



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 126 OF 2015

TERRA CRAFT LIMITED.....APPELLANT/APPLICANT

VERSUS

BEN MUSUNDI WALIUBAH1ST RESPONDENT

BENSON IFEZA ANYUMBA2ND RESPONDENT

RULING

1. The application dated 7th December, 2018 seeks orders that:

The orders dismissing this Appeal for non-attendance issued on 26th September, 2018 be and is hereby set aside and the orders for stay of execution issued before be and is hereby reinstated.

2. According to the grounds and the affidavit in support of the application dated 26th September, 2018, the Applicant and the 2nd Respondent appeared before Hon. Justice Mboghli where the matter was cause listed to confirm the filing of supplementary affidavits and for directions. That the matter proceeded before Hon. Justice Mboghli, only for the Applicant to find out later that the Appeal was dismissed on 26th September, 2018 by this court for non-attendance. The Applicant blames the failure to attend court on the mix up in the cause list which did not capture the case numbers and the names of the parties correctly.

3. In opposition to the application, the 1st Respondent filed the grounds of opposition dated 7th January, 2019 which are as follows:

1. The application is an afterthought and an abuse of the court and should be dismissed as it has been brought after a long inordinate delay when the Respondent filed his Party and Party Bill of Costs.

2. The application is incompetent, fatally defective and ought to be struck out.

3. Paragraphs 2,3,4,5 and 10 of the affidavit are false and do not reflect the correct position of the Record of the court. The application is thus hinged on falsehoods and ought to be dismissed *ex debito justitiae*.

4. The Applicant has never shown any interest in prosecuting this appeal as the record will confirm. The Applicant never fixed the appeal for directions and never attended court for directions. The Applicant never fixed the appeal for hearing and equally never attended the same when it came up for hearing yet it is their appeal. Clearly, no useful purpose will be served in allowing the application as the Applicant has proved time and again to be indolent and has lost interest in the appeal.

5. Without prejudice to the foregoing, should the honourable court allow the application for one reasons or another, we pray that the Appellant be ordered to fulfill the following conditions:-

i. Deposit the decretal sum in a joint interest earning account in the names of both counsels on record within 14 days as a condition for reinstating the stay of execution order.

ii. To fix the appeal for hearing within 21 days.

iii. To pay the Respondent throwaway costs Ksh.50,000/= within 7 days.

4. The 2nd Respondent supported the application and stated that on 20th September, 2018 he also appeared before Hon. Justice Mbogholi where the appeal was listed to confirm the filing of supplementary affidavits and for directions on how the appeal was to proceed. The non-attendance herein when the appeal was dismissed is blamed on the mix up in the cause list.

5. I have considered the application and the response to the same.

6. A perusal of the court file reflects that only counsel for the 2nd Respondent was in court on 26th September, 2018 when this court dismissed the Appeal for non-attendance. The cause list for this court for the said date which is exhibited herein reflects the correct file but the wrong parties. On the same date, the cause list for Hon. Justice Mbogholi reflects the wrong number but the names of the parties were reflected as the same as in the Appeal herein. Due to this incongruence in the cause list for the dates in question, this court is persuaded to allow the application.

7. Consequently, the application is allowed with costs in cause.

Dated, signed and delivered at Nairobi this 14th day of Nov., 2019

B. THURANIRA JADEN

JUDGE