



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 433 OF 2018

IN THE MATTER OF ARTICLE 50(1), 162, 169 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LANDLORD AND TENANT (SHOP, HOTEL AND CATERING ESTABLISHMENTS) ACT CAP 301

AND

IN THE MATTER OF THE MAGISTRATE'S COURTS ACT, 2015

AND

IN THE MATTER OF THE BUSINESS PREMISES RENT TRIBUNAL (BPRT) CASE NO. 95 OF 2015

BETWEEN

SHADE MANUFACTURERS & HOTEL LTD.....APPELLANT/APPLICANT

VERSUS

1. SERAH MWERU MUTUU

2. GRACE GACIKU

3. VIRGINIA WANJIRU

4. LOUIS WAITHERA..... RESPONDENTS

RULING

1. The Applicant/Petitioner through a Notice of Motion dated 27th November 2020 prays for the following orders:-

a. That upon interparte hearing and determination of the Application the Honourable Court be pleased to reinstate the Applicant's Notice of Motion dated 11.3.2020.

b. That costs be borne by the Respondent.

2. The Application is premised on the grounds on the face of the application and supported by the Applicant's supporting affidavit dated 27th November 2020.

3. The Respondent filed Replying Affidavit dated 2nd December 2020 in opposition of the Petitioner's/Applicants application.

BACKGROUND OF THE APPLICATION

4. On 10/3/2020 the Court certified the Applicant's application dated 11th March 2020 urgent, allowed it to proceed ex-parte and issued orders staying up execution of the decree due to pending reference set for hearing on 30/3/2020. The Court granted prayer No. 2 of the motion pending interparte hearing of the application. The Court directed the application be served and response be filed within 7 days from the date of service. The matter was set down for mention on 30/3/2020 for further orders and directions.
5. The matter was subsequently mentioned on 8/6/2020 when court found that the orders of 10/3/2020 had not been complied with. The matter was again set for mention on 7/10/2020; on which date there was no appearance and upon noting that was the 2nd time for parties to fail to appear the matter was scheduled for NTSC on 25/11/2020 and Deputy Registrar directed to issue notice to both parties.
6. On 25/11/2020 the Petitioner and her counsel did not appear. The Counsel for the Respondent appeared and moved the court to dismiss the Petitioner's/Applicant's application dated 11th March 2020 for want of prosecution. The application was accordingly dismissed.
7. The Petitioner/Applicant application dated 11th March 2020 subject of the present application seeks the following orders:-
- a. That this application be certified urgent and service thereof be dispensed with in the first instance.**
 - b. That pending the inter parte hearing of this application, there be a stay of execution of the decree and any consequential order issued by this Honourable Court.**
 - c. That pending Inter Parte hearing of this application the warrants of attachment issued by the Honourable Court in favour of the Respondents be withdrawn or set aside.**
 - d. That the costs of the application be borne by the Respondents.**
8. In the instant application the Petitioner/Applicant seeks that the application dated 11th March 2020 be reinstated. The Petitioner concedes the Petition herein was accordingly discontinued with costs. That a bill of costs was taxed on 4/12/2019. The Applicant/Petitioner being aggrieved with the Taxing Master's decision field a reference Application dated 31/1/2020 contesting the decision of the Taxing Master.
9. It is contended by the Applicant the Application was served upon the Respondent who did respond. That while awaiting determination of the Reference application dated 31/1/2020 it is stated the Respondent then proceeded to obtain Warrant of Attachment of Applicant's Movable. This provoked the filing of the application dated 11/3/2020 to stay the Warrant of Attachment pending determination of the reference.
10. The Court upon being seized with this matter issued stay order of execution on 12th March 2020, directing the Respondents be served and application proceed to inter partes hearing on 30th March 2020. The matter did not proceed as directed due to Covid – 19 pandemic.
11. The applicant contend that its Advocate noted that on 25/11/2020 that the matter had been fixed for notice to show cause why the suit could not be dismissed but as of then what was remaining was the Applicant's two applications dated 31/1/2020 and 11/3/2020. It is contended the NTSC may have been issued erroneously considering that the two applications had not superseded a period of one year on failure to be prosecuted and heard as set out in the relevant provisions of the Civil Procedure Rules.
12. It is averred by the Respondent's Advocate that on 25/11/2020 he tried to explain to the Court the position of the matter, but the electronics gadgets he was using went off due to interruption of electricity in his office premises and as such he was unable to attend the proceedings. He states had the court been aware of the facts of this matter, the application dated 11/3/2020 would not have been dismissed.
13. The Respondent oppose the Applicant's application urging the Petitioner discontinued the Petition with orders for costs to the Respondent, which costs were duly taxed. That proper procedure to take out warrant for execution was followed as there was no order for stay of execution and that there is no law requiring the adaption of certificate of costs for Party/Party costs for the same to be recovered.
14. In the instant, application, there is no dispute that the Applicant filed two applications dated 31/1/2020 and 11/3/2020 which applications have not been heard and determined on merits. The application dated 31/1/2020 whether meritorious or not challenges the Respondent's taxed costs. They seek stay of execution of the decree. There is a prayer for the warrant of attachment in favour of the Respondents to be withdrawn or set aside. In addition to the aforesaid the Petitioner/applicant prays for ruling or decision of 4th December 2019 to be set aside and/or vacated.
15. The Applicant's Counsel further has explained the reasons for failure to attend hearing on 25th November 2020 which I find not to be uncommon with virtual hearings in the Courts and I accept the same as a reasonable ground for failure to attend virtual hearing.
16. I note that it would be against the rules of natural justice to allow the Respondents to proceed with execution, when the Applicant's application was dismissed due to failure of counsel to attend virtual hearing. It is trite that a mistake of Counsel should not be visited on his client. The applicant should be allowed to have its day in Court rather than condemning it unheard; as substantive justice demand that no one should be condemned unheard.
17. Having considered the application and the oppositions thereto I find the application meritorious. I proceed to grant the application dated 27th November 2020 in the following terms:

a. The Petitioner's / Applicant's application dated 11th March 2020 be and is HEREBY reinstated.

b. Stay of execution be and is **HEREBY** granted pending hearing and determination of the application dated 11th March 2020.

c. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF MARCH, 2021.

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J. A. MAKAU

JUDGE