



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.513 OF 2002

EPHRAIM WAITHAKA RUTHAPLAINTIFF

V E R S U S

JOYCE MUKUHI NJENGADEFENDANT

R U L I N G

By chamber summons dated 17th September 2002 made under Order 9B rule 8 and Section A of Civil Procedure Rules the applicant has applied that the Ex-parte order stating proceedings in maintenance cause no.5 at the Resident Magistrate`s Court in Milimani on 16th September 2000 be set aside and that application by way of Notice of Motion dated 12th September 2002 be heard interpartes and determined on merit.

In the Notice of motion dated 12th September 2002 the appellant/applicant had prayed an order of stay of proceedings in Chief Magistrate`s (Milimani Commercial Court) Maintenance Cause No.05 of 2002 pending the hearing of the appeal. At the hearing of the application the applicant hear did not appear although he had been served. The court granted the prayer exparte but he now applies for setting aside of that default order citing reasons in the supporting affidavit by his advocate Joyce Mukuhi Njenga sworn on 17th September 2002, where she states that she came late to court on 16th September 2002 and was informed by the court clerk that the file had been called out and the matter marked S.O.G and she informed counsel for respondent who she met outside immediately thereafter but still the said counsel came and called out the file and obtained ex-parte orders but in reply the affidavit of Wilfred Ngunjiri Nderitu sworn on 27th September 2002 the deponent rightly admits being informed by the applicant`s counsel that the matter had been marked S.O.G in their absence but that he retrieved the file from the Registry to have it mentioned as the matter had been put off in the morning when in fact it ought to have been heard in the afternoon.

I have keenly read the affidavits of both counsel and it is quite clear to me that the applicants counsel is attempting to pass the buck by trying to blame the court entirely without honest justification.

The respondent counsels replying affidavit dated above paragraphs 5, 6 and 7 seem to describe the position:- They state

“5. THAT I waited until the clerk started calling out the matters listed before the judge for the afternoon. This was at about 2.50 p.m. The matters were called out and dealt with upon which the judge called out matters on Justice Kuloba`s list as the latter was not in. Thereafter, I mentioned my matter and I was advised to go to the registry in order to have the file retrieved. At the registry, I saw Mr. Kamunge who arranged for the file to be taken back before the Honourable Hayanga J.

6 THAT when I appeared before the Judge, I informed him that the application was stood

over in error as the Judge had (on Friday the 13th September 2002) ordered that the application be served on the respondent for hearing inter parties on the 16th September 2002 at 2.30 p.m.

7. THAT the Judge then enquired whether the application had been served and I informed him that I had. The Judge thereupon observed, and recorded, that there was proper service on the Respondent according to the affidavit of Henry Kioko Nzyuko sworn on the 16th September 2002 and proceeded to give the order of stay of proceedings. I verily believe that in all circumstances of the case, the Judge was entitled to do so and in any event he had inherent power to do so in order to prevent an abuse of the court process.”

It is discernable that the applicant`s counsel indeed was not present at this time originally set while the counsel for the applicant attended and as the respondents affidavit has not been contraverted. I believe what he depones to herein as true besides the same is fully vindicated by the record of proceedings in the file. It is in fact an act suggesting of manipulation for the applicant counsel to have attemptation appear on the file earlier than the time set.

In principle setting aside ex-parte order is discretionary and is to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought, whether, by evasion or otherwise to obstruct or delay the cause of justice,” as was said by Harris J in SHAH V MBOGO 1967 EA II 6. The omission by the applicant`s counsel to call for the file knowing that it was meant for afternoon could have or could not have been deliberate but if the former then her design was to aid delay, if the latter then it could be excusable as lacking in the condemned quality of design.

I have considered these approaches of counsel and the aspects of the case and there is a doubt in my mind if the nature of design was objectionable to enable me to exercise my discretion in disfavour of the application, but I do not think the action was objectionable.

I therefore grant the application to set aside exparte order but order that the applicant pays costs for this application.

Delivered this 1st day of November 2002

A. I. HAYANGA

J U D G E

Read to Mr. A.T. Njoroge

Mr. Muhigi Advocate

A. I. HAYANGA

J U D G E