



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 41 OF 2019

TAHMEED EXPRESS LIMITED.....APPELLANT/APPLICANT

-VERSUS-

JOSEPHINE NDANU(suing as a legal representative of the Estate of

Julius Muoki Munyeke (deceased).....RESPONDENT

-AND-

RANDA COACH LIMITED.....(JUDGMENT DEBTOR) RESPONDENT

RULING

1. The Appellant filed an appeal on **17th May, 2019** against a ruling by the trial court. Together with the appeal, he filed an application by way of Notice of Motion dated **17th May, 2019** seeking an order of stay pending hearing of the appeal.
2. The said application was listed for hearing on **6th June, 2019** but was dismissed for want of prosecution following the absence of the then Applicant and his advocate Mr. Ndere. The present application dated **12th June 2019**, seeks to have the dismissal orders of **6th June, 2019** set aside and the Notice of Motion dated **17th May 2019** reinstated for hearing.
3. One of the grounds in support of the application is that the court inadvertently dismissed the application for want of prosecution. Further that counsel instructed Mr. Muthama through his clerk to hold his brief on **23rd May, 2019**. He got no brief on what had transpired until **11th June 2019**. Further that he was never served with any replying affidavit and or submissions. That he only got apprehensive when the auctioneer called him.
4. Mr. Ndere for the Applicant filed a supporting affidavit expounding on the grounds listed. He asked to be granted the orders sought as denying them would subject the Appellant/Applicant to a lot of prejudice, as there is no resemblance between the Applicant and the judgment debtor.
5. It was his submission that in view of the pending appeal it is only fair that the dismissed application be reinstated, for hearing since the mistake was by counsel. He relied on Article 159 (2) (d) of the constitution and the case of **Philip Chemowolo & Another –v- Augustine Kubende (1982 – 1988) KAR** where it was decided as follows: -

“Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”
He further referred to the case of **Bamburi Special Products Ltd –vs- Richard K. Samoei (2017) eKLR** and asked the court to allow the application.

6. The Respondent filed a replying affidavit taking issue with the Applicant who referred to her advocate Mr. Muthama as its advocate who appeared on **23rd May, 2019**. She averred that the application is meant to deny her the fruits of the judgment in place. That allowing the application would be prejudicial to her.
7. M/s. J.A. Makau for the Respondent in their submissions contended that the Applicant’s counsel was not being truthful when he claimed

ignorance of the hearing of 6th June, 2019. That the said date was taken by consent with Mutinda Kimeu representing Mr. Ndere. He referred to the case of **Bains Construction Co. Ltd vs- John Nzare Ogowe (2011) eKLR** where the Court of Appeal observed: -

“It is to some extent true to say mistakes of counsel as is the present case should not be visited upon a party but it is equally true when counsel as agent is vested with authority to perform some duties as principal and does not perform it, surely such principal should bear the consequences”.

8. It is counsel’s submission that counsel for the Applicant does not obey court orders and he fails to come to court when dates are given. This he says is being done by the Applicant who is enjoying stay orders. Referring to the case of **Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral & Boundaries Commission & 6 Others; (ii) Kamlesh Mansukhalal Damji Pattni -v- Director of Public Prosecutions & 3 Others (2015) eKLR (iii) Simon Thuo Mwangi –vs- Unga Feeds Limited Civil Appeal No. 181 of 2003(2015) eKLR**, among others counsel submitted that since the failure to attend court by counsel for the Applicant was deliberate, the application is not merited.

9. It was his further submission that the Respondent will suffer prejudice if the application is allowed. The reason being that the Respondent proved her case before the Magistrate’s court which gave her judgment and her young family is suffering because of this delay. To support this, he cited the case of **Machira t/a Machira & Co. Advocates East Africa Standard (No. 2) (2002) KLR63**. It is therefore the Respondent’s prayer that the application be dismissed since the Applicant’s counsel has not filed submissions in respect to the application dated 17th May, 2019.

Determination

10. I have considered the application dated 12th June 2019 and the rival submissions. The record in this case is very clear on what has transpired in this matter. The sequence is as follows:

- **On 17th May, 2019 the Applicant filed a memorandum of appeal challenging orders by the Hon. Mayamba – Principal Magistrate Kilungu made on 18th April, 2019.**
- **Together with the appeal was filed an application seeking orders of stay of the orders issued on 18th April, 2019 by Mr. Mayamba or an order maintaining the status quo.**
- **The application was placed before this court on 20th May, 2019 and an order for maintenance of status quo was issued.**
- **The same fixed for hearing on 23rd May, 2019.**
- **On 23rd May, 2019 the matter could not proceed because Mr. Mutinda Kimeu and not Mr. Muthama holding brief for Mr. Ndere for the Appellant/Applicant claimed to have been served with a Replying affidavit in court and required seven days to file a further affidavit.**
- **The request was granted and directions taken to the effect that the application would be disposed of by way of written submissions within 14 days.**
- **The application dated 17th May 2019 was then fixed for hearing on 6th June 2019.**
- **By 11:35 am there was no appearance by the Appellant/Applicant nor his advocate Mr. Ndere. Furthermore, Mr. Ndere had neither filed the further affidavit nor submissions as sought for on 23rd May, 2019.**
- **The application dated 17th May, 2019 was then dismissed for want of prosecution.**
- **It is the dismissal order of 6th June, 2019 that the Appellant/Applicant seeks to set aside vide the application dated 12th June 2019.**

11. From what I have set out above, it is clear that the Appellant/Applicant was represented in court on 23rd May 2019 when directions were taken and a hearing date taken. It was exactly fourteen (14) days between 23rd May, 2019 – 6th June, 2019 when the matter came for hearing.

12. Mr. Ndere cannot convince this court that for those 14 days he never got a chance to peruse the court file to see what orders had been made. The clerk he allegedly sent must have told him who held his brief on 23rd May, 2019. Was it so difficult for him to call Mr. Mutinda Kimeu and not Mr. Muthama to inquire on what transpired in court?

13. Even as he argued this application he has never filed the further affidavit and the written submissions in respect to the application dated 17th May, 2019 which he wants reinstated.

14. M/s J.A Makau for the Respondent has cited a myriad of decisions showing that where there are set down procedures and processes the same must be adhered to, to avoid any injustice to the parties. It is true that the mistake of counsel should not be visited on the client but we all must remember that there are other parties and counsel in the same matter and all this must be balanced, to avoid any injustice to either of the parties.

15. This matter before me is about setting aside the dismissal order of 6th June, 2019 and not about the orders dismissing the objection proceedings by the Magistrate’s court at Kilungu.

16. I will therefore not consider the merit of the application dated 17th May, 2019 at this point. After considering all I have stated above, I find it reasonable to give the Appellant/Applicant one more chance to argue its application dated 17th May, 2019 subject to the following

conditions: -

- i. The Appellant/Applicant to pay to the Respondent costs for 6th June, 2019 assessed at Kshs.8,000/= to be paid within 7 days.**
- ii. Court adjournment fees for 23rd May 2019, and 6th June, 2019 to be paid on or before the next hearing date.**
- iii. The Appellant/Applicant to file its submissions to the application 17th May, 2019 on or before 15th October, 2019. Anything filed after 15th October, 2019 should not be accepted by the registry.**
- iv. Application dated 17th May, 2019 to be heard on 31st October 2019. The Appellant/Applicant will have no audience before this court if conditions (i) – (iii) are not complied with.**

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 8TH DAY OF OCTOBER, 2019 IN OPEN COURT AT MAKUENI.

H. I ONG'UDI

JUDGE