



REPUBLIC OF KENYA
IN THE COURT OF KENYA AT MALINDI
COMMERCIAL & ADMIRALTY DIVISION

HCCC NO.9 OF 2015

(FAST TRACK)

RAIN DROPS LIMITED PLAINTIFF

VRS

COUNTY GOVERNMENT

OF KILIFI DEFENDANT

RULING

The application dated 29th April 2015 seeks to set aside the orders of this court issued on 27th April, 2015. The application is supported by two affidavits of Mr. Bwire Okono Advocate sworn on 29th April 2015 and that of Riziki Abdalla sworn on 28th April, 2015. The respondents filed a replying affidavit sworn on 4th May, 2015 by Joseph Munyoki Nzioka.

Mr. Bwire, Counsel for the applicant submitted that their office was served with a hearing notice on 17th April 2015 for the hearing of the application on 27th April, 2015. The court clerk, Riziki Abdalla received the hearing notice under protest as the date was not convenient to them: Unfortunately, the court clerk did not diarise the matter and that is why there was no appearance for the defendant on 27th April 2015. This made the plaintiff's application dated 23/3/2015 appear to be unopposed.

Mr. Bwire contends that it was a human mistake not to diarise the matter. The parties were pursuing an out of court settlement. The mistake of the advocate should not be visited upon the defendant. The defendant is willing to abide by any conditions imposed by the court. The mistake is excusable and moreso, since it was that of a junior counsel who is barely one year in practice. The mistake cannot be held to be gross negligence on the part of the defendant's counsel. The application has been made without delay.

Mr. Kilonzo, counsel for the respondent vehemently opposed the application. Counsel maintains that the court should distinguish between excusable mistakes and gross negligence. There was gross professional negligence on the part of the defence counsel and this should not be considered as an excusable mistake. The hearing notice was duly served. There was no replying affidavit on record and the proposed replying affidavit is a mere narration as it has not been sworn: the court has discretion to grant the orders but that discretion must be exercised judiciously: There are no triable issues raised in the replying affidavit to warrant setting aside of the court orders.

Counsel for the plaintiff contends that the application is made with utmost bad faith: The defendant does

not challenge the manner in which the revenue has been earned. The money is in an escrow account and the defendant's intention is to cripple the plaintiff financially. Counsel further maintains that part of the money was deposited in the account even before the dispute started.

The pleadings and submissions show that indeed the applicant was served with a hearing notice on 17th April, 2015. The plaintiff's application was filed way back on 24th March 2015. Counsels for both parties appeared before me on 27/3/2015 and the application was also mentioned although not listed for hearing on that day. It is not clearly explained by the defendant as to why there was no replying affidavit filed and served by 27th April 2015, one month later yet the defendant was aware of the application. MR. Bwire contends that he has prepared a draft affidavit which raises triable issues. This is not dealing with the main issue as to why there was no reply to the application. The court could have perused the replying affidavit and make its ruling instead of the application appearing to be unopposed.

Mr. Bwire, confirms that the mistake was on the part of their office. That mistake made the court and the plaintiff believe that there was no opposition to the application. The fact that the case was diarised for that day does not answer the question of lack of reply to the application.

There is pending a ruling in relation to the main dispute. The application by the plaintiff was meant to share the income that is banked in the escrow account. The agreement between the parties provide for how the proceeds should be shared. The plaintiff is entitled to 30% of the income. The applicant herein contends that there is a dispute as some of the receipt books were not accounted for. This could have led to siphoning of part of the income. This is still an allegation that has not been established by proper facts and documentary evidence. However, it would be fair to allow the applicant to defend the application so that it can be determined on its merit. Although the mistakes of a counsel should not be revisited upon the client, this is not a statutory provision which has to be maintained in all case. When the acts of the counsel amount to simple carelessness or gross negligence, the client should be able to absorb the effects of his or its advocate's conduct. In some situations those mistakes lead to injustices upon other parties.

Mr. Kilonzo maintains that part of the income accrued before the dispute arose. I do agree with that submission. There is no good reason as to why the amount accrued before the filing of the case should not be released. Similarly, the dispute is not mainly based on the amount collected but on the termination of the agreement. Prior to the filing of the case, the parties were mutually dividing the income as per the agreement. More still, there would be no prejudice to the defendant if the plaintiff's share of Ksh.37 million is released. The defendant is still holding more funds that are due for distribution in the escrow account. There are also valuable properties installed by the plaintiff which can be used as security for the amount in the event that it is held that the plaintiff is not entitled to its share of the income.

In the end, the application dated 29/4/2015 is granted but on the following terms:

1. The amount of Ksh.37,000,000/= (Thirty Seven Million) to be released to the plaintiff within seven (7) days hereof.
2. The rest of the income to be retained in the escrow accounts.
3. Should the defendant fail to comply with the order one (1) herein above within seven (7) days hereof, the bank where the income is banked shall be at liberty to release the plaintiff's share of 30% of all the income as per the orders of 27th April, 2015.

Dated, signed and delivered at Malindi this 21st day of May, 2015.

SAID J. CHITEMBWE

JUDGE