



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Appeal 348 of 2011

DOLPAK TRADING COMPANY LIMITED. APPLICANT/APPELLANT

VERSUS

WILFRED OWITI AKUNGU(Suing as Next Friend of the Minor)

NEREAH AWINO. 1ST RESPONDENT

ELIJAH KAMAU MUTEKA. 2ND RESPONDENT

JAMES KARANJA KIBANYA. 3RD RESPONDENT

RULING

The application before the court is the Notice of Motion dated 9th February, 2012 seeking the setting aside of this court's orders dated 19th December, 2011. The orders dismissed the applicant's application dated 21st July, 2011 with the consequential interlocutory orders thereunder.

On 21st July, 2011 this court granted the Applicant/Appellant a stay of execution of the outstanding judgment against it on condition that the Applicant would provide a specified security on or before the 14th November, 2011 in terms of a bank guarantee for the decree sum, pending the hearing and final determination of the appeal. The suit was to be mentioned on the said 6th December, 2011 to observe and confirm compliance which was later extended by request to 19th December, 2011.

It is noted and not denied that the counsel, who appeared for the applicant on 4th December, 2011 was one Mr. Ibrahim who only held brief for the firm of M. Kahonge & Company. It is now the Applicants case that Mr. Ibrahim by mistake reported to Mr. Kahonge that the mention to confirm compliance was refixed by court on 20th December, 2011 instead of the 19th December, 2011. That the result of the confusion of dates was that the applicant failed to attend court on 19th December, 2012 when the court in the absence of the Applicant and in the circumstances, dismissed the application and order of stay earlier granted.

It is the main thrust of this application therefore, that the mistake committed was that of counsel and that the innocent party, the applicant/Appellant, should not be made to suffer.

To prove the authenticity of the fact that its advocate had been misled by Mr. Ibrahim who had held the brief, the advocate for the applicant exhibited his diary showing the fact that he had diarized December 20th, 2011 and not 19th December, 2011 as the date when the application was fixed for mention for the applicant to demonstrate compliance.

The Respondents oppose this application. They do not deny the applicant facts showing a mistake on the part of Mr. Ibrahim and eventually the applicant's advocate. However, they argue that the bank guarantee which was prepared by Equatorial Commercial Bank was dated 20th December, 2011 itself and could not have been availed on the same date to court. They secondly, argued that the Applicant inordinately delayed to file this application to set aside, which was not filed until 21st February, 2012 while the event of not attending court took place almost three months before.

I have carefully considered the application and the material in support and opposition to it. I have no doubt in my mind, that if the mistake that led to the failure of the applicant's counsel to attend court was the only mistake made by the Applicant herein, this court would find no difficulty in allowing this application. This is because the Applicant's counsel would simply have been misled. Anyone of us can be misled, especially accidentally or inadvertently.

The applicant however, has not come out fully to disclose other related facts and issues which would assist the court to properly exercise its discretion in its favour. For example and assuming that what the applicant swore is correct, then it follows that the Applicant's counsel must have attended court on 20th December, 2011 to present the bank guarantee. He must have found that the matter had been dealt with on 19th December, 2011. He must, therefore have found the need to urgently set aside the orders made by this court on 19th December, 2011. Why then did the applicant delay filing this application until 21st February, 2012 which was three months down the line and clearly inordinately delayed, considering the circumstances of the case?

The applicant was under obligation, if it really was serious to convince this court that it acted diligently and properly, to explain the delay in filing this application. It failed to do so and failed to depone whether or not its counsel attended court on 20th December, 2011 and what the counsel found and further, how he proceeded with the matter until this application was filed on 21st February, 2012. Failure to explain appears deliberate and in bad faith. This being a matter where this court exercises discretion in favour of a party, any act or conduct of the party in bad faith would stand on the way of a favourable exercise.

The final result is that this court gets the impression that the applicant conduct abovementioned was intended to further delay the enjoyment of the judgment and decree by the Respondent. It should not be allowed to continue delaying this matter further. This application is accordingly found without merit and is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 7th day of March 2013.

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JUDGE