

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
Civil Case 236 of 2005

GIRO COMMERCIAL BANK LIMITEDPLAINTIFF

VERSUS

JASVINDER SINGH DHADIALLA DEFENDANT

RULING

The Chamber Summons dated 30.9.2005 is expressed to have been brought under the provisions of Order L. Rule 17, Order XXXIX Rule 1 and 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. The primary order sought is setting aside the order of 20.9.2005, dismissing the application dated 17.8.2005 and the said application be reinstated for hearing.

The application has been brought on the primary ground that the non-attendance on 20.9.2005 was occasioned by an inadvertent oversight which led to the failure to diarize the matter by the Plaintiff's counsel.

The application is supported by an affidavit sworn by Richard M. Mutiso an Advocate who had previously been briefed by Counsel on record for the Plaintiff. The application is opposed and there are grounds of opposition filed on behalf of the Defendant by his Advocates.

The application was canvassed before me on 18.11.2005 by Mr. Hira Learned Counsel for the Plaintiff and Mr. Simani Learned Counsel for the Defendant. The gist of the Plaintiff's application is that the date when the application sought to be reinstated was fixed for hearing was misdiarised by Counsel's office with the result the neither Counsel nor the Plaintiff attended the Court when the said application came up for hearing on 20.9.2005. Failure to attend Court on the said date was therefore due to inadvertence and was not deliberate. Counsel for the Plaintiff emphasized that his mistake should not be visited upon his client.

Responding to the submissions made on behalf of the Plaintiff Counsel for the Defendant relied upon the Grounds of Opposition aforesaid and submitted that the reason given for non-attendance by Counsel for the Plaintiff was not genuine. Counsel impugned the application sought to be reinstated and argued that its reinstatement would serve no useful purpose.

I have considered the application, the supporting affidavit the Grounds of Opposition and the submissions of Counsel. Having done so, I take the following view of the matter. The principles of settling aside ex-parte judgments or orders are well settled. The Court exercises its judicial discretion in favour of setting aside an order in order to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error but will not assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice (See SHAH -V- MBOGO & ANOTHER (1967) E.A.116 at page 123).

I have gone through the record of this case carefully. I have not found evidence of conduct of the Plaintiff or its counsel to suggest that they have deliberately sought to obstruct or delay the course of justice. The explanation for Counsel's non-attendance at the hearing of the Plaintiff's application of 17.8.2005 cannot be said to be inexcusable. Such mistakes do occur in advocates' offices now and again.

In this case once the mistake was detected remedial action was taken by filing this application.

In JOSEPH NJUGUNA –V- MEDICINO GIOVANNI: NAIROBI C.A. NO. 216 of 1997 (UR) the Court of Appeal allowed an appeal against an order refusing to set aside an ex-parte judgment where an Advocate by mistake had not entered the hearing date in her diary. The Court of Appeal said at page 207 of the judgment:

“We know that administrative mistakes of this kind do occur in the offices of busy practicing advocates.... In our view the explanation given by Miss Jan Mohammed was good enough to show why she failed to attend at the hearing of the suit.”

On this Court of Appeal authority and in the circumstances of this case I will not visit Counsel’s mistake on his client. The Defendant has not demonstrated that he will suffer loss that cannot be adequately compensated by costs. In the result the Plaintiff’s application dated 30.9.2005 is allowed in terms of prayer 3 thereof.

The Plaintiff will pay costs of this application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-