



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. CIVIL APPL. NO. 169 OF 2014

LOISE WAIRIGIA NJOROGI.....APPLICANT

VERSUS

STANLEY MANYARA & NANCY K. MANYARA1ST RESPONDENT

PIUS WARUIRU MUKURIA2ND RESPONDENT

E. GITAU NG'ANG'A T/A TREND

AUCTIONS LIMITED3RD RESPONDENT

NTEMI HOLDINGS.....4TH RESPONDENT

GIDEON K. MEENYE5TH RESPONDENT

RULING

1. What is before me is the Application by the 2nd Respondent dated 20th April, 2015.

2. In the Application, the 2nd Respondent is seeking for the following orders:

a. This Honourable Court be pleased to review and set aside its orders dated 17th November, 2014.

b. That further this Honourable Court be pleased to expunge from its Record the order dated 17th February, 2015.

c. That this Honourable Court do grant a stay of any further proceedings in Civil Appeal No. 33 of 2015 pending the hearing and determination of this Application.

d. That the Honourable Court be pleased to strike out the Memorandum of Appeal filed on 11th March, 2015 in Machakos HCCA. No. 33 of 2015.

e. That this Honorable Court do set down the Application dated 31st October, 2014 for hearing on a date convenient for the Court and all parties.

f. That the costs of this Application be borne by the Applicant.

3. The Application is premised on the grounds that there is an error on the face of the record; that the orders of 17th November, 2014 were granted without affording the 2nd Respondent an opportunity to be heard and that the 2nd Respondent only became aware of the orders of the court when the matter was mentioned on 11th March, 2015.
4. According to the Affidavit of the 2nd Respondent's advocate, the counsel who held his brief and indicated that he had no objection to the grant of prayer numbers 2 and 3 went out of the scope of his instructions because he could not have asked for time to respond to the Application and at the same time concede to the very prayers that he was to oppose by the filing of a Replying Affidavit.
5. Counsel deponed that the orders of 17th February, 2015 should be expunged from the record because they do not reflect the true proceedings of the Court and that the filing of the Record of Appeal after more than three (3) months from the grant of the orders of 17th November, 2014 is a grave abuse of the court process.
6. In response, the Applicant filed Grounds of Opposition in which he averred that the Application is an abuse of the court process and is only meant to delay the pending Appeal.
7. The Applicant's and the 2nd Respondent's advocates filed their respective submissions and authorities which I have considered.
8. On 31st October, 2014, the Applicant filed in this court a Notice of Motion dated 31st October, 2014 in which he sought for various orders which included an order for extension of time in which to file "*the Memorandum of Appeal, Record of Appeal and Application for stay of execution out of time.*"
9. The Application was placed before Kariuki J on 3rd November, 2014 when he certified it as urgent. The court fixed the Application for hearing on 17th November, 2014.
10. The 2nd Respondent's advocate has not denied that he was served with the Application. Indeed, when the Application came up for hearing on 17th November, 2014, Mr. Muthoka held brief for Mr. Burugu for the 2nd Respondent.
11. The record shows that on that day, Mr. Muthoka, on behalf of the 2nd Respondent's counsel, applied for more time so as to be able to file a Replying Affidavit.
12. However, when the Applicant's counsel sought for prayers number 2 and 3 of the Application dated 31st October, 2014 "*for now*", counsel for the 2nd Respondent informed the court that he had no objection for the granting of the said orders, save for prayer number 4.
13. Prayer numbers 2 and 3 of the Application were for the extension of time within which the Applicant could file his Appeal while prayer number 4 sought for a stay of execution of the order of Hon. E.A. Mbichi pending the hearing of the intended Appeal.
14. Having consented to the grant of prayer number 2 and 3 of the Application, the court allowed those prayers and directed parties to file their respective Affidavits and submissions in respect of prayer number 4. That prayer was withdrawn by the consent of the parties when the matter came up for hearing on 11th March, 2015.
15. The 2nd Respondent now wants to set aside the orders of 17th November, 2014 on the ground that he never instructed the advocate who was holding his brief to concede to prayers number 2 and 3 of the Notice of Motion dated 31st October, 2014.
16. According to the 2nd Respondent's counsel, he could not possibly have instructed his colleague to

concede to those prayers and at the same time ask for time to file a Replying Affidavit.

17. That might be so. However, it is still possible that the 2nd Respondent could concede to the filing of the Appeal out of time but oppose an order of stay of execution of the Judgment of the lower court. There is therefore nothing strange with the consent order that was entered into between the Applicant and the counsel who was holding brief for the 2nd Respondent's advocate on 17th November, 2014.

18. Although the 2nd Respondent's counsel has deponed that he never instructed the counsel who held his brief to concede to prayer numbers 2 and 3 of the Application dated, counsel has not given to this court the written instructions that were conveyed to his colleague.

19. As correctly submitted by the Applicant's counsel, courts have held that an advocate who holds brief must have full instructions before a court of law. In the case of ***Patrick Kenneth Muthuri & 2 others vs. Richard Karimi Nderitu (2015) eKLR***, the court held as follows;

“It is always presumed that an advocate who rises up in court and informs the Presiding Judge that he or she is holding brief has full instructions. It is therefore the responsibility of the principal advocate to fully brief his or her agent advocate.”

20. I am in agreement with the above holding. The court having recorded and adopted the consent of the advocates on 17th November, 2014, it cannot be said that there is an error or mistake apparent on the face of the record. Indeed, there is no sufficient reason that the 2nd Respondent has advanced to enable this court review its orders.

21. For those reasons, the Application dated 20th April, 2015 is dismissed with costs.

DATED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE