



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 16 OF 2011

DAVIES MOTORS CORPORATION LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

MARSHALLS EAST AFRICA LIMITED.....1ST DEFENDANT/RESPONDENT

FOTON EAST AFRICA LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. This is the notice of motion dated 19th October 2017 brought under section 80 of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 12, rule 7 and order 45 rule 1 of the Civil Procedure Rules, 2010 and Articles 47, 48, 50 and 159 (2) (d) and (e) of the Constitution and all other enabling provisions of the law.

2. It seeks orders:-

(1) Spent

(2) Spent

(3) Spent

(4) That this honourable court be pleased to set aside and/or vary and/or review the orders made on 20th September 2017 by this honourable court, the learned Justice M. Gitumbi, and which orders were inter alia to the effect that the main suit be dismissed for non-attendance of the plaintiff/applicant.

(5) That upon the setting aside and/or varying and/or reviewing the orders as mentioned under paragraph 4 above this honourable court do order that the main suit be reinstated unconditionally and be set down for further hearing on a priority basis and that the further hearing as aforesaid do pick up from the point at which it had stopped on 11th July 2016.

(6) That this honourable court be pleased to make such other further orders as it may deem fit and just in the circumstances of the case.

(7) That the costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs (1) to (20).

4. The application is supported by the affidavit of George Muchiri, Advocate for the plaintiff sworn on the 19th October 2017.

5. The application is opposed. There is a replying affidavit sworn by Garhwal Abhimanyu a director of the 1st defendant, sworn on the 17th July 2018.

6. On the 14th November 2017, the court directed that, the application do proceed by way of written submissions. On the 9th July 2019, Mr. Kalove told the court that the 1st defendant's submissions were ready. He sought leave to file and a date for ruling was given.

7. I have considered the application and the affidavit in support. I have also considered the replying affidavit, the submissions made on behalf of the plaintiff and the 1st defendant, and the authorities cited.

8. Order 12, rule 7 of the Civil Procedure Rules Provides that:-

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”.

9. In the case of **Belinda Murai & Others vs Amoi Wainaina [1978] LLR**. It was held that:-

“.....A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because, it is committed by Senior Counsel. Though in the case of Junior counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....” .

10. I hereby exercise the court’s discretion in favour of the plaintiff/applicant. I find the application to be merited and the same is allowed. I hereby grant prayer (4) and (5) of the notice of motion. The costs be borne by the plaintiff/applicant

It is so ordered.

Dated, signed and delivered in Nairobi on this 11th day of December 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. K. Mungai for Muchiri advocate for the Plaintiff

Mr. Kalove advocate for the Defendants

Kajuju - Court Assistant