



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 25 OF 2014

BEDROCK HOLDINGS LIMITED PLAINTIFF

VERSUS

MASENO UNIVERSITY 1ST DEFENDANT

RILEY FALCON SECURITY SERVICES LIMITED 2ND DEFENDANT

PUBLIC PROCUREMENT OVERSIGHT AUTHORITY 3RD DEFENDANT

RULING

By a ruling dated 29th October 2015 this Court, in determining a preliminary objection raised by Counsel for the Defendants/Respondents, saved the Plaintiff/Applicant's suit herein by requiring it to file a compliant verifying affidavit within seven days failing which the suit would stand dismissed. The verifying affidavit was not filed and by the Notice of Motion dated 2nd May 2016 the Plaintiff/Applicant has sought extension of time within which to file the affidavit and an order that the verifying affidavit filed herein on 9th November 2015 be deemed to have been filed on time.

The gist of the application is that the delay of two days was occasioned by the unavailability of the Court file in the registry as the same was allegedly still in the Judge's chambers; that once the file was availed on 9th November 2015 the verifying affidavit was filed and it is only in the interest of justice that this application be allowed. Further that the applicant stands to suffer serious economic loss if the application is not allowed.

These grounds are echoed in the supporting affidavit as well as in Mr. Mwamu's submissions at the hearing. Mr. Mwamu Advocate for the applicant, also argued that this Court ought not to visit mistakes made elsewhere upon a litigant. He attributed

the mistake which occasioned the delay in this matter to the Court registry which he described as chaotic and further submitted that in any event even had the mistake been on Counsel's part it ought not to be visited on the client. He put reliance:-

“1. National Bank of Kenya Limited V. Anaj Warehousing Limited [2015] eKLR.

2. Sonal Holding (K) Limited V. Paresh Kumar Dodhia.

3. Edney Adaka Ismail V. Equity Bank Limited [2014] eKLR.

4. Paul M. Mwangi V. Rhoda Wanjiku Njuguna [2015] eKLR”.

The application was vehemently opposed on grounds that the delay in filing the application was not explained; that as the Court had ordered that if the verifying affidavit was not filed within seven days the suit would stand dismissed and the suit having thus been determined this Court is now functus officio and cannot re-open the case. Mr. Gachuba Advocate for the Defendants/Respondents relying on two cases:-

“1. Telkom Kenya Limited V. John Ochanda [2014] eKLR.

2. Karanja Karenju V. Attorney General & Another [2008] eKLR”.

contended that the applicant is seeking to have a second bite at the apple and this application ought to be dismissed.

This application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act and an unnamed Article in the Constitution. However in his submissions Mr. Mwamu did make reference to Sections 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules which ideally are the provisions under which the application ought to have been made. Both Section 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules give the Court power to extend the time limited for doing any act. Indeed Order 50 Rule 6 of the Civil Procedure Rules provides that such enlargement of time may be ordered although the Application for the same is made after the time has expired. That is the nature of the application. The applicant had until 7th November 2015 to file the verifying affidavit. It did not do so until 9th November 2015 and even then it was not until 2nd May 2016 that this application to enlarge time was brought.

The explanation for not filing the application is said to be the unavailability of the Court file as the same was said not to have been released by the Judge. At face value that explanation is reasonable and whereas it may not be correct I do agree with Mr. Mwamu that the failure by the registry to avail the file cannot be visited on the applicant. Counsel did not however explain why it took him almost six months to bring this application and to this end this Court would reiterate the provisions of Sections 1A and 1B to his good self and observe that an Advocate who neglects to observe the overriding objective of the Civil Procedure Act not only fails his client but the Administration of Justice.

Mr. Gachuba has argued that this Court should not allow this application because as it had ruled that the case would stand dismissed it will be re-opening the case yet it is functus officio. In **Telkom Kenya Limited V. John Ochanda [2014] eKLR** the Court of Appeal dealt with a similar issue and relying on the Supreme Court decision in **Raila Odinga & 2 Others V. Independent Electoral and Boundary Commission & 3 Others [2013] eKLR** it came to the following conclusion on the doctrine of functus officio:-

“The doctrine is not to be understood to bar any engagement by a Court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional/re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in EVENING POST LIMITED VS AL THANI [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

“A Court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the Court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded and the Court functus, when its judgment or order has been perfected.The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the Court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher Court if that right is available”.

(underlining mine).

The order made by this Court on 29th October 2015 had not, by the time this application was filed, been perfected; the proceedings had not been finally concluded as no judgment had been entered and decree drawn out of it and what the applicant is asking this Court to quote the Court of Appeal, does not amount to a merit-based decisional engagement with the case. It is my finding therefore that this Court is not functus officio and whereas I do appreciate that a Court should not make orders in vain it cannot escape my mind that the delay here was for only two days. There is an explanation for that delay which although as I have stated may not be correct is plausible and excusable.

Accordingly I allow the application and extend the time limited for filing the verifying affidavit. It is also deemed as properly filed. The costs of this application shall however be borne by the Plaintiff/Applicant. It is so ordered.

Signed, dated and delivered at Kisumu this 15th day of September 2016

E. N. MAINA

JUDGE

In the presence of:-

Miss Adwar for the Plaintiff/Applicant

Mr. Gachuba for the 2nd Defendant/Respondent

CC: Moses