



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MERU

MISC. APPL. NO. 24 OF 2019

CHARLES GITONGA RUGOJIPLAINTIFF/APPLICANT

VERSUS

DAVID KIRIMI MWITHIMBU.....1ST DEFENDANT/RESPONDENT

LARSEN & TOUBRO LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. By a notice of motion dated 15/7/2019, brought under section 3 and 3A of the Civil Procedure Act, Order 12 Rule 7, Order 45 Rule 1 and Order 51 of the Civil Procedure Rules, the applicant is seeking orders to review, vary and set aside the orders of 15/7/2019 dismissing the plaintiff's application dated 14/5/2019 together with consequential orders and that matter be heard on priority basis.

2. The application was based on the grounds on the face of it and on the supporting affidavit of Ezra Muchomba advocate for the applicant. He avers that his non-attendance in court on 15.7.2019 was occasioned by a technical mishap. He was filing an affidavit of service at around 9.32 am, then he entered the ELC court at 10.26 am with the affidavit of service only to find that the matter had been called and an order dismissing the application had been made. He contends that there was no inordinate delay and the applicant is keen on prosecuting the matter.

3. The 1st respondent in his grounds of opposition stated that the applicant failed to prosecute his application which was filed under certificate of urgency, and that in any event the parent application is dead on arrival since the high court cannot transfer a suit from a court that initially lacked jurisdiction.

4. The issue for determination in the present application is **whether there is a basis for the court to exercise its discretionary power to set aside the order of 15/7/2019 and reinstate this suit?**

5. Section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte. The court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties.

6. The guiding principle in the court's exercise of this judicial discretion was laid down in **Mbogo & Another Vs Shah (1968) EA 93 page 195**. The exercise of a court's discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vain, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

7. In the case of **Belinda Murai & 9 Others Vs Amos Wainaina (1978) eKLR**, Madan J set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake;

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”

8. The records of the court indicate that when the matter was called out in the morning at 9.00 am, on 15.7.2019, the matter was given time allocation at 10.00 am for hearing. Come 10.00 am and there was no appearance for applicant's counsel prompting the court to put the file aside again. At 10.20am, the matter was called out again where by the application was dismissed for non-attendance on the part of applicant's counsel. The respondent's counsel were certainly not bound to wait indefinitely for the applicants counsel to appear in court.

Nevertheless, I have considered that the application or review has been filed timeously and that the matter was rather fresh when it came up on 15.7.2019. Bearing in mind the above authorities, I am inclined to allow the application in the following terms;

1. The suit herein is hereby reinstated and the application of 14.5.2019 is to be listed down for hearing.

2. The applicant is to meet the costs of this application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 29TH JANUARY, 2020

IN THE PRESENCE OF:-

C/A: Kananu

Muriuki K. for 1st respondent

Ms. Matiang'i holding brief for 2nd respondent- Applicant

HON. LUCY. N. MBUGUA

ELC JUDGE