



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 867 of 2005

TEMA HOME CARES COMPANY LTD.....PLAINTIFF

VERSUS

DISMAS OPANDE OGOT.....1ST DEFENDANT

REMJEWS OMBOKE OGOT.....2ND DEFENDANT

KEN OGOLLA NYAMITTA.....3RD DEFENDANT

GLACIER CLEANING SERVICES LTD.....4TH DEFENDANT

RULING

The plaintiff filed this suit against the defendants seeking judgment as prayed in the plaint dated 12th July 2005 and filed the same day.

Simultaneously with the plaint he filed a Chamber Summons under Certificate of Urgency in which he sought injunctive orders against the respondents restraining the respondents from performing certain contracts as contained in the body of the Chamber Summons dated 12th July 2005.

The plaintiff appeared before Ransley J and obtained ex parte orders and the application was fixed for inter parte hearing on 20th July 2005. On 20th July 2005 the application could not be reached and was stood over to 25th July 2005.

But on that date it was again not heard. The parties agreed by consent to have the matter heard on 15th September 2005 due to summer vacation. On 15th September 2005 when the application came up for hearing, there was no appearance for the applicant and on application by counsel for the respondent the application was dismissed.

This application seeks to set aside that dismissal order of 15th September 2005 and reinstate the Chamber Summons dated 12th July 2005. Mr. Kariuki for the applicant submitted that his failure to appear was due to omission of the application from the cause list of that day. On 14th September 2005 he had sent his clerk to the High Court Civil Registry to collect the cause list for the 15th September 2005 which cause list listed only 4 judges and his application was not listed. On 15th September 2005 he proceeded to the High Court to

make inquiry but he was shown a different cause list which listed all the matters and all the judges and he realized that his application was listed before Makhandia J.

He immediately rushed to Justice Makhandia's chambers but when he arrived there at about 9.37 a.m, he discovered that his application had been dismissed for non-attendance. He immediately filed this application the same day seeking orders to set aside the said dismissal order. He submitted that the error is excusable and urged the court to set aside the dismissal order and reinstate the applicant's application dated 12th July 2005 and to be heard on its merits.

The application is opposed by the respondent. Mr. Okundi for the respondent submitted that the date was taken by consent and the applicant was aware. The applicant has not given reasonable explanation to warrant the court to exercise its discretion in its favour. Further he submitted that the interim orders which were issued and extended on 25th July 2005 cannot be extended, the same having expired.

The main concern of the court in the exercise of its discretion is to do justice between the parties. ***PATEL VS. E.A. CARGO HANDLING SERVICES LTD [1975] EA 75.*** The discretion is intended to avoid injustice or hardship resulting from accident inadvertence, or excusable mistake or error, but it is not designed to assist a person who ha deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. ***SHAH VS. MBOGO [1967] EA 116.*** In exercising the discretion the court should consider among other things, the facts and circumstances both prior and subsequent, and all the respective parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by setting aside the judgment should be considered and it should always be remembered that to deny a person a hearing should be the last resort of the court.

I am satisfied that failure by the applicant's counsel to appear in court has been explained and is excusable. I am therefore inclined to exercise my discretion in his favour on the issue of whether or not an order which has expired can be extended, I agree with Mr. Okundi that the court cannot extend what does not exist. But the court has power to reinstate the same.

The dismissal order issued by this court on 15th September 2005 is hereby set aside and the applicant's application dated 12th July 2005 reinstated but I decline to reinstate the ex parte orders which expired on 15th September 2005. Costs to the respondent. Those are the orders of this court.

Delivered and dated at Nairobi this 13th day of October 2005.

J.L.A. OSIEMO

JUDGE