



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELCC NO. 289 OF 2017

(Formerly Kisii Elc case No. 357 of 2017)

GEORGE AWUOR OKULLO.....PLAINTIFF/1ST RESPONDENT

VERSUS

CHINA WUYI COMPANY LIMITED.....1ST DEFENDANT/APPLICANT

AND

JACK BARAZA BARAZA.....1ST THIRD PARTY/2ND RESPONDENT

BERNARD ALIWA.....2ND THIRD PARTY/3RD RESPONDENT

RULING

1. On 1st September 2020, the defendant, **CHINA WU YI COMPANY LIMITED** (The applicant herein) through M/s Wambugu and Muriuki Advocates mounted the instant application by way of a Notice of motion dated 27th August 2020 under sections 1A,1B and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya, Order 12, Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The applicant is seeking the orders infra;-

i. Spent

ii. This honourable court be pleased to set aside/vary its orders made on the 15th July 2020 dismissing the application dated 27th January 2020 for non -attendance, together with all other consequential orders;

iii. The applicant's application herein be reinstated for hearing on merits inter parties.

iv. Pending the inter parties hearing and determination of this application, this honourable court be pleased to extend the order of stay of execution issued on 27th January 2020.

v. The costs of this application.

2. The application is anchored on grounds (a) to (o) set out on the face of it. These include;-

i. Unfortunately, on this date counsel for the applicant was not able to attend court and due to circumstances beyond his control.

ii. Multiple persons in the office of counsel on record for the applicant came into contact with a person who was diagnosed to have suffered Covid -19 necessitating the office to be closed as a matter of emergency and all persons asked to refrain from attending the office for 2 weeks.

iii. The order of dismissal of application on 215th July 2020 was not caused by any deliberate indolence on the part of the applicant nor its counsel on record but due to unavoidable circumstances that can befall anybody else during this period.

iv. This honourable court has jurisdiction to review, set aside and /or vacate the orders of 15th July 2020 by dint of the provisions of sections 1A ,1B and 3A of the Civil procedure Act as well as Order 51 of the Civil Procedure Rules.

v. This application has been made without any delay and unless the application is reinstated, the applicant will be driven away from the seat of justice unheard.

3. The application is further premised on a seventeen (17) paragraphed supporting affidavit sworn on even date by learned counsel Mr. Emmanuel Eredi of the firm representing the applicant. Annexed to the said affidavit are copies of Covid -19 results of employees of counsel for the applicant and copies of correspondence marked as “EE-1 and EE-2” respectively. Briefly, counsel deposed that dismissal of the application dated 27th January 2020 seeking inter alia, stay of execution of the orders given on 4th December 2019 was not caused by any fault or wrong doing on the part of the applicant’s counsel. That this court has the discretion to set aside the ex-parte order made on 15th July 2020 to avoid injustice resulting from excusable mistake or error.

4. The plaintiff, **GEORGE AWUOR OKELLO** (the 1st respondent) through M/s Ouma Njoga and Company Advocates, opposed the application by way of his 21-paragraphed replying affidavit sworn on 8th February 2021 and filed herein on 9th February 2021. He deposed, inter alia, that the applicant does not deserve the orders sought in the application as interim stay of execution was granted on 28th January 2020 and the application was not served on the respondent until 24th February 2020 when the same was due for inter parties hearing as shown in the stamped received application marked as “GAO-1” and annexed to the affidavit.

5. The 1st respondent further deposed that on 20th May 2019 the court ordered and directed that applicant’s submissions be served within 14 days from the date of service of the said submissions. That by a letter dated 21st May 2020, learned counsel for the applicant undertook to file and serve the submissions which undertaking was not honoured. That the applicant merely seeks sympathy of the honourable court and no explanation exists for its non attendance save for the negligence on the part of the applicant and or it’s counsel. That the delay in filing the application is inexcusable and inordinate which the court should not condone. That the application has not met the requisite threshold for it’s grant.

6. By a further affidavit of nineteen (19) paragraphs sworn on 19th February 2021 and duly filed in court on 1st March 2021, Emmanuel Eredi counsel for the applicant termed the allegations in the replying affidavit baseless, unfounded, callous and without any factual foundation whatsoever. He deposed in part that one Francis Kamau, a pupil in the firm of advocates for the applicant was diagnosed with Covid -19 virus resulting to closure of the said firm offices in order to protect the welfare of it’s employees. Copies of a certificate and information page of the pupil’s work book marked as “EK-1” and “EK-2” are annexed to the further affidavit in support of the application. That the applicant is firmly interested in preventing the application which was dismissed and that it be reinstated for it’s hearing on merit and to avoid immense prejudice to the applicant.

7. Further to this court’s orders and directions given on 10th February 2021, the application was heard by way of written submissions pursuant to **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.**

8. By submissions dated 19th February 2021 and duly filed in court on 1st March 2021 learned counsel for the applicant provided brief facts of the matter and identified four (4) issues for determination which include; whether there was inexcusable delay in prosecuting the application and whether it can be reinstated. In analyzing the issues in favour of the applicant, counsel cited the case of **Philip Chemwolo and another =vs= Augustine Kubende (1982-88) KLR 103** that a party should not suffer the penalty of not having his case heard on merit. That the applicant has given reasons for delay in bringing the application as noted in **Evita =vs= Kyumbu (1984) KLR 441**. That the court has the discretion of reinstating the application as per the decision in **Haji Ahmed Sheikh t/a Hasa Haulers =vs= Highway Carriers Ltd (1982-88) 1 KAR 1184**, among others authorities. That a party cannot be shut out of the proceedings due to mistake of counsel as observed in **Mbogo =vs= Shah and another (1968) EA 93 and Belinda Murai and 9 others =vs= Amos Wainaina (1979) eKLR**.

9. The respondents’ submissions were not duly filed herein despite the directions given and as captured in paragraph 7 hereinabove.

10. I have carefully noted the entire application, the replying affidavit and the further affidavit as well as the applicant’s submission including all the authorities relied upon therein. So, is the application meritorious?

11. The provisions of the law under which the application is originated, are all taken into account herein. The provisions are tailored towards meeting the ends of justice which is the ultimate goal of this court.

12. The orders sought to be set aside by way of the application were made on 15th July 2020 when the court dismissed the applicant’s notice of motion dated 27th January 2020 with costs. The court noted that the said motion was not argued by written submissions as per the court’s orders and directions made on 20th May 2020 or at all. It is pretty clear that counsel for the applicant attended court when the orders and directions were given and there was no reason for non-attendance of counsel in court when the motion was dismissed.

13. The court found that the motion was devoid of merits and also applied the guiding principles in **Article 159 (2) (b) and (e) of the Constitution of Kenya, 2010** (The Constitution) which reads:

(b) justice shall not be delayed

(e) the purpose and the principles of the Constitution shall be protected and promoted.

14. It is noted that the court granted stay of execution of judgment delivered on 4th December on even date for thirty (30) days from that date at the instance of the applicant. On 28th January 2020, the present firm of advocates for the applicant was granted leave to come on record accordingly.

15. It is further noteworthy that the application was commenced forty (40) days after the delivery of judgment and grant of interim stay of execution which has since lapsed. Further, the applicant took in excess of fifty six (56) days without canvassing the motion dated 27th January 2020 as discerned in paragraph 12 hereinabove.

16. In the circumstances, was the delay reasonable and excusable? In the case of **Raphael Musila Mutiso and 3-others –vs- Joseph Ndava Nthuka and another (2019) eKLR**, the Court of Appeal held that delay for a day will result to dismissal of an application if not explained.

17. It is established law that the right to fair hearing under **Article 50(1) of the Constitution** before an adverse decision is taken against a party is fundamental and permeates the entire justice system: see the Court of Appeal decision in the case of **James Kanyiita Nderitu and another-vs-Marios Philotas Ghikas and another (2016) KLR, Chemwolo, Murai and Shah cases (supra)**.

18. **Article 48 of the Constitution provides for the right to access to justice.** The applicant approached this court immediately upon delivery of judgment and was granted stay of execution of the judgment but the same lapsed as already noted. By the Notice of Appeal dated 17th December and filed on even date, the applicant filed an appeal from the judgment by dint of **Order 42 Rule (6) (4) of the Civil Procedure Rules, 2010**: see also my decision in the case of **Geofrey Sure Ogada (suing as administrator of the estate of Joshua Ogada Ogonda-Deceased)-vs-Reuben Otieno Disii and another (2021) eKLR**.

19. To that end, it would not be fair for the application to be heard simultaneously by this court and the Court of Appeal. Clearly, this court is now functus officio in respect of this case. I cannot proceed to make one more step in the obtaining situation as I subscribe to the decision in the celebrated case of the **Motor Vessel Lillian “S”-vs-Caltex Oil (Kenya) Ltd (1989) KLR 1**.

20. Accordingly, I decline the application mounted by way of notice of motion dated 27th August 2020 and filed herein on 1st September 2020. The cost of the application to abide the appeal as envisioned in the Notice of Appeal duly filed in this matter,

21. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA BAY VIA EMAIL AS THE PARTIES WERE DULY NOTIFIED, THIS 23RD DAY OF SEPTEMBER 2021.

G.M.A. ONGONDO

JUDGE