REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL SUIT NO. 66 OF 2018

(Formerly Kisumu ELC NO. 779 of 2015)

ZAINUL VELJI.....PLAINTIFF/RESPONDENT

VERSUS

ERI LIMITED.....DEFENDANT/APPLICANT

RULING

The application dated 11th September 2018 asks the Court to review, vacate or set aside the Consent Orders recorded on 6th June 2018.

1. It was the contention of the Applicant that the advocate who entered into the consent on its behalf, did so inadvertently as he lacked sufficient material facts or because he either misapprehended or was ignorant of all the material facts.

2. According to the Applicant, the advocate appearing for the Plaintiff intentionally rode on the ignorance of the Defendant's advocate, so as to steal a march on the Defendant by re-opening an application;

> ***"……. that the Plaintiff, by her conduct, had demonstrably waived her right to oppose."***

3. The defendant's case was that the Plaintiff had taken advantage of both the Court and of the advocate who had held brief for the Defendant's advocate on 6th June 2018.

4. The Defendant believes that the Plaintiff had failed to disclose to the Court that it had failed, neglected or refused to respond to the application dated 28th August 2017.

5. In the circumstances, the Defendant feels that when the Plaintiff told this Court that the application would have to be heard afresh, that constituted a misrepresentation by the Plaintiff.

6. What transpired in court on 6th June 2018?

7. The record shows that Mr. David Otieno Advocate appeared for the Plaintiff, whilst Mr. Mbeka Advocate held brief for Mr. Achura Advocate, for the Defendant.

8. Mr. Otieno Advocate first informed the Court that this case had been at the Land Court, which had now transferred it to the High Court.

9. A perusal of the record of the proceedings reveals that on 28th May 2018, S.M. Kibunja J. ordered that the case be transferred to the High Court, from the Environment and Land Court.

10. The learned Judge directed that the case be mentioned before the High Court on 6th June 2018, and that explains how the matter found its way to my Court on 6th June 2018.

11. During the said Mention, Mr. Otieno Advocate told the Court that;

> ***"The application dated 28/08/2017 is pending for Ruling.***
>
> ***As the Land Court did not write a Ruling, the application may be heard afresh."***

12. In response to that statement, Mr. Mbeka Advocate said;

> ***"That is the position."***

13. I understood Mr. Mbeka Advocate to be confirming that the application dated 28th August 2017 was still pending, as the Land Court had not yet delivered a Ruling.

14. I also understood the two parties to be saying that because the Land Court had not yet delivered a Ruling, the pending application may be heard afresh.

15. My further understanding is that the application dated 28th August 2017 had already been heard, and that it was only the Court's Ruling that the parties had been waiting for.

16. I so find because if the application had not yet been heard at all, it would not make any sense for Mr. Otieno Advocate to talk about the need for the said application being heard afresh.

17. In her submissions, the Plaintiff now states as follows;

> ***"What transpired is that when it turned out that the Plaintiff had not responded to the application when it came up for hearing, the Judge directed that he will proceed and rule on it. There was no hearing."***

18. If, as the Plaintiff now submits, there had been no hearing, there should never have arisen a need to be heard afresh.

19. In my considered opinion, the Plaintiff was not being candid when she made reference to the need for the application being heard afresh, when she now says that the application had not yet been heard at all.

20. On the other hand, I find that Mr. Mbeka Advocate did not tell the Court that he had been instructed to request for a Ruling Date for the application dated 28th August 2017.

21. If his instructions were to make that request, then he did not discharge it.

22. And he has not explained to this court why he failed to request for a Ruling Date, if, indeed, that was his mandate.

23. There is no suggestion that Mr. Otieno Advocate influenced or coerced or persuaded Mr. Mbeka Advocate to act in a manner inconsistent with the instructions which the Defendant had given him.

24. If Mr. Mbeka was ignorant of the relevant history of the case, that can only be attributable to the failure by the Defendant to give him full instructions.

25. As the Defendant pointed out, parties and their Advocates have a duty to assist the Court to administer justice expeditiously.

26. By failing to adequately instruct the advocate who had been instructed to hold brief, the Defendant was not discharging its obligation.

27. And when an advocate accepted to hold brief for a colleague, whilst the said advocate did not have a comprehensive brief, he too was not discharging his obligation.

28. An advocate who holds brief ought to ensure that he is adequately instructed, preferably in writing. By so doing, he will be assisting not only the court, but also the party whose advocate's brief he was holding.

29. Secondly, when an advocate held brief when he was adequately instructed, he would be safeguarding his own reputation, as he would be working from an informed position.

30. Another issue which is significant relates to the orders made on 20th March 2018. On that date Kibunja J. took the position that;

> ***"…. the Respondent had opted not to file and serve any replying papers, and the Court will list the Application for Ruling."***

31. I understand that to mean that the Plaintiff had been given an opportunity to respond to the application dated 28th August 2017, but she had failed to do so. Therefore, the learned Judge concluded that the Plaintiff had opted not to respond.

32. It follows that the Court would then have rendered its Ruling in the absence of any response from the Plaintiff.

33. The Plaintiff was well aware about the position, and in an attempt to get another chance to respond to the application, she filed an application dated 22nd March 2018. The said application sought the following substantive relief;

"The directions and orders made on 20th March 2018, by which the court directed that the application dated 28th August 2017 shall be considered as an undefended application be set aside and the Plaintiff be granted leave to file a response to the application."

34. By bringing that application the Plaintiff was confirming that unless she was granted leave to respond, the application dated 28th August 2017 would be considered as undefended.

35. It would not be the Court or the Defendant who would have denied the Plaintiff a right to respond. It is the Plaintiff's own inaction which deprived the Court of input from the Plaintiff. Therefore, any prejudice that could be occasioned to the Plaintiff, because of her own failure to respond to the application dated 28th August 2017 could not be construed as being inimical to the Overriding Objective and **Article 159** of the **Constitution.**

36. The Courts cannot compel parties to respond to applications.

37. If a party has chosen to refrain from responding to an application against him, the Court would be right to proceed with the application.

38. In the final analysis, I find that the Defendant has failed to offer any explanation for bringing the current application more than 3 months after the consent order was recorded.

39. Secondly, I find no satisfactory reason in law to warrant the setting aside of the consent order.

40. I also find no sufficient grounds to warrant either the variation or the vacation of the consent order in issue.

41. Accordingly, the application dated 11th of September 2018 is dismissed.

42. Notwithstanding the said dismissal of the application, I find that the Plaintiff is not deserving of an order for costs. I so find because, (as I have already held herein), the Plaintiff had not been candid when she talked about a hearing afresh whilst she was well aware that the application had not yet been heard.

43. Accordingly, I order that each party will bear their own costs of the application dated 11th September 2017.

DATED, SIGNED and DELIVERED at KISUMU This 22nd day of May 2019

FRED A. OCHIENG

JUDGE