



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. MISC. APPLICATION NO. 262 OF 2016

NJOROGE NYAGAH & CO. ADVOCATES.....PLAINTIFF

VERSUS

LEXIS INTERNATIONAL LIMITED.....DEFENDANT

RULING

1. On 27/2/2018, Lexis International Limited (the **Client**), brought a notice of motion of even date seeking the following orders:

- 1. The honourable court be pleased to set aside the orders given on 26th February 2018.***
- 2. That the honourable court be pleased to re-instate the respondent/applicant's application herein dated 18th October 2018.***
- 3. That the applicant be allowed to proceed with this suit to its natural conclusion on merit.***
- 4. This honourable court be pleased to give directions as to an early hearing date for the respondent's application.***
- 5. Costs of this application be provided for.***

2. The application was supported by an affidavit sworn by Ochieng M. Khairalla, counsel for the client. The client contended that its counsel's failure to attend court on 27/2/2018 was occasioned by an erroneous entry in their office diary indicating that the matter was to be before the Deputy Registrar of this court. Consequently, its counsel did not attend this court, hence the dismissal of its application dated 18/10/2017.

3. The advocate opposed the application through a replying affidavit sworn on 3/5/2018 by Mrs Norah Anindo Owino. She contended that the application had been overtaken by events because the bill of costs dated 28/9/2016 had already been taxed on 8/11/2017. She further contended that the hearing date culminating into the dismissal order was given in the presence of both counsel and counsel knew that the matter was before this court.

4. The application was canvassed orally on 31/10/2018. Mr. Nyangeno, counsel for the client, urged the court to exercise its discretion under Articles 159 and 50 of the Constitution and set aside the dismissal order. In response, Mrs Owino reiterated that the application had been overtaken by events and what was pending was a ruling by the taxing officer.

5. I have considered the application alongside the response thereto. I have also looked at the record before court. Similarly, I have considered the relevant legal framework and jurisprudence.

6. Section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte. The court's discretionary power should, however, be exercised judiciously with the overriding objective of ensuring that justice is done to all the parties.

7. The guiding principle in the court's exercise of its discretionary jurisdiction to set aside a dismissal order of this nature was laid down in **Mbogo & Another Vs Shah EALR 1908** at page 13. The court's discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

8. In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978), Madan J** set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of a court of justice on account of 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 mistake 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.....”

9. **Apaloo** JA outlined the following approach to a similar question in **Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103**.

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.

10. The present application seeks a reinstatement of the client’s notice of motion dated 18/10/2017. The said notice of motion dated 18/10/2018 sought an order staying taxation of the bill of costs dated 28/9/2016 pending the hearing and determination of an appeal contemplated by the client against the ruling of this court delivered on 22/9/2017. At this point, the record shows that submissions on the bill of costs were received by the taxing officer who on 8/11/2017 reserved this matter for ruling. Secondly, there is no evidence of any appeal which has been lodged against the ruling delivered by this court on 22/9/2017. It is over twelve months since the said ruling was delivered and there is no evidence that the contemplated appeal was indeed filed. In light of the foregoing, I do not see any proper basis for exercising discretion to reinstate the dismissed application.

Consequently, the notice of motion dated 27/2/2018 is accordingly dismissed for lack of merit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF NOVEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Ms Motabori Advocate for the Advocate

Ms Mureithi holding brief for Mr Masinde Advocate for the client

June Nafula - Court Clerk