REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC CIVIL APPLICATION NO. 153 OF 2015

MUTUA MWANGANGI

JOHN MUTISO ……..……..…….…….. APPLICANTS

VERSUS

JAMES MUTUA MUTIO …… RESPONDENT

RULING

Issue for determination

0. The question for determination in this application is whether the Court will reinstate to hearing an application for inter alia stay of execution. By an application dated 17th November 2015, the applicant seeks principally an order for the reinstatement of an earlier application dated 15th July 2015 seeking stay of execution pending appeal to the High Court from a Judgment of the Chief Magistrate's Court. The application for stay of execution had been scheduled for hearing on the 21st September 2015, when the applicant's counsel did not attend and the application was dismissed for non attendance.
0. The application for reinstatement was supported by an affidavit of Sandra Nyakweba a claims director of the Insurance Company which represents the interests of its Insured, the applicants herein, pleading inadvertence for the default in attending court on the hearing date and avers that it was a result of mistake of counsel then "on record at the time [who] left without proper handing over thus leading to the discovery of the matter after time had lapsed."
0. In reply counsel for respondent, Mr. Francis Sila, Advocate has filed a Replying Affidavit sworn on 2nd November 2015 opposing the application for reinstatement primarily on grounds that the application for stay of execution pending appeal which was dismissed for non attendance on 21st September 2015 had in fact not been served on the respondent; that no details were given as to the advocate for the applicant who allegedly left without proper handing over leading to the failure of counsel for the applicant to attend the hearing of 21st September 2015 and that the respondent had already taken steps for the execution of the judgment of the trial court and 'paid further court fees in the sum of Ksh.6,555/- and taken out warrants of attachment and sale to recover the judgment sum from the applicant.'

Jurisdiction to reinstate an application

0. Order 12 Rules 1.and 7 of the Civil Procedure Rules empower the court to dismiss a suit for want of attendance by the parties and for reinstatement of thereof upon application upon terms as may be just, as follows:

1. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit.

7. Where under this Order judgment has been entered or ***the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.***

0. I consider that a fortiori, an application being a minor procedure within a suit, the court would have similar powers to dismiss and reinstate an application as in this case.
0. In ***PITHON WAWERU MAINA V THUKA MUGIRIA,*** Court of Appeal, at Nairobi (Potter, Kneller JJA & Chesoni Ag JA) Civil Appeal No 27 of 1982 of 19 May 1983, POTTER JA set down the principles to be applied in considering an application for setting aside judgment or dismissal of suit for want o f appearance, defence or attendance at hearing under the rules of the former Civil Procedure Rules, in similar terms as the Civil Procedure 2010, as follows:

"This is another case concerning the exercise of the judicial discretion under Order IXA, rules 10 and 11 and under Order IXB rule 8 (which are in the same terms) of the Civil Procedure (Revised) Rules 1948, ***to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing.*** *As regards the exercise of that discretion, certain principles are now well established in our law.*

Firstly, as was stated by Duffus P in Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E:

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."

Secondly, as Harris J said in Shah v Mbogo [1967] EA 116 at 123B:

"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

That judgment was approved by the Court of Appeal in Mbogo v Shah [1968] EA 93.

And in Shabir Din v Ram Parkash Anand (1955) 22 EACA 48 Briggs JA said at 51:

"I consider that under Order IX rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."

Thirdly:

" … a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice." See per Newbold P in Mbogo v Shah [1968] EA 93 at 96 G."

0. I agree with the principles for the setting aside of exp-arte judgment or judgment (or dismissal) of suit for failure of parties to attend and observe that the first two principles apply to the application

before the Court. The applicable principles for the present circumstances are, therefore, that the court has unfettered discretion to do justice between the parties and the exercise of discretion is intended to 'to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error' but not to aid a party who seeks to delay the fair conclusion of suit. In addition, as observed in ***Shabir Din v Ram Parkash Anand*** (1955) 22 EACA 48 –

"In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case."

CONCLUSION

0. On the merits of the application, it appears to me that counsel for the applicant who had filed an application for stay of execution ending appeal could not lightly fail to attend court for the hearing of the application which if dismissed for want of prosecution or attendance would immediately result in execution process falling due. I am prepared to accept that there must be a mistake of counsel, whether inadvertent or negligent. That the applicant did not give the details by way of name of the advocate and time and diary of the law firm to indicate that the hearing of the application was indeed diarised and that the advocate handling the matter had left without proper handing over, is not an indication that the situation did not happen as alleged; it only indicates a negligent manner of handling the application for which the court has discretion to excuse. In the grounds of the application, the applicants plead that mistake of counsel should not be visited upon the applicant who are styli desirous of prosecuting their application for stay of execution and appeal from the judgment of the trial court. I find that there was mistake by counsel in not serving the application for stay of execution before the hearing and in not attending the court for its hearing.
0. The application for reinstatement was filed on 18th November 2015 some two months since the application for stay of execution was dismissed on 21st September 2015. In the circumstances of the failure of proper handing over by advocate who had the conduct of the matter for the applicants, a period of two months is not inordinate delay.
0. The advocates for the applicants are however guilty of negligence in the handling of this matter for the applicants and while their mistake may in the interests of justice not be visited upon the applicant, the advocates are liable to be mulcted in costs for the delay in the conclusion of the matter engendered by their conduct. According the costs of the application for reinstatement will be paid to the respondent by the advocates for the applicants.

ORDERS

0. Accordingly, the Notice of Motion dated 17th November 2015 for reinstatement of the application dated 15th July 2015 is allowed. The applicant's counsel will pay to the respondent the costs of this application for reinstatement to be agreed or taxed in default of agreement. The application for stay of execution and leave to appeal dated 15th July 2015 shall be heard on a date to be fixed by the Court in consultation with the parties within the next fourteen (14) days. **In the meantime status quo will be maintained.**

DATED AND DELIVERED THIS 3RD DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Miss Midaye for applicant

Miss Ngatia for Mr. Sila for the Respondent

Ms. Doreen- Court Assistant.