



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 657 OF 2010

BENHUR MILTON M .MWANGANGI.....PLAINTIFF

=VERSUS=

BUYUKA OBONYO ADVOCATES.....1ST DEFENDANT

P.C.ONDUSO & CO. ADVOCATES.....2ND DEFENDANT

AND

SHADY ACRES LIMITED.....1ST INTERESTED PARTY

KABANIRAN LIMITED.....2ND INTERESTED PARTY

RULING

1. This is a ruling in respect of two applications. The 1st application is dated 3rd July 2020. It is brought by the 2nd Defendant/Applicant. The second application is dated 17th July 2020. It is brought by the 1st Defendant/Applicant. The two applications seek setting aside of this court's orders given on 22nd June 2020. I will therefore deal with the two applications together.

2. The Plaintiff/Respondent filed an originating summons on 20th June 2016 in which he seeks to enforce professional undertaking given by the 1st Applicant. At the request of the Respondent's counsel, the Court directed on 22nd June 2020 that the originating summons be disposed of by way of affidavit evidence and oral submissions. The matter was set down for hearing but it could not proceed for one reason or the other.

3. On 22nd June 2020, the originating summons came up for hearing. The matter was mentioned virtually in the presence of the Respondent's counsel who requested that the matter be disposed of by way of written submissions. The counsel also prayed for a further order that the sum of Kshs 60,000,000/= be deposited in court within 60 days. The court gave directions regarding the filing of submissions. The court also directed that Kshs 60,000,000/- be deposited in court within 30 days. It is these orders of 22nd June 2020 which prompted the applicants in the two applications to file the two applications.

4. The deponent in the first application who is an advocate of the High Court states that on the material day he could not access the link to the virtual online platform. He contacted the Court Assistant who eventually allowed him into the virtual hearing platform but he found that the court had already dealt with the matter. He therefore contends that failure to come into the virtual court session in time was not deliberate. He seeks that the court sets aside the orders of 22nd June 2020. He contends that if the orders are not set aside, the 2nd Applicant will be prejudiced in his defence and that there is need to cross-examine the respondent as to the circumstances leading to the undertaking which is sought to be enforced.

5. On his part, the deponent to the second application who is also a lawyer states that on the material day, he was not admitted to the virtual court hearing session for the day. He states that failure to attend court was not intentional as it was due to failure by the court to send a link to him. He argues that it is important that the orders of the court given on 22nd June 2020 be set aside so that the hearing can proceed as per the earlier directions of the court.

6. The Respondent filed two replying affidavits one each opposing the Applicants' applications. The Respondent contends that this matter had been coming for hearing on a number of occasions but in all instances, the same was adjourned at the instance of the Applicants and the Interested Parties. When the matter came up for hearing on 22nd June 2020, his Advocate who was cognizant of the guidelines which had

been issued by the National Council on the Administration of Justice in view of the Covid 19 Pandemic requested the court to direct that the case be disposed of by way of written submissions.

7. The Respondent states that the court granted the request for filing of written submissions and further directed that Kshs 60,000,000/= be deposited in court. The Respondent contends that non-attendance of the Applicants in court on 22nd June 2021 was deliberate and that the 1st Applicant has deliberately refused to comply with the court's orders of 22nd June 2020. He argues that this is a matter which can conveniently be disposed of by way of written submissions and that the Applicants have not given any reasons as to why they cannot file submissions.

8. The Parties were directed to dispose of the two applications by way of written submissions. The 1st Applicants filed submissions dated 29th March 2021. The 2nd Applicant filed submissions dated 16th March 2021. The respondent filed his submissions dated 9th April 2021. I have considered the submissions by the parties herein. The only issue which arises for determination is whether the Applicants have demonstrated that they have grounds upon which this court can exercise its discretion to set aside the ex-parte orders.

9. There are a number of decisions from this court and from superior courts which deal on the exercise of discretion when it comes to setting aside of ex-parte orders. In the case of **Pithon Waweru Maina –vs- Thuka Mugiria [1983] eKLR** it was stated as follows: -

“ a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48. c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93).

10. The Applicants have given reasons why they were unable to attend the virtual court proceedings of 22nd June 2020. The failure to attend was due to the inability of the Court Assistant to admit them into the system. The system which was prevailing then required that Advocates provide their e-mails in advance which will then be used to admit the Advocates into the system. It is unlike the present case where Advocates are given a link to join and then the court admits them.

11. The 1st Applicant’s Counsel was not admitted. The 2nd Applicant’s Counsel was admitted after he called and texted the Court Assistant. It is possible that due to the sheer numbers of Advocates on each given date, a Court Assistant could forget to admit all of them. I therefore find that this is a clear case where I should exercise my discretion in favour of the Applicants. I therefore allow the two applications with the result that the orders given on 22nd June 2020 are hereby set aside. This case shall be listed for hearing as by the earlier directions of the court. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JUNE 2021.

E.O.OBAGA

JUDGE

In the Virtual Presence of :-

Mr Sichangi for Mr Ashiruma for 1st Defendant/Applicant

Mr Mikwa for Mr Gitonga for Plaintiff/Respondent

Mr Court Assistant: Steve

E.O.OBAGA

JUDGE