



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
CIVIL APPEAL NO. 423 OF 2014

WATH H. SALAT APPELLANT

VERSUS

SAMUEL MULWA NDUVA..... RESPONDENT

RULING

1. By a Notice of Motion dated 24/3/2015, the Applicants have sought to re-instate the motion dated 18/9/2014 that was dismissed on 18/3/15 for non-attendance. The grounds for the Motion were set out in the body of the Motion and the Supporting Affidavit of Lucas Owauna Oluoch sworn on 24/03/2015.
2. These grounds were that; the non-attendance on 18/3/15 was due to inadvertent mistake by the part of the Advocate's clerk in diarizing the hearing date; that the application had been brought timeously and that no prejudice would be suffered by the Respondent if the orders sought were granted. Mr. Oluoch swore that when his clerk took the date for the application dated 18/9/14, he indicated in the diary the hearing for the same to be 23/3/2015; that on the 23/3/2015 the matter was not cause-listed and on inquiring discovered that the matter had been dismissed on 18/3/14. That the date of 23/3/15 had been taken by the consent of the parties but the registry retained the 18/3/15. That in the circumstances the court should exercise its discretion in favour of the Applicant.
3. The application was opposed vide Grounds of Opposition dated 10/4/15 and Replying Affidavit of Antony Lyuba sworn on 10/4/15. It was contended that the application was misconceived and frivolous that the Applicant had not complied with the conditional stay made on 29/9/14, that the application is intended to delay the Respondent from reaping the fruits of his judgment.
4. In the Affidavit of Antony Lyuba, it was contended that on 6/2/15 at 10.30 a.m., Mr. Lyuba and the clerk of Ms Ochieng Ochieng & Co. attended the registry to fix a date for the motion dated 18/9/14; that he and Mr. Ochieng's clerk agreed on the 18/3/15 as the date for the hearing of the subject application and that there was no variation of the date as alleged in the Supporting Affidavit. Mrs. Guserwa submitted that the application was not dismissed for non-attendance because the application was allocated the time of 10.15 a.m. That she actually submitted for the dismissal of the application.
5. I have considered the Affidavits on record and the submissions of Counsel. In my view, in an application such as the present one, the court has to consider if the same has been made timeously, the reason advanced for non-attendance and the prejudice, if any, to be suffered by the respective parties.

6. The application sought to be re-instated was dismissed on 18/3/15. The applicant alleges that he discovered the dismissal on 23rd March, 2015. The present application was filed on the following day, 24/3/15. In my view, the Applicant acted with dispatch, a period of six (6) days from the date of dismissal and the date of filing of the present application. The same was filed timeously.

7. As to the reasons for the failure to attend court on the 18/3/15, Counsel for the Applicant blamed his clerk for mis-diarizing the application. He indicated that the clerk diarized the application for 23/3/15 instead of 18/3/15. There was allegation that the registry should have indicated the date of 23/3/15 as agreed by the respective clerks. The clerk for the Respondent's Advocates denied that there was any error on the part of the registry as to the hearing date. He insisted that the correct date taken and diarized by the registry clerk was 18/3/15.

8. I have perused the record. It is clear that there was only one single entry minuted for the hearing of the subject application on 18/3/15 and there was no indication that any other date had been entered. The clerk of Mr. Ochieng must have misled Mr. Oluoch. Be that as it may, Mr. Oluoch produced a copy of his office diary which showed that this matter was actually diarized for 23/3/15. That may have been an error. I did not get the feeling that the Applicant was overreaching himself. Mistakes are bound to happen. Whether due to negligence or inadvertent mistake, Mr. Oluoch readily admitted to the wrong doing on the part of his clerk. I think the discretion given to the court to re-instate dismissed proceedings or set aside orders made ex-parte is meant to do justice to the parties and not to help indolent litigants seeking to overreach themselves. In the present case, I think the Applicant and his Advocate must have been innocent in the whole confusion.

9. Mrs. Guserwa submitted that the matter was dismissed on merit and not for non-attendance in that she attended and applied for the dismissal thereof. I have looked at the record, the same partly reads:-

“.....There being no reasons to be recorded under Order 12 Rule 3 of the Civil Procedure Rules, the application dated 18/09/14 is hereby dismissed with costs.”

In my view, this clearly shows that the application was dismissed under the provisions under which the court cited dismissal for non-attendance. I therefore reject Mrs. Guserwa's contention and hold that the merits of the application were not addressed.

10. As regards prejudice, I have found that the application was dismissed due to a mistake on the part of the Applicant's Advocates. If the application is not re-instated, the Applicant's right to have the decision of the lower court reconsidered would be forever lost whilst if he was granted a second chance, the Respondent will have an opportunity to contest that application on merit. My view is that, the prejudice to be suffered by my refusal to grant the orders sought will be far much higher as opposed to granting the same. I think an order for costs will be able to compensate the Respondent.

11. Accordingly, I am satisfied that the application is meritorious, I allow the same. The Applicant will pay costs of Kshs.3000 to the Respondent within 30 days.

12. It is so ordered.

DATED and Delivered at Nairobi this 12th day of June, 2015.

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A. MABEYA

JUDGE