



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC APPLICATION NO 516 OF 2018

JOSIAH MUNENE KIMATHI1ST APPLICANT

JENNIFER KIMATHI2ND APPLICANT

MONARCH INSURANCE CO LTD.....3RD APPLICANT

VERSUS

GEORGE ONYANGO OUMA and

JAO (As administrators of the

estate of the Late BO (Minor).....RESPONDENT

RULING

INTRODUCTION

1. The Applicant's Notice of Motion application dated and filed on 14th December 2018 was filed pursuant to the provisions of Section 1A,1B, 3B of the Civil Procedure Act, Order 12 Rule 7, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. Prayer No 1 and 2 were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT the Honourable Court be pleased to set aside its orders of 29th October 2018 and reinstate the Applicants' Application dated 15th October 2018 in Nairobi Miscellaneous Application No 516 of 2018.

4. THAT cost of the application be provided.

2. The Applicants' Written Submissions were dated 11th February 2019 and filed on 12th February 2019 while those of the Respondent's were dated 25th February 2019 and filed on 26th February 2019.

3. Parties asked this court to deliver its decision based on Written Submissions that they fully relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPLICANTS' CASE

4. The Applicants' application was supported by the affidavits of Daniel Kiprop Kurui that was undated and that of Leah Muithiraniah that was sworn on 14th December 2018. The two (2) deponents were both advocates in the firm of M/S M W Muli & Co Advocates that was on record for the Applicants in this matter.

5. Leah Muithiraniah deponed that judgment in **CMCC No 1582/2013 Nairobi** was to be delivered on 3rd August 2018. However, it was not delivered and was instead deferred to 16th August 2018 but on that day, it was further deferred to 27th August 2018.

6. She stated that they were not able to trace the file on 27th August 2018 and after keeping vigilance on the matter on 4th October 2018, she was informed that the file was traced at the typing pool where the judgment was being typed. The following day on 5th October 2018, she was informed that judgment was delivered on 24th August 2018 and the file taken to the Typing Pool which was the reason why they were unable to trace the file on 27th August 2018.
7. She was emphatic that had they been aware of the delivery of the judgment, they could have perused the court file and filed a Memorandum of Appeal within thirty (30) days. She therefore contended that they had come to court with clean hands.
8. She stated that she had sworn her Affidavit in support of the present application to be granted a stay of execution of the aforesaid judgment **pending the hearing and determination of the said application** (emphasis court)
9. On his part, Daniel Kiprof Kurui stated that he had been ready to proceed with the hearing of the Applicants' application dated 26th October 2018 that was scheduled for hearing on 29th October 2018. He said that he went to the Chief Magistrate's Court in Milimani for a matter that was being mentioned and he requested a clerk who was known to him to hold his brief in this matter.
10. He averred that he was shocked when he came to the High Court and found the aforesaid application had been dismissed. He contended that the omission to attend court was inadvertent and unintentional and his clients ought not to be punished for his mistake.
11. He added that it was common practice for advocates to juggle between courts and attend several matters. He pointed out that the Respondents would not suffer any prejudice if the present application was allowed and thus urged this court to allow the same.

THE RESPONDENTS' CASE

12. In response thereto, on 17th January 2019, Onyango Ouma swore a Replying Affidavit on his own behalf and on behalf of his Co-Respondent, Jane Atieno Ouma. The same was filed on 28th January 2019.
13. The Respondents asserted that the Applicants' application was an abuse of the court process and it was clear that they did not take the matter seriously. They added that the Applicants fixed an *ex parte* hearing date for the hearing of their application but failed to prosecute the same. It was also their contention that the Applicants did not tender any proof that they were before the subordinate court on the material date.
14. They therefore urged this court to dismiss the present application.

LEGAL ANALYSIS

15. This court looked at the parties' Written Submissions and found it prudent to address the following preliminary issues that it noted to have been pertinent:-

- 1. Whether the Applicants' Notice of Motion application dated and filed on 14th December 2018 as drafted, was competent.**
- 2. Whether the Applicants could be granted orders for stay of execution pending appeal.**

16. It therefore addressed the said issues under the separate and distinct headings.

I. COMPETENCE OR OTHERWISE OF THE APPLICANTS' NOTICE OF MOTION APPLICATION DATED AND FILED ON 14TH DECEMBER 2018.

17. It is worthy of note that the aforesaid application was seeking the reinstatement of the Applicants' Notice of Motion application dated and filed on 15th October 2018 that was dismissed for want of prosecution on 29th October 2018. The Applicants were therefore expected to proffer a plausible reason why the said application should be reinstated.

18. It was evident that the Affidavit of Daniel Kiprof Kurui was intended to explain exactly what happened on 29th October 2018 so that this court could be persuaded to reinstate the Applicants' Notice of Motion application dated and filed on 5th December 2018. The Affidavit of Leah Muithiraniah was not relevant for that purpose.

19. A careful perusal of the Affidavit of Daniel Kiprof Kurui showed that the same was undated. This was contrary to the provisions of Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya).

20. The said Section 5 of the Oaths and Statutory Declarations Act states that:-

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

21. It is couched in mandatory terms. Failure by the Commissioner for Oaths to date the said Supporting Affidavit of Daniel Kiprop Kurui therefore rendered the Applicants' application in respect of the reinstatement of their Notice of Motion application dated and filed on 15th October 2018 incompetent and defective *ab initio*.

22. Whereas Article 159(2) (d) of the Constitution of Kenya, 2010 mandates courts to administer justice without undue regard to procedural technicalities, it is not a panacea for all technicalities. An undated Affidavit is not a procedural technicality that can be cured by Article 159(2)(d) of the Constitution of Kenya as it goes to the root of the document, which becomes an oath and admissible, only after duly complying with the mandatory provisions of Section 5 of the Oaths and Statutory Declarations Act.

23. It was therefore the view of this court that the Applicants' present application in respect of reinstatement of their Notice of Motion application dated and filed on 15th October 2018 was defective and incompetent *ab initio* for want of proper supporting affidavits and could not be granted as had been prayed for.

II. COMPETENCE OR OTHERWISE OF THE PRAYER FOR STAY OF EXECUTION PENDING APPEAL

24. This court established that the Supporting Affidavit of Leah Muithiraniah was seeking to support the Applicants' application for the granting of an order for stay of execution pending appeal.

25. This court looked at the parties' respective Written Submissions on the question as to whether the Applicants should be granted an order for stay of execution pending appeal and noted that they were all agreed that a party seeking the said order must demonstrate that he has met all the conditions that have been set out in Order 42 Rule 6(2) of the Civil Procedure Rules.

26. What they were not agreed upon was whether or not the Applicants had met the threshold to be granted the said order. The Applicants argued that they had met all the conditions while the Respondents were emphatic that they had not.

27. Having said so, this court noted that the Applicants had not sought a prayer for stay of execution of the judgment in **Nairobi CMCC No 1582 of 2013** that was delivered on 24th August 2013 **pending appeal** (emphasis court). What had been sought for was a stay of the said judgment **pending the hearing and determination of the present application.**

28. Notably, a court can only grant an order that has only been sought in a pleading. It cannot grant an order that is introduced for the first time in Written Submissions. This is because parties are bound by their pleadings.

29. Accordingly, this court did not consider the parties' Written Submissions on the issue of a stay of execution pending appeal, on merit, as there was no such prayer in the Applicants' Notice of Motion application dated and filed on 14th December 2018.

DISPOSITION

30. For the foregoing reasons, the upshot of this Court's Ruling was that the Applicants' Notice of Motion application dated and filed on 14th December 2018 was not merited and the same is hereby dismissed. Costs of the application shall be in the cause.

31. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of July 2019

J.KAMAU

JUDGE