



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCC NO. 5 OF 2018

BONIFACE KIVINDYO MUTISYA PLAINTIFF

-VERSUS-

ALFRED KAVILA KIVINDYO 1ST DEFENDANT

CONSOLIDATED BANK LTD 2nd DEFENDANT

ALMA SOLUTIONS LTD 3rd DEFENDANT

RULING

INTRODUCTION

1. The Applicant/2nd defendant seeks orders for arrest of judgment and admission of submissions in respect of the instant suit.
2. The same is based on Article 159 (2) (b) and (d) Constitution of Kenya. Section (A), (B), 3 (A) CPA, Order 51 Rule 1 and 8 CPR 2010, and all enabling provisions of the law. It is supported by the ground on the face of the motion and an affidavit sworn by Prestone Wawira on 29/10/2018.
3. The Application was opposed by Mr. Hassan holding brief for Ms. Nyaata advocate for the Plaintiff/Respondent.
4. The core ground in support is that the counsel who was handling the matter resigned from the firm and was on compulsory leave since 19/10/2018 thus submissions were not filed in time.
5. It is deponed in support of the application that, the counsel who was handling the matter was on compulsory leave from 19/10/2018 and also resigned. On 25th July 2018, the hearing of this suit was concluded and the judge directed that the parties would have 30 days to file their submissions.
6. The court directed that the judgement herein would be delivered on 23rd October 2018. The advocate previously in conduct of the matter, EK, resigned from the firm and was away on compulsory leave since 19th October 2018.
7. As the firm took over his matters for reallocation, it was noted that there had been an inadvertent lapse in filing submissions which gravely prejudices the 2nd Defendant's defence in this matter.
8. It is in the interests of justice that the 2nd Defendant's submissions filed together herewith be admitted, deemed as duly filed with leave of court, and considered before the judgment herein is delivered.
9. The Respondent had not filed any reply as service was effected same day of hearing despite directions on 29th October 2018 for same to be served for hearing on 02/11/018.
10. During hearing of the application the applicant advocate submitted that, the advocate who handled the matter EK resigned from the firm and was required to hand over all files which he was handling.
11. On 24/10/2018 there was an audit of files he was handling where it was discovered this matter was coming for judgement. The submission had not been prepared.
12. It is in interest of justice the court allows application and consider written submissions and arrest judgment. No prejudice shall be

suffered by the Plaintiff

13. The nature of this case is such that only 2nd Defendant who appeared in this matter; the Plaintiff never requested judgement against Defendants No. 1 and 3. It is submitted that there is collusion between the Plaintiff and Defendants No. 1 & 3.

14. In the circumstances of the case applicant seek court to exercise discretion and consider that the 2nd Defendant is the only party who had defended this suit. Admission of 2nd Defendant application would enable court to get understanding of issues in the matter.

15. In a rejoinder, the respondent advocate submitted that, It is not justified to put off judgement which was scheduled for delivery on 24/10/2018. What matters is not submission but evidence on record. Submission is just an opinion of what is on record as evidence.

16. Causing unnecessary delay should not be allowed. In any case whoever loses in the matter will be at liberty to appeal.

17. The matter is not accurate but for the firm. Associates come and go but firm remain. Thus urge court to dismiss application with costs, and court to deliver judgement.

18. ART 159; judicial authority;

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

3. Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.

19. OBJECTIVE OF ACT CAP 21

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.[Act No. 6 of 2009, Sch.]

20. Duty of Court.

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

[Act No. 6 of 2009, Sch.]

21. It is alleged the associate resigned on 19/10/2018 and today is 02/11/2018. It is not shown when the associate advocate left the firm when the firm discovered the lapse. No evidence of advocate having resigned and or being on compulsory leave.

22. By the time application was filed, the judgement was ready for delivery save that the court was way on 24/10/018 but that day the court was not sitting.

23. Admission of the submissions herein entails the rewriting the judgement and thus adjourn the delivery of the same to a later date. The above will violate the provisions of **art 159 Constitution and Sections 1A and 1B CPA** above cited.

24. The material before the court is insufficient to persuade the court to exercise discretion in favour of the Applicant.

25. The application should have been filed earlier. There are no sufficient reasons to justify arrest of judgement.

26. Thus the court makes the following orders;

1. The application is dismissed with no orders as to costs.

2. The delivery of judgement to proceed.

DATED, DELIVERED, SIGNED THIS 12TH DAY OF NOVEMBER 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE