



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Application 128 of 2007

KADET LIMITED.....PLAINTIFF

VERSUS

JOHN KAMUGO MWANGI..... DEFENDANT

RULING

The Defendant has filed this application dated 25th September 2008 under the provisions of Sections 3A and 63(e) of the Civil Procedure Rules and Order 56, Rule 17 of the Civil Procedure Rules. He seeks inter alia for an Order that this court be pleased to vary and/or set aside its orders made on 10th June 2008 and the application dated 21st June 2007 be reinstated and set down for hearing.

The application is based on the grounds that:-

- **The application dated 21st June 2007 came up for hearing on several occasions the last time being 10th June 2008.**
- **On all those occasions the firm of Chemitei & Co. Advocates had instructions to prosecute the application on behalf of Itonga & Co. Advocates.**
- **Unfortunately through inadvertence, Counsel instructed to attend Court could not attend on 10th June 2008 when the application was dismissed for non-attendance.**
- **The inadvertence is deeply regretted.**
- **The Respondent has already issued a proclamation in execution of the decree.**
- **This Honourable Court has inherent jurisdiction powers and discretion to allow this application in the interest of justice.**
- **A genuine mistake on the part of the Counsel ought not be visited on the litigant.**
- **The Respondent will not be prejudiced in any way by the re-instatement of the application as this will give the parties an opportunity to ventilate the issues with a view of getting a final determination by the Court on merit.**

The application is supported by an affidavit sworn by Mr. James K. Kathili Advocate who has been requested to hold brief for Messrs Itonga & Co. Advocates on record for the Defendant. In his affidavit, he depones to the grounds aforesaid.

The application was argued before me by Mr. Kathili who confirmed that he had instructions to act from Itonga Advocate. He reiterated all his court attendances and sought the indulgence of court to excuse his inadvertence in failing to diarise the matter for hearing on the 10th June 2008.

Mr. Karira appeared for the Respondent and opposed the application. He argued that an application for stay ought to be brought under Order 21 Rule 22 or Order 41 Rule 4. He further submitted that the court has no jurisdiction to grant stay in another court of competent jurisdiction. Further, that this cause is a Miscellaneous application. It is not an appeal so Order 41 Rule 4 should not be invoked.

These grounds are interesting and may find merit when analysed. However this is not the hearing of the substantive motion in this cause which seeks leave to appeal out of time.

As I have stated hereinabove, the application before me seeks to set aside *ex-parte* orders dismissing an application for non-attendance.

The Respondent urged me to dismiss the application on further grounds that there is no evidence supporting the lack of diarization through a copy of the diary. Further that the application was filed after undue and explained delay and ought to have been filed under Order 9 b seeking reinstatement. Mr. Karari also challenged the authority of Mr. Kathili to sign the pleadings.

This application was filed 4 days after a similar application dated 30th June 2008 was withdrawn on technical grounds. I granted the applicant interim orders for 7 days within which he filed the current application. I find that the applicant was diligent in filing the application.

I have looked at the court record and note that the application dated 21st June 2007 (sought to be reinstated) was initially fixed for hearing on 1st August 2007. On that day, the applicant sought an adjournment as they had just been served with Replying papers.

Subsequent hearings on 9th October 2007 and 11th December 2007, the applicant was ready to proceed but the court could not reach the matter. On the subsequent dates of 18th December 2007 and 11th March 2008, the matter was not listed (though Counsel for the applicant appeared) and the Judge was indisposed respectively.

The application was dismissed on the 10th June 2008 being the first time that the applicant's Counsel either did not appear or was not ready to proceed.

This court finds merit in exercising its discretion in favour of the applicant under these circumstances. The applicant and its advocate had been diligent in all previous hearings and I can excuse a seldom mistake. I also agree that in such an instance an error by an Advocate should not be visited upon his client.

The application is endorsed by M/s Itonga & Co. Advocates who are on record and only signed by Kathili Advocate who has instructions from the firm on record. I do not therefore find in favour of the Respondent's objection in this regard.

The Respondent shall still raise all its grounds at an *inter parte* hearing of the application dated 21st June 2007. I am inclined, which I hereby do, to allow the application in terms of prayers 3 and further order reinstatement of the interim orders granted by this court before the 10th June 2008 when the application was dismissed.

Cost of this application shall be borne by the Applicant.

Dated AND signed at Nairobi on this 24TH day of AUGUST 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 10TH day of OCTOBER 2012.

F. AZANGALALA
Judge

In the presence of :

Mr. Kiboi for the applicant.

Ms Ayuma h/b for Mr. Korir for the respondent.