



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.44 OF 2015

SAMUEL K. TONU.....PETITIONER/RESPONDENT

VERSUS

THE SPEAKER, NAKURU COUNTY ASSEMBLY.....1ST RESPONDENT/APPLICANT

THE CLERK, NAKURU COUNTY ASSEMBLY.....1ST RESPONDENT/APPLICANT

JAMES KIPKOROS TUEI.....1ST RESPONDENT/APPLICANT

RULING

INTRODUCTION

1. By way of a Notice of Motion dated 7th July, 2015 the Speaker, Nakuru County Assembly, The clerk, Nakuru County Assembly, the Clerk, Nakuru County Assembly and James Tuei (hereinafter the Applicants), sought a stay of proceedings before this court pending the determination of the their appeal in the Court of Appeal against the ruling by the Honourable Employment and Labour Relations Court on 19th June, 2015.
2. That application was placed before this court (Mshila, J) on 9th July, 2015 under a certificate of urgency. Same was certified urgent to be served and set for hearing *interpartes* on 21st July, 2015.
3. The matter subsequently came up on 21st July, 2015 and the same was set for hearing on 13th October, 2015.
4. On 13th October, 2015, the matter was listed before this court (Ndung'u, J). Mr. Kipkoech for the petitioner was present with no appearance for the three (3) respondents. That hearing date had been taken by consent. Mr. Kipkoech sought for dismissal of the application dated 7th July, 2015 for want of prosecution which prayer was granted by the court with costs to the Respondents therein.

The Current Application

5. By way of a notice of motion dated 30th June, 2016, the applicants seek orders:

a) Spent.

b) That this court be pleased to reinstate the application dated 7th July, 2016.

c) That costs of the application be provided for.

6. The application is premised on the affidavit of Lawrence Macharia Karanja and on fourteen (14) grounds namely:

i) That the Honourable court in Nakuru ELRC Petition No.2 of 2015 delivered its ruling on the 19th day of June, 2015 upholding the Applicants' objection to its jurisdiction in hearing and determining this matter as lodged by the Petitioner.

ii) That the Honourable court ordered the transfer of the matter from itself to the High Court for adjudication.

iii) That the applicants being aggrieved with the decision to transfer the matter have preferred an appeal against the Order to the Court of Appeal.

iv) That the Applicants subsequently filed an application dated 7th July, 2016 seeking a stay of the proceedings in the High Court pending the hearing and determination of the intended Appeal.

v) That the application was scheduled for hearing on the 13th day of October, 2015 when the same was placed before Justice Ndung'u who subsequently dismissed it for non-attendance.

vi) That the firm herein attended before Justice Mshila who was handling the matter only to learn that the same had not been listed before the said justice.

vii) That the firm herein subsequently served with a hearing indicating that the matter was coming on 12th May, 2016 as per the hearing notice served upon the advocates for the Respondents/Applicants by the advocates for the Petitioner/Respondent.

viii) That the attendance herein was on the belief that the application dated 7th July, 2015 was coming up for hearing only to be informed that the hearing was for the main petition.

ix) That the advocate attending court on the said date learnt that the application had been dismissed for non-attendance on the 13th day of October, 2015 by the Hon. Justice Ndung'u whereas the same had not been listed before the said court.

x) That the efforts of the Applicants in seeking to have the appeal heard and determined will be defeated in the event that the matter is heard by the High Court being the subject matter of the appeal.

xi) That the overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice

xii) That the Respondents/Applicants are desirous of prosecuting the application/matter and the non-attendance of the advocate should not be made to adversely affect the interests of the Respondents/Applicants.

xiii) That there is sufficient reason to justify making of the present application as the reinstatement of the application dated 7th July, 2015 seeks to facilitate the ends of justice.

xiv) That it is therefore met and just to have the Order dismissing the application dated 7th July, 2015 reviewed to reinstate the application to protect the interests of the Respondents/Applicants as well as to preserve the ends of justice.

7. The gist of the grounds and the affidavit in support is that on the 13th October, 2015, counsel for the applicant attended, before Justice Mshila who was handling the matter. The matter was however placed before this court which court dismissed the application for non-attendance.

8. The applicant's counsel only came to learn of the dismissal of the application when served with the hearing notice indicating the matter was coming up for hearing on 12th May, 2016 and while attending court in the belief that it is the application dated 7th July, 2015 that was up for hearing, counsel learnt the application had been dismissed.

It is the applicant's case that the application dated 7th July, 2015 was not listed before Justice Mshila who was handling the same, neither was it listed before any other court on the said date.

The Respondent's case:

9. The application is opposed and in a replying affidavit, Kipkoech B. Ngetich, Advocate has stated that the application dated 7th July, 2015 was listed for hearing on the 13th October, 2015. He refers the court to annexure "KBN1" in his affidavit.

10. The applicants are accused of devising to delay the cause of justice. The application has been made after unreasonable delay.

11. It is further urged that the court has already given directions as to the disposal of the main petition herein through written submissions. Indeed, the matter was due for mention on 16th August, 2016 (now past) to confirm filing of submissions. The applicants are accused of dragging the matter with an intention to defeat the petitioner's constitutional right to have this matter heard and determined expeditiously.

Issues for determination:

12. I have had occasion to consider the application, the supporting affidavit and the replying affidavit. The issue for determination is only one; whether the applicant has met the threshold for the setting aside of the orders of court of 13th October, 2015 thereby meriting reinstatement of the application dated 7th July, 2015.

Analysis and Determination:

13. The power to set aside judgment/orders is a discretionary power bestowed on the court. It is trite law that the power is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error. The exercise of such discretion is not available to a person who has deliberately sought to obstruct or delay the cause of justice.

14. In our instant suit, the applicants' mainstay in support of their application is that the matter was not listed on 13th October, 2015 either before Justice Mshila or this court. Counsel for the applicants went to Hon. Justice Mshila's court which was handling the matter.

15. The Respondent contend the matter was listed and a copy of the day's causelist is annexed. In the affidavit, that copy is referred to as annexure "KBN1" but in the annexures, I note it is marked annexure "KBN2". That copy of the causelist is clearly showing matter listed before "Hon. Justice Odera Court 1." The list shows this matter was listed before Justice Odera for hearing. There is no evidence that the same was listed before me.

16. Yet, the day's corum in this file clearly shows that the file was placed before me and I proceeded to deal whereupon the application dated 7th July, 2015 was dismissed. The only logical conclusion is that the matter was placed before me by court officer(s) without disclosing that the same was not listed.

17. Consequently, there exists a mistake or an error indeed on the part of the court which error or mistake cannot be visited on the applicants.

The matter having not been listed before this court, there is no way that the applicants' counsel would have been expected to attend.

Indeed the matter was hitherto being handled by Justice Mshila and without listing there would have been no reasons for counsel for the applicants to appear before this court.

18. Consequently, the orders of 13th October, 2015 must be set aside to avoid injustice or hardship on the part of the applicants. With the result that I set aside the orders of court of 13th October, 2015 and reinstate the application dated 7th July, 2015. Since I have found that the applicants were not at fault, I order that each party bears its own costs

Finally, the urgency in that matter is not lost on this court. I direct that the parties herein take directions soonest on the disposal of the application dated 7th July, 2015.

Orders accordingly.

Dated, signed and Delivered at Nakuru this 7th day of December, 2016.

A. K. NDUNG'U

JUDGE