



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISCELLANEOUS CIVIL APPLICATION NO. 299 OF 2007 (B)**

**S. M. KIVUVA**

**T/A S. M. KIVUVA & COMPANY ADVOCATES. .... APPLICANT**

**VERSUS**

**AGNES MBATHA MUSOMBA. .... RESPONDENT**

**R U L I N G**

The Application before the court is the Notice of Motion dated 21<sup>st</sup> day of February, 2014. The same is brought under Section 3A of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules.

The orders sought in the Application are: -

1. Spent
2. That the orders of the court dated 25<sup>th</sup> November, 2013 be set aside.
3. That in any event the costs hereof be awarded to the plaintiff.

It is premised on the grounds set out on the body of the same and it is supported by the Affidavit of Sarah Mbithe Kivuva sworn on the 21<sup>st</sup> February, 2014 see my draft against the respondent and a copy of the Certificate of costs issued on the 11<sup>th</sup> February, 2008.

The Applicant attempted to execute the same and after a period of 2 years the Respondent filed the application dated 11<sup>th</sup> July, 2013 seeking to set aside the certificate of costs and the same was set down for hearing on the 25<sup>th</sup> November, 2013.

On the said date, the Application was amongst the Civil Matters taken out of the cause list for 25<sup>th</sup> November, 2013 by the Judiciary since this week had been set aside as criminal appeals week. The Applicant invites the court to take judicial notice of this fact.

It is further deponed that unknown to the Applicant's Advocate on record, the Respondent sneaked the matter to court contrary to the rules of natural justice as he knew the applicant would have no representation and by so doing the Respondent misled the court and took advantage of the other side which is against the rules of practice as a party should not derive any benefit from misleading the court. He urges the court to grant the Application and set aside the orders granted on the 25<sup>th</sup> November, 2013.

The Respondent has opposed the Application by way of a Replying Affidavit sworn by Agnes Mbatua Musomba on the 22<sup>nd</sup> April, 2014.

In the said Affidavit she depones that her Application dated 11<sup>th</sup> July, 2013 was coming up for hearing on the 25<sup>th</sup> November, 2013 which date had been taken by consent when parties were last in court on the 18<sup>th</sup> July, 2013.

She further deponed that on 18<sup>th</sup> July, 2013 when the Application came up for hearing, the court was not sitting. This must have been a mistake because according to the record the Application came up for hearing on 25<sup>th</sup> November, 2013 and this date was given in court on 18<sup>th</sup> July, 2013.

On 25<sup>th</sup> November, 2013 the Respondent attended court and though the matter was not listed the file was placed before Justice Onyancha who dealt with it and granted the orders as prayed therein in terms of prayers 4, 5, 6 and 7 and granted the Respondent herein leave to file the intended objection within 14 days.

She further depones that the learned judge enquired why the file was before him and whether the Respondent was in court and noting that the date had been taken by consent, went ahead and heard the Application ex parte (***these contents are, however, not captured on the day's proceedings***). She denied that the file was not sneaked into the court as alleged by the Applicant.

According to the deponent, the Respondent who is an Advocate of the High Court ought to know that a file with interim orders that may require extension will most certainly end up in court even if the trial court is not sitting and is therefore, preposterous of her to allege that the file was sneaked into court.

She further depones that the applicant does not deserve the orders sought herein as she is guilty of indolence having filed the Application 3 months from the date of the orders and this delay has not been explained and further that the orders sought by the applicant will not serve any purpose other than delay the matter unnecessarily as she has already complied with the orders of Hon. Justice Onyancha. He urges the court to dismiss the Application.

I have carefully considered the Application together with the Affidavits and the submissions made by the parties herein. The Bill of Costs by the Applicant was filed on the 24<sup>th</sup> May, 2007 and a Certificate of Taxation was issued on the 11<sup>th</sup> February, 2008.

From what I am able to gather from the record, the taxation proceeded ex parte and in execution of the decree, the Respondent was arrested and brought before the Deputy Registrar on 11<sup>th</sup> July, 2013 pursuant to the said warrant and on the same date, he filed the Application dated 11<sup>th</sup> July, 2013 and in the wider interest of justice, the Deputy Registrar ordered that the file be placed before a judge for the hearing of the said Application. The Application came up before Justice Waweru on the same day in the afternoon when he ordered that it be heard on the 18<sup>th</sup> July, 2013 and stayed further execution until that date.

On the 18<sup>th</sup> July, 2013, the Application was fixed for hearing on the 25<sup>th</sup> November, 2013 when the same was not listed and the proceedings of that day have led to the Application the subject matter of this ruling.

There are two issues for determination by the court as agreed on by both counsels and these are: -

1. Should the court exercise its discretion in favour of the Applicant to set aside the ex parte orders?
2. Is the mistake of the counsel excusable?

This being an application to set aside an ex parte order, the discretion of the court in setting aside such an order is wide. There are no limits or restrictions on the court's discretion except that if it does vary the order, it does so on such terms as may be just.

In the case of **Shah Vs Mbogo (1967) E.A. 916** the court had this to say:-

***“I have considered, in relation to the present application, the principles governing the court’s discretion to set aside judgment obtained ex parte. The discretion is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”***

The Applicant’s reason for non attendance was because the matter was not listed as the judiciary was undertaking ***“the criminal appeals week”***. Though the court has taken judicial notice of the fact that the week had been set aside for criminal appeals, the court also notes that there were interim orders that had been granted by Hon. Justice Waweru. In a case where there are interim orders, the Applicant would as of necessity endeavor to place the file before a Judge for extension of the orders and especially in this particular case where the Respondent had been brought to court under a warrant of arrest. The Counsel for the Applicant ought to have reasonably expected that the file would be placed before a Judge for that purpose. It was, therefore, not prudent of him to have failed to attend court’s registry on the material date to know the position regarding the matter.

Secondly, the orders sought to be set aside were made on the 25<sup>th</sup> November, 2013 and the Application was made on the 21<sup>st</sup> February, 2014 almost 3 months thereafter. That was a delay of 3 months. There is no explanation as to why it took the Applicant 3 months to file the instant Application. Certainly, the delay is inordinate and the applicant in failing to file the same on time exhibited indolence for which this court cannot come to his assistance.

I have also considered what has transpired since the orders sought to be set aside were granted. The effect of the orders were to allow the Respondent herein to file an objection which he has since filed. The Applicant will not suffer any injustice or hardship as she will recover her fees at the end of it all.

The upshot of the foregoing is that the Application dated 21<sup>st</sup> November, 2014 lacks merits and the same is dismissed with no orders as to costs.

Dated, signed and Delivered at Nairobi this 10<sup>th</sup> day of March, 2016.

.....

**L NJUGUNA**

**JUDGE**

**In the presence of**

***Mr. Wambiri for the Applicant.***

***M/s Munene for the Respondent.***