REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. E397 OF 2018

MASTER POWER SYSTEMS LIMITED.....PLAINTIFF

VERSUS

CIVICON ENGINEERING AFRICA .....1ST DEFENDANT

GZI KENYA LIMITED.....2ND DEFENDANT

RULING

1. Through the application dated 14th March 2019, the applicant seeks orders that:-

> ***1. Spent***
>
> ***2. That the Honourable Court be pleased to review and or set aside the exparte orders issued on 13th March 2019 and proceedings thereto and in its place do be pleased to reinstate the applications dated 10th December 2018 and 4th February 2019 and order that the same be heard on merit.***
>
> ***3. That the applicant herein be set down for hearing interpartes as a matter of urgency.***
>
> ***4. That costs of this application be provided for.***

2. The application is brought under Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 12 Rule 7, Order 51 Rule 10(2) and 15 of the Civil Procedure Rules, Article 50(1) and 159(2) (e) of the Constitution.

3. The application is supported by the affidavit of the applicants counsel, **RONO CAROLYNE,** and is premised on the grounds that the applicant applications dated 10th December 2018 and 4th February 2019 were listed for hearing on 13th March 2019 but that the applicant's counsel inadvertently misdiarized the hearing date to be 14th March 2019. She adds that when the said applications came up for hearing on 13th March 2019, the applicant's counsel did not attend court thereby leading to their dismissal for non attendance.

4. The applicant states that the non-attendance by counsel was therefore as a result of an honest mistake/error on the part of the advocate which error should not be visited on the client.

5. At the hearing of the application **Mr. Lusi,** learned counsel for the applicant submitted that under Order 12 Rule 11 of the **Civil Procedure Rules (CPR)** as read with Section 3A of the **Civil Procedure Act** the court has inherent powers to grant the orders sought in the application. For this argument, counsel relied on the decision in the case of ***Wachira Karani v Bildad Wachira*** [2016] eKLR wherein the court observed that the **Civil Procedure Rules** cannot possibly anticipate every situation that may arise in litigation and that in the absence of an express provision, the court can take recourse in its inherent jurisdiction.

6. The respondent filed Grounds of Opposition in response to the application and set out the following grounds:-

> ***1. The plaintiff application is bad in law as the same had been filed under the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010 which applies to setting aside judgment or orders for dismissal of a suit as opposed to setting aside orders dismissing an application for non attendance.***
>
> ***2. The plaintiff's advocate has failed to furnish the court with cogent reasons for her non-attendance as reasonable diligence on***

the part of the applicant's advocate would have revealed that the applications dated 10th December, 2018 and 4th February, 2019 were fixed for hearing on 13th March, 2019.

3. The plaintiff's advocate has not furnished sufficient proof that the matter was misdiarised in her diary as the annexure marked CR-1 to the application purports to show pages of a diary without proof of the fact that the diary in fact belongs to the plaintiff's advocate.

7. At the hearing of the application, **Mr. Darr**, learned counsel for the respondent submitted that the applicant's affidavit in support of the application does not sufficiently explain how the matter was misdiarised and that annexures of the pages of the advocates diary do not show that the diary in question belonged to the advocate as had been alleged.

8. It was submitted that an application seeking the exercise of the courts discretion must be supported by an honest explanation as it is a serious matter to mislead the court. Counsel argued that the applications sought to be reinstated are not merited and that the plaintiff should instead fix the main suit for hearing.

9. I have carefully considered the instant application, the Grounds of Opposition filed by the respondent, the parties' respective submissions together with the authorities that they cited. I note that the main issue for determination is whether the court should exercise its inherent discretion to reinstate the applications dated 10th December 2018 and 4th February 2019.

10. The applicant conceded that Order 12 Rule 7 of the CPR provides for the reinstatement of suits, but also maintained that the said provision was still relevant to this application in view of the fact that the CPR could not have anticipated for every possible scenario. The applicant argued that the court could still invoke its inherent powers under Sections 3 and 3A of the Civil Procedure Act and allow the application in the interest of justice.

11. My finding is that by granting the court inherent jurisdiction under Sections 3, 3A, and 63(e) of the Civil Procedure Act, the drafters of the law took cognizance of the fact that there could be instances that could arise, during proceedings, that would require the court to exercise its discretion and grant prayers sought in respect to applications that are not necessarily expressly provided for in the Civil Procedure Act. Courts have however held the view that such discretion must be exercised judiciously and in the most deserving cases as opposed to acting whimsically and capriciously.

12. The circumstances in this case, as explained by the applicant's counsel Miss Rono, through a sworn affidavit, is that there was an error or confusion in the recording/entry of dates in her diary that showed that the applications would come up for hearing on 14th March 2019 instead of the actual date being 13th March 2019. The advocate attached copies of the relevant pages of her diary as annexures to the supporting affidavit to demonstrate to the court that there was a mix-up in the recording of the hearing date. On his part, counsel for the respondent argued that there was no sufficient proof of the alleged mix up in the dates.

13. My finding is that no material was placed before this court to show that the applicant's counsel, who is an officer of the court, was not being truthful in her assertion that she mistakenly and inadvertently recorded the hearing date as 14th March 2019 instead of 13th March 2019.

14. My position is fortified by the fact that the instant application was filed on 14th March 2019, barely one day after the applications were dismissed on 13th March 2019. I find that the quick action by the applicant, to file the instant application so as to notify the court of their predicament is a demonstration that the applicant acted in good faith and had no intention of misleading the court as alleged by the respondent.

15. The respondent further argued that the applications sought to be reinstated are not merited. My finding is that the merits of the applications or lack thereof is not the subject of this ruling as that is a matter that can only be determined after the hearing of the said applications.

16. Courts have held the view that mistakes of counsel should not be visited on the client. This position was espoused in the case of ***Belinda Muras & 6 Others v Amos Wainaina*** [1978] KLR in which the court defined what constitutes a mistake as follows:

"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."

17. Similarly in ***Phillip Chemwolo & Another v Augustine Kubede*** [1982-88] KLR 103 it was held that:-

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit".

18. In the instant case, I find that there is no way that the applicant could have known or contributed to the erroneous entry made in his advocate's diary. I further find that the mistake can be attributed to human error for which the applicant should not be penalized.

19. In conclusion, I find that the instant application is merited and I therefore allow it as prayed with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 3rd day of October 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Lusi for the applicant

Mr. Owino for the respondent

Court Assistant –Margaret