



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 28 of 2002

SAMMY MUSYOKI NZAMBA :::::::::::::::::::::::::::::::::::APPLICANT/RESPONDENT

MBILIKI NZUKI::: RESPONDENT/APPLICANT

RULING

1. The Applicant, Sammy Musyoka Nzamba seeks orders under Order XLIV Rule 1 (1) and XXI Rule 22, as well as Order XLI Rule 18 of the Civil Procedure Rules that the “*ex-parte judgment of 11.5.2007 be reviewed and the same be set aside/vacated*” and the appeal be heard inter-partes.

2. From the Affidavit sworn by the Applicant on 26.11.2007, it is his case that when the Appeal was heard on 23.3.2007 and judgment delivered on 11.5.2007, he had no knowledge of either of the two events. That he only became aware of the outcome thereof on 1.10.2007 and that he felt let down by his previous advocates, M/S Mutua & Mbaluka Advocates who neither informed him of the date of hearing nor the date of judgment and that he only came to know of the unfavourable judgment when the Respondent was heard bragging that he was going to attach the Appellant’s properties and recover a lot of money thereafter.

3. The Applicant in his lengthy Supporting Affidavit laments that after his advocates informed him of the outcome of the Appeal, he tried to get assistance from other advocates including one Mr. Eric Mutua but he was unable to get much help from them and in the meantime, his previous advocates returned his file to him and when the Bill of Costs was being taxed on 7.11.2007, he was not given a hearing and the taxation proceeded nonetheless. That he was only able to get proper representation when his present advocates, M/s Mwangangi & Co. Advocates came on record and the present Application was thereafter filed.

4. At paragraphs 20, and 21 of the Supporting Affidavit, the Applicant depones as follows:-

“(20). *That the delay in filing this application is not inordinate*

in the circumstances as once I learnt of the exparte judgment herein I took all necessary steps and did all within my ability to move this court.

“(21). *That the exparte judgment has greatly prejudiced me as I have been condemned without being heard for no fault of mine but for the mistakes of my Advocates and I beseech this Honourable court not to visit the same on me.*”

5. In his Replying Affidavit sworn on 5.2.2008, Ronald Moki Mbiliki depones that the Appeal was lodged in 2002 and the delay in finalizing it until 2007 was occasioned by the deliberate action of the Applicant and his advocates who failed to attend court in spite of notice to do so. That since he had no interest in it, the same proceeded to hearing with notice to his advocates and the Applicant cannot now blame anyone but himself.

6. I have taken into account the eloquent and well thought out submissions by both advocates appearing and I have read the authorities submitted but my mind is clear that the discretion to review the judgment delivered on 11.5.2007 is one that must be exercised judiciously and so that no party is unduly prejudiced and yet that no party should be assisted to abuse the process of this court. The Applicant seeks that kind of discretion and the only reason given is that he failed to attend the hearing of the Appeal before *Sitati J.* on 22.3.2007 because his advocates failed to inform him of the hearing date and that his side of the story was not taken into account when the court determined the Appeal.

7. I should retrace my steps and note as follows:-

The Appeal in this case was filed on 10.2.2002 as stated by the Respondent. On 28.2.2002, the Appellants (now Respondents) by an Application of the same day sought stay of execution of the decree emanating from the decision of the lower court. That Application was eventually withdrawn on 20.3.2003. Parties returned to the lower court where an order of stay of execution pending appeal was dismissed on 17.9.2003. On 17.3.2005, directions were given that hearing dates be fixed at the Registry. On 12.5.2005, 8.6.2005, 21.9.2005, the advocate for the Appellant appeared alone but with notice to the Applicant's advocates but no dates for hearing were given until 28.9.2006 when ***Onyancha, J.*** fixed it for hearing on 12.10.2006 after noting the absence of the Applicants. On that day the advocate for the Appellant was attending to a sick child but Mr. Mbaluka for the Applicant was present. Hearing was stood over generally but the Appellant fixed it for hearing on 22.3.2007. Being satisfied that the Applicant had been served, the hearing proceeded before ***Sitati, J.*** On that day, Mrs Thoronjo for the Appellant is recorded as saying;

"The respondents have not been appearing in this matter -but we did serve them all the same. We are ready to proceed with the appeal. There is an A/S to that effect." It proceeded for hearing in the absence of the Applicant and his advocate.

8. Should the judgment be reviewed in these circumstances? I am convinced that the Applicant, like many other laymen, put all his faith and trust regarding the Appeal in his lawyers. His conduct after judgment was desperate because he had no idea how to proceed without legal counsel. It is clear that his advocates were notified of the first date of hearing of this Appeal i.e 12.10.2006 and had the advocate for the Appellant been present, the Appeal would most likely than not have been heard inter-partes. On the second day it came for hearing i.e 22.3.2007, they were absent and it proceeded to finalization. I would agree with the holding in Kiarie vs Njoroge [1986]KLR 402 that the mistakes of an advocate should not be visited upon the litigant. In this case, I have seen nothing that would point to indolence on the part of the Applicant although as submitted by Mrs Thoronjo for the Appellants he should have been more alert than he was. However, any prejudice caused would be cured by costs.

9. I think that the Applicant is deserving of discretion as he has shown that there is a sufficient reason to review the judgment of this court within the meaning of Order XLIV Rule 1(1) of the Civil Procedure Rules.

10. In the end the Application dated 26.11.2007 will be allowed subject to the Applicant paying Kshs. 20,000/= thrown away costs to the Appellant within 30 days of this Ruling failing which the orders will be vacated. Thereafter and if there is no default, the Appeal can be fixed for hearing a fresh.

11. Orders accordingly.

Dated and delivered at Machakos this 26th day of June 2008

Isaac Lenaola

Judge

In the Presence of: Mrs Mwangangi for Appellant

No appearance for Respondent

Isaac Lenaola

Judge