on leave.

In his response, **Mr. Mahugu** orally submitted that failure of counsel to be in court was not inadvertent as court commences its work at 9 a.m. Counsel should therefore have sought assistance from other advocates in court. The deponent of the supplementary affidavit resumed duty on 11th February 2009. That affidavit ought to have been sworn on 11th February 2009 therefor. In any event there was no evidence that the said deponent was on leave. Accordingly there was no good reason why it was not sworn in good time.

At the conclusion of the submissions, **Kasango J** was of the view that since the applicant's O.S filed in Mombasa could have some bearing on this matter and since the same was due for hearing on 3rd March 2009, she stood over the matter for mention 2nd March 2009. On that date parties confirmed that the application in Mombasa was due for hearing the following day. The matter was then stood over to 6th March 2009 for mention. Apparently the Mombasa matter did not proceed as scheduled and was stood over to 18th March 2009. **Kasango J** again on the request of the parties stood over her ruling to 24th April 2009. Eventually the Mombasa matter was heard and ruling reserved to 25th May 2009.

When the matter next came for mention, it was before me as **Kasango J** had left the station on transfer. I was informed by the parties that Mombasa court had given orders allowing the applicants application for stay of proceedings and execution on all matters that the parties were involved in on condition that the applicant would deposit Kshs.6,000,000/= as security for costs within 10 days from the date of the order. The amount had however not been deposited. I was further informed that parties were engaged in negotiations with a view to an amicable settlement of all those matters involving the applicant and respondent. That being the case I was persuaded to stand over the matter to 12th June 2009 to record a settlement if any. On 12th June 2009, parties were still engaged in negotiations. I was prevailed upon to grant them a further mention on 26th June 2009. On this occasion I was told that parties had agreed to have the accounts reconciled and the amount owing to the respondent determined within 30 days. I therefore stood over the matter for final mention on 27th July 2009. During the final mention as aforesaid, parties informed me that they had been unable to reach and settlement. They all then agreed that I should act on the submissions made before **Kasango J**, on the application craft and deliver the ruling.

I have carefully considered the application, the various affidavits on record together with the annextures, rival oral submissions, the authorities cited as well as the law. Perhaps a brief resume of this matter may be apt. The respondent is a firm of advocates whereas the applicant is an insurance company. The applicant over a period of time enlisted and retained the services of the respondent to represent, conduct and defend suits on its behalf in Mombasa, Nairobi and Nyeri. By the time the parties found themselves in court, the respondent had handled in excess of 1200 cases on behalf of the applicant. As it happens in this sought of relationship, there comes a time when there must be a parting of ways. Such fall out is never peaceful. It is always accompanied by acrimony. This is what happened in the

circumstances of this case.

What did the respondent do? As expected he presented for taxation its advocate/client bills of costs against the applicant. As at the time the parties found themselves in court, the respondent had filed and taxed 121 such bills of costs. Pursuant to those taxed bills, the respondent filed various enforcement suits after obtaining certificates of taxed costs and pursuant thereto obtained interlocutory judgments. Indeed the respondent had gone ahead and obtained warrants of attachment issued against the applicant in some of those enforcement suits some of which are the subject of these proceedings. It is this action of the respondent that forced the applicant to move the High court of Kenya at Mombasa by way of an originating in Misc. application No. 11 of 2009 seeking various orders. Simultaneously with the filing of the O.S, the applicant also sought and obtained a temporary stay of proceedings and execution in all enforcement suits set out in the schedule annexed to the application arising out of the advocates/client bill of costs between the respondent and applicant. I want to assume that the said order encompassed the four suits in this court to wit HCCC No. 123/08, 124/08 125/08 and 126/08. In retaliation, the respondent fired off an application for security for costs. The application was apparently allowed, however on condition. The condition imposed was that the applicant deposits Kshs.6,000,000/= within 10 days of the order as security for costs. The applicant has to date not complied with said order. The effect of the said non-compliance is that there is no longer any stay of proceedings. Accordingly the respondent is at liberty to proceed and enforce the taxed client/Advocate bills of costs. So much for the history of the matter.

I am being asked to set aside the order made on the 16th February dismissing the application dated 7th January 2009 on the grounds that the applicant's counsel was late in coming to court. That the said delay of about 13 minutes was not deliberate but inadvertent and uncalculated. Order IXB rule 8 of the civil procedure allows this court wide latitude to set aside or vary an order of dismissal upon such terms as are just. The starting point of course is that the court has unfettered discretion when considering such an application. However, like every judicial discretion the court has to exercise such discretion upon reasons and not capriciously. Among the matters to be considered are the circumstances of that led to the dismissal order, the previous conduct of the parties, whether the application has been made without undue delay and fourthly, I must consider whether the order of reinstatement will unduly prejudice the respondent. These are some of the considerations but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the court should not be restricted in its operations.

The application dated 7th January 2009 sought essentially four orders; stay of execution of the decrees issued in the four cases herein to wit 123, 124, 125 and 126 all of 2008, pending the hearing and determination of the application, secondly, that the court do order the consolidation of the four cases. In the alternative, that there be a stay of proceedings in the said suits pending the determination of the issues arising in this suit. Thirdly, it prayed that this court do direct the respondent to deliver an account of all the monies paid by the applicant to the respondent between the years 1999 and 2008 in relation to the legal services rendered by him to the applicant. Lastly the applicant prayed for costs.

That application came for hearing before **Kasango J** on 2nd February 2009. As **Mr. Mahugu** had not filed a replying affidavit he sought an adjournment which was granted on condition that he would file and serve his replying affidavit on the applicant on or before 3rd February 2009 and the applicant was in turn granted leave to file a further affidavit within 5 days of service of the replying affidavit. It would appear that the respondent complied with the terms of the order and served on the applicant the replying affidavit within time. The applicant was not that lucky however. It was unable to file a further affidavit within the time frame ordered. Although it eventually did, the same was filed out of time and without leave of court. That being the case it is liable to be struck out. If that is done, as it should, the instant application will be left bare. That being the case, the affidavit sworn by **Mr. Mugambi** will not suffice to turn the scales in favour of allowing the application.

Mr. Mugambi claims that he was late in coming to court by 13 minutes. That might well be true. However why did he not instruct some other counsel in court to hold his brief and let the court know that he was held up in the court registry. That is what a diligent counsel would have done. It appears to me

that **Mr. Mugambi** simply took the court for granted. As was said in **Ketterman v/s Hansel Properties Ltd (1985) 1 ALL E.n. 38 at page 62**:-

"**We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequence of the negligence of the lawyer to fall on their heads rather than allowing an amendment at a very late stage of the proceedings....**"

I subscribe to this holding and I believe that it is appropriate here.

These cases cannot be treated in isolation from what went on in similar cases in Mombasa and more significantly the conduct of the applicant. These cases arise from legal services rendered to the applicant by the respondent. The applicant having failed to pay for the legal services rendered as aforesaid, the respondent taxed his client/Advocate bill of costs. In fact the said bills were taxed by consent of the parties. The certificates of taxed costs were subsequently issued. It is also noteworthy that after every taxation, the applicant sought and was granted stay of execution for 30 days. It was after the applicant failed, ignored and or refused to settle those taxed costs that the instant suits were filed for purposes of enforcement. Though the applicant upon being served with the summons entered appearance in time, it failed to file defences. Accordingly on 12th November 2008, the Deputy Registrar on the application of the respondent entered interlocutory judgments for the amounts claimed in the suits. Those interlocutory judgments have not been set aside. Indeed even in the application under consideration, there is no prayer for setting aside of those ex-parte interlocutory judgments. Of what purpose then will consolidation of the four suits or alternatively staying the proceedings serve? I cannot think of any other than the applicant perhaps seeking to lock out the respondent from enjoying the fruits of his judgments. The applicant having not filed its defences to the suits, there is nothing to show that the issues arising in these suits are the same and therefore they ought to be tried contempreneously. Hence the prayer for an order for consolidation.

The enforcement suits and warrants of attachment arose out of the final certificate of costs issued by the taxing master upon taxation of respective bills of costs. No references were filed in respect of those taxed costs. Those certificates of taxed costs have not been quashed, set aside, reviewed, varied and or altered in any way and by dint of statute they are final. Accordingly the current proceedings are in my judgment an improper attempt to stay final certificates of costs, judgment and execution of warrants in matters where no appeal or reference has been lodged and further no stay pending appeal obtained as contemplated by the law. In any event there can never be stay of taxed costs. It was so held by the court of appeal in the case of **Francis Kabaa v/s Nancy Wambui & Another civil application number 298 of 1996** (UR) thus: "**..... In any case even if that were so, the appellant, if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs.....**"

The applicant in the Mombasa cases was ordered to deposit Kshs.6,000,000/= as security for the respondent's costs. It failed to comply with the said order and offered no explanation. Is it possible that the applicant is in dire financial straights and or suffering from liquidity problems? In the absence of any explanation by the applicant for its failure to comply with the said order, that possibility cannot be ruled. It can also not be ruled out that the applicant is engaging in these unnecessary proceedings to merely buy time. In the premises I do not think that the applicant's conduct is anything to write home about. That being the case the respondent will certainly be prejudiced in the circumstances of this case if the application was to be allowed much as it was made timeously.

In the upshot I am satisfied that on the material placed before me, I am unable to exercise my unfettered discretion in favour of the applicant. Accordingly, the application dated 16th February 2009 is dismissed with costs to the respondent. As agreed by the parties at the commencement of these proceedings this ruling shall apply also to Nyeri HCCC Nos. 124/08, 125/08 and 126/08 respectively.

Dated and delivered at Nyeri this 29th day of October 2009

M. S. A. MAKHANDIA

JUDGE