



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 141 OF 2009

DAMISHA BUILDING CONTRACTORS LTD.....PLAINTIFF/APPLICANT

VERSUS

AUTO SPRING MANUFACTURERS LTD.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated **28th November, 2014** the Applicant seeks an order of this court setting aside its orders made on the **23rd April, 2014** together with consequential orders thereto and subsequently to allocate the suit a hearing date for formal proof and determination on merit.
2. The application is premised on grounds that the Defendant has no defence in this suit; the Applicant and his advocate were never served with the Notice of Motion dated **14th January, 2014**; the Applicant was never served with a hearing notice for the hearing of the Notice of Motion dated **14th January, 2014**; the Applicant has been condemned unheard; the Applicant is suffering due to the orders issued on the **3rd April, 2014** as it has been forced to take out the hearing of this suit fixed for the **24th July, 2014**; the Applicant is anxious to have this suit concluded expeditiously and no loss will be occasioned to the Respondent if this application is allowed.
3. **Michael Makori**, the Managing Director of the Plaintiff/Applicant swore an affidavit in support of the application where he deposed that since the **16th November, 2012** they have been represented by **Justin Nyaberi of Omwoyo, Momanyi Gichuki & Co. Advocates** and no other advocate. The firm of **Metto & Co. Advocates** had ceased to act for them. They became aware of the ruling of the court dated **3rd April, 2014** on the **4th July, 2014**, when the Respondent's advocates served their advocate; they would not have failed to reply to the Notice of Motion dated **14th January, 2014** if it was served upon them, they should not be condemned unheard which is prejudicial to them, the move by the Respondent was deliberate as they have no case.
4. In response thereto, **Mutula Kilonzo Junior** stated that the application has been overtaken by events as the appeal (subject matter of the ruling) has already been filed in the Court of Appeal, in Civil Appeal No. 150 of 2014; upon filing of the Notice of Appointment dated **15th November, 2012** by **Omwoyo Momanyi Gichuki & Co. Advocates**, the said advocates and **M/s Metto Co. Advocates** did not indicate to the court and parties which of the two (2) law firms was to be served with pleadings and/or service; that the pleadings were served upon the firm of **Metto and Co. Advocates** on **20th January, 2014** and they duly received it. There had been correspondence between the firm of **Kilonzo & Co. Advocates** and the two (2) firms of advocates; the Applicant is estopped by law and conduct from purporting that the application dated **14th January, 2014** was not properly served yet the firm of **Metto & Co. Advocate** received the same and has not filed an affidavit to rebut the affidavit of service. They have not denied having not received instructions from the Applicant; the affidavit sworn by **Amos Mwiva** has not been challenged and

before the matter was taken out of the hearing list by consent, **Messrs Omwoyo Momanyi Gichuki & Co. Advocates** were informed that the appeal had been filed and therefore the hearing could not proceed.

5. I have considered rival submissions filed by both counsels for the Applicant and Respondent. The main issue herein is that the Applicant and his advocate were not served with the Notice of Motion dated **14th January, 2014** that culminated into the ruling dated **3rd April, 2014**. All along the Applicant was represented by the firm of **Metto and Co. Advocates**. On the **16th October, 2012** **Mr. Nyaberi** of **Omwoyo, Momanyi Gichuki and Company Advocates** appeared in court holding brief for **Mr. Metto** for the Plaintiff. A Notice of Appointment dated **15th November, 2012** was filed in court by the firm of **Omwoyo, Momanyi Gichuki & Co. Advocates** in the following terms:

“Take notice that the plaintiff Damisha Building Contractors LTD have appointed the firm of M/s Omwoyo Momanyi Gichuki & Co. Advocates Twiga Towers 4th Floor room 401 Moi Avenue/Muranga Road P. O. Box 50380 – 00200 Nairobi to act together with the firm of Metto & Co. Advocates who have been acting for them hereinbefore.” (Emphasis mine).

Both the firm of **Metto & Co. Advocates** and **Omwoyo Momanyi Gichuki & Co. Advocates** were seized of instructions to appear for the Plaintiff as at the **29th January, 2014**.

6. The Notice of Motion dated **14th January, 2014** as drawn by the firm of **Kilonzo and Co. Advocates** was to be served upon **Metto and Company Advocates** *per se*. An affidavit of service sworn by **Amos Mwiva** dated **27th January, 2014** was a confirmation that the stated firm of advocates were duly served with the Notice of Motion. They accepted service and duly stamped the document that was eventually returned to court. It was on the basis of that acceptance of service that the case proceeded. The firm of **Metto & Co.** were duty bound to notify the Plaintiff. What transpired as correctly pointed out was done inadvertently as the firm of **Omwoyo, Momanyi Gichuki and Co. Advocates** who were acting alongside the firm of **Metto & Company Advocates** should also have been notified of the Motion.
7. However, it is apparent that todate the Plaintiff has never withdrawn instructions from the firm of **Metto and Co. Advocates**. Therefore some of his advocates having been aware of the Motion. It cannot be asserted with certainty that the Applicant was condemned unheard.
8. Consequent to what transpired the Respondent has filed an appeal in the Superior Court which has been assigned a Number (**Civil Appeal No. 150 of 2014**). In the premises the question to be determined is whether granting of the order sought will serve substantial justice? This is a matter that calls upon this court to satisfy a standard of fairness in ensuring that justice is done.
9. The appeal is against the ruling of this court which dismissed a Preliminary Objection raised. Whether or not the matter should proceed to formal proof will be pegged on the decision of the Superior Court. Granting the order sought will be in vain as this court cannot purport to set aside the fact of filing the appeal in the court of appeal which is a consequent action following the order dated **3rd April, 2014**.
10. Following the above reasoning, I decline to grant orders sought. In the result the application is dismissed with no orders as to costs.
11. It is so ordered.

Dated at Kitui this 16TH day of NOVEMBER, 2015.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Machakos this 2nd day of December, 2015.

P. NYAMWEYA

JUDGE