



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 142 OF 2017

COAST BUS LIMITEDAPPELLANT

VERSUS

ROSE MAKOKHA NAFULA.....RESPONDENT

RULING

1. On 8/10/2018 the Respondent filed a Notice of Motion dated 2/10/2018 and sought that the appeal be dismissed for want of prosecution on the basis that the appeal having been filed on the 17/07/2017, the Appellant had taken no steps to prosecute the matter and that there had not been compliance with the provisions of Order 42 Rule 13 and 35(2) of the Civil Procedure Rules.
2. That application was slated for hearing on the 27/11/2018 and on that day scheduled there was filed an Affidavit of service sworn and filed to show that the Appellant was duly served on 5/11/2018. Despite that otherwise sufficient service there was no attendance by the Appellant. On 27/11/2018, the date set for hearing, and after the appeal was called out without attendance by Applicant, and the Applicant/Respondent having addressed the court of the appeal was ordered dismissed.
3. It would appear that the appellant's counsel or his staff attended court on the 29/11/2019 and filed a Replying Affidavit sworn by one ALLAN ODONGO in opposition to the application. What then following was a lull till the 13/3/2019 when the Notice of Motion dated 9/3/2019 was filed and sought interim stay of the orders of 27/11/2019, setting aside of the same orders and reinstating the Appeal for having on the merits.
4. The application was crafted to have been founded on the fact that by some inadvertence the counsel misdiarised the hearing date as 29/11/2018 instead of 27/11/2019 and that the same mistake formed the basis of late filing of the Replying Affidavit.
5. It was then said that the respondent had demanded payment of the decretal sum and a decision to seek reinstatement was made on the 4/3/2019 with a contention that if the interim orders are not granted the Appellant stood to suffer irreparably because the respondent would execute the decree subject of the appeal.
6. The application when served was opposed by the Respondent who filed a Replying Affidavit sworn by counsel for the Respondent on the 20/3/2019. The opposition advanced is that there was no evidence to show that there was a mistake of mis-diarising and that there was an unexplained and inordinate delay in bringing the application for reinstatement.
7. The application was termed a ploy to delay the respondent from accessing the fruits of litigation and correspondence was then exhibited to show that upon dismissal counsel engaged each other in negotiations culminating in a letter by the Applicants counsel dated 25/2/2019 enclosing a consent to settle the matter by payment of the sum of Kshs.1,246,500, then deposited in an escrow account at NIC Bank City Centre Nairobi.
8. That consent was duly signed by the counsel for the respondent on the 28/2/2019 or thereabout but it seems not to have been signed by the Appellants counsel. That consent addressed to the bank seems to have resulted from a trail of email exchanged between counsel between 5th January 2019 and 5/2/2019. Also exhibited was a letter dated 6/12/2018 and received by the Appellants advocates on 13/12/2018 by which the respondent informed the Appellant of the fact of dismissal and demanded. Based on such documentation the Replying Affidavit terms the current Application as malicious and gross abuse of the court process.
9. When parties attended court to argue the application, they essentially reiterated their affidavits without anything more. I have taken due regard of the rival position of both sides and the only issue I find to beg determination is whether the appellant/Appellant has established a case for the court to exercise its discretion of setting aside in its favour.
10. The principles that guide the court in exercise of the very wide and unfettered discretion to set aside expressed to be intended to be

exercised by courts in order to avoid injustice or hardship occasioned by or resulting from excusable mistake, inadvertence or accident but not intended to assist a party who has set out to obstruct and delay the course of justice [1]. It is also a requirement that the default leading to the order sought to be set aside must be explained and a prompt action taken to remedy the default.

11. Put in the context of the matter before me, I have asked myself whether there was an excusable mistake to enable me exercise the court's discretion in the Appellant's favour.

12. I do not doubt that it is possible to misdiarise. Even the court diary at times misses out a matter. However the explanation does not appear plausible for two reasons:-

i. No attempt was made to exhibit the pages of the advocate's diary for the two days, 27/11/2018 and 29/11/2018, to show that indeed there was a mistake. That to the court shows lack of candour.

ii. On the 29/11/2019 the office of the Appellants counsel did file a Replying Affidavit. It is not said what was done with that Affidavit and why the cause list for the day was never interrogated to see why the matter was not listed.

That shows the court lack of due diligence to assist the court meet its overriding objectives.

13. In addition, it took the appellant a period between late November 2018 to mid-March 2019, to file the application. That in my calculation translates into some 3 ½ months with no steps being made to correct the mistake, if there was indeed a mistake. But of more concern is the fact that, the fact of dismissal of the appeal was brought to the attention of counsel by a written letter way back on 13/12/2018 that information appear to have instigated correspondence by phone, letters and email which in fact calumniated in an agreement to settle at a definite sum. The Respondents counsel even signed the consent. The letter forwarding the consent and disclosed to have emanated from the head offices of the appellant's counsel in Nairobi was itself explicit. It said:-

“The above matter and telephone conversation between you and the undersigned refers.

Kindly sign and stamp the attached amended consents and return them to us for further dealing.

We apologise for the inconvenience”.

14. What would one make of the conduct of the Appellant when the current application is juxtaposed against the correspondence exchanged? Would it be genuine to say that a decision to file the application was made on 4/3/2019? If indeed it was so made, what become of the consent reached between the parties? Won't it have been expected of the appellant's counsel, even at the level of professional courtesy, to inform his colleague of a reason for renegeing?

15. All the above questions if answered honestly paint the picture of what the court of appeal called in *Shah vs Mbogo (supra)*, a person who has set by design or otherwise to obstruct, delay and or defect the course of justice.

16. In my opinion and finding, the Appellant had led the Respondent to believe that the matter was not to be revived by an application to set aside and reinstatement but was settled and the only thing outstanding was the withdrawal of the sums deposited as security in settlement of the decretal sum. Once the respondent was so led, the applicant should not be allowed to renege from his represented position. At least not with the blessing of the court

17. I do find that the appellants conduct was deceitful and evasive and not in the best of expectations of a litigant and his counsel. For that reason I am unable to exercise my discretion in favour of such a litigant and thus order that the Notice of Motion dated 9/3/2019 be dismissed with costs to Respondent.

Dated and signed at Mombasa this 4th day of June 2019.

P.J.O. OTIENO

JUDGE

Dated and delivered at Mombasa this 7th day of June 2019.

LADY JUSTICE D. CHEPKWONY

JUDGE

[1] *Shah vs Mbogo* [1968] EA 93.