Cementers Limited v Mihrab Development Limited (Insolvency Petition E034 of 2022) [2025] KEHC 3156 (KLR) (Commercial and Tax) (28 February 2025) (Ruling)

Neutral citation: [2025] KEHC 3156 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY PETITION E034 OF 2022

MN MWANGI, J

FEBRUARY 28, 2025

BETWEEN

CEMENTERS LIMITED ..... PETITIONER

AND

MIHRAB DEVELOPMENT LIMITED ..... RESPONDENT

RULING

1. The respondent filed a Notice of Motion application dated 28th October 2024 pursuant to the provisions of Article 50 of *the Constitution* of Kenya 2010, Sections 1A & 3A of the *Civil Procedure Act*, Order 11 Rules 1 & 3 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The applicant's prayers are for the orders made on 1st October 2024 against the respondent to be set aside, the respondent to be granted leave to properly file its pleadings and submissions, and a date for highlighting of submissions to be set.

2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Kenneth Kimathi, an Advocate of the High Court of Kenya and learned Counsel for the respondent. He averred that the pleadings that ought to have been filed by the respondent in this suit were mistakenly filed under Insolvency Notice No. E126 of 2022 due to confusion between the two cases. He averred that granting the orders sought herein is crucial for the respondent's right to a fair hearing enshrined under Article 50 of *the Constitution* of Kenya, 2010. Mr. Kimathi stated that the respondent had previously filed an application dated 8th October 2024 seeking similar reliefs as the ones sought herein, but technical issues prevented them from accessing the Court on 23rd October 2024.

3. In opposition to the application, the petitioner filed a replying affidavit sworn on 8th November 2024 by Mr. Dipak Halai, a Director of the petitioner company. Mr. Halai averred that the instant

application is defective for being brought under the wrong provisions of the law. He contended that the respondent has been consistently negligent in handling this case by failing to appear in Court on multiple occasions, missing deadlines, and making misleading claims about having filed submissions under Insolvency Notice No. E126 of 2022, which suit was marked as closed by Judge Mugambi on 28th February 2024.

4. He stated that the respondent has filed multiple applications seeking the same relief, amounting to an abuse of the Court process and waste of judicial time. He further stated that the above notwithstanding, the respondent has not provided satisfactory reasons for their delays. He urged this Court to apply the doctrine of laches and bar them from further burdening the Court.

5. The instant application was canvassed orally. Mr. Kimathi, learned Counsel for the respondent submitted that the mistake of Counsel should not be visited on the respondent especially because they erroneously filed the pleadings in this case in Insolvency Notice No. E126 of 2022 which was being handled simultaneously with this case. He further submitted that the respondent will be prejudiced in the event that pleadings in this suit are not considered since the claim runs to Kshs. 150,000,000/=.

6. Mr. Njiru, learned Counsel for the petitioner submitted that the respondent has not given sufficient reasons to warrant being granted the orders sought herein. He further submitted that from the Court Tracking System (CTS), the last filing in Insolvency Notice No. E126 of 2022 was 1 year and 11 months ago. That the documents filed were submissions for supporting the application for a statutory demand. He therefore asserted that the respondent is not being truthful.

Analysis And Determination.

7. I have considered the instant application, the affidavit filed in support thereof, the replying affidavit by the petitioner and the oral submissions made by Counsel for the parties. The issues that arise for determination are –

    i. Whether the instant application is fatally defective for being brought under the wrong provisions of the law; and

    ii. If the instant application is merited.

Whether the instant application is fatally defective for being brought under the wrong provisions of the law.

8. The instant application has been brought inter alia, under to the provisions of Order 11 Rules 1 & 3 of the Civil Procedure Rules, 2010 which provides for Case Management Conference, whereas it is seeking for setting aside of orders, leave to file pleadings and submissions, and a date for highlighting of submissions. This Court is of the considered view that leave to file pleadings and/or submissions and fixing a date for highlighting of submissions are some of the things that are taken care of during case management. I am not therefore persuaded that the application herein has been filed under the wrong provisions of the law.

9. This Court is alive to the provisions of Sections 1A and 1B of the *Civil Procedure Act* which call upon Courts to do substantive justice to the parties by giving effect to the overriding objective thereunder in the interpretation of its provisions and Rules which include; the just determination of the proceedings; efficient disposal of disputes; efficient use of available judicial and administrative resources, and the timely disposal of the proceedings at a cost affordable to the respective parties. The effect of the

overriding objective was considered by the Court of Appeal in Stephen Boro Gitiha v Family Finance Building Society & 3 others [2009] eKLR, as hereunder –

> The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way... I must warn litigants and counsel that the courts are now on the driving seat of justice and the courts in my opinion have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as it is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.

10. Bound by the above decision, it is my finding that even if the instant application ought to have been filed pursuant to provisions other than those provided for under Order 11 Rules 1 & 3 of the Civil Procedure Rules, 2010, the fact that it was filed under the said provisions affects the form rather than the substance of the application. This is especially so because the information contained in the instant application would still remain the same even if the respondent was to move the Court under different provisions of the law.

11. In view of the above, it is my finding that the said issue is one of procedural technicality and under Article 159(2) (d) of *the Constitution* of Kenya, 2010, it does not give rise to a fatal error. As a result, it is my finding that the instant application is not fatally defective.

If the instant application is merited.

12. The respondent prays for this Court to set aside its orders made on 1st October 2024 and grant it leave to file its pleadings and submissions in this suit. The respondent claims that the pleadings that it ought to have filed in this suit were mistakenly filed under Insolvency Notice No. E126 of 2022 which was proceeding simultaneously with this case, due to confusion between the two cases. The petitioner on the other hand averred that the respondent is not deserving of the orders sought herein since its Advocates have been consistently negligent in handling this case by failing to appear in Court on multiple occasions, and by missing deadlines.

13. On perusal of the Court record, it is evident that both the respondent and its Advocates on record have failed to attend Court on multiple occasions but have only offered an explanation for the failure to appear in Court on 23rd October 2024, when the respondent's application dated 8th October 2024 was coming up for mention. The respondent's contention that the submissions that ought to have been filed in this suit were filed in Insolvency Notice No. E126 of 2022 were rebutted by the petitioner who averred that Insolvency Notice No. E126 of 2022 was marked as closed by Judge Mugambi on 28th February 2024.

14. I have gone through the digital court file for Insolvency Notice No. E126 of 2022 on the Case Tracking System and I note that the only pleadings filed therein by the respondent that ought to have been filed in this suit are a replying affidavit sworn on 29th November 2022 in opposition to the petition and a response to the petition dated 29th November 2022 both filed on 30th November 2022. I therefore agree with Counsel for the petitioner that the respondent's Counsel is not being truthful by stating that he complied with the directions given by this Court for filing of submissions but filed them in Insolvency Notice E126 of 2022 on the CTS instead of electronically in this case file.

15. I am of the view that the mistake of filing a replying affidavit sworn on 29th November 2022 in opposition to the petition and a response to the petition dated 29th November 2022 in Insolvency Notice No. E126 of 2022 instead of in this suit is one that should not be visited on the respondent since it can be remedied by costs. To this end, I am guided by the Court's finding in Lucy Bosire v Kehancha Div. Land dispute Tribunal & 2 Others [2013] eKLR, where Odunga J (as he then was) held that -

> It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip Keipto Chemwolo & Another -vs- Augustine Kubende [1986] KLR 492; [1982-88] 1 KAR 1036 at 1042; [1986-1989] EA 74.

16. It is however not in every case that a mistake of Counsel will be a ground for setting aside Court orders. The Court of Appeal in the case of Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR, stated as hereunder in respect to mistake of Counsel -

> ...From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. Halsbury's Laws of England, 4th Edn, Vol 44 at p 100-101) and also Re Jones [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court's expectations this way:
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> > '....I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...'

Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client...Hence, the mistakes of Mr. Mouko's clerk became the mistakes of Mr. Mouko. This takes us back to the question, was the same excusable enough to warrant court's favour?

In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party. In view of the age of this case and the timelines within which the appellant has acted, we take the view that the appellant has been less than candid with the court and that the appellant's true intentions are the derailment of the suit.....The respondents were basically being held at ransom by the appellant's laxity in having the matter laid to rest...

17. In this case, I agree with the petitioner's Advocate that the respondent and its Advocates on record have demonstrated a lot of laxity in the manner in which they have been handling this suit. It is not disputed that the respondent and its Advocates on record have failed to appear in Court on multiple occasions but have only offered an explanation as to why they failed to attend Court on one occasion, being 23rd October 2024. In addition, they failed to file their submissions to this petition as directed by the Court and instead of offering an explanation for their lack of compliance, they opted to mislead this Court on the whereabouts of the said submissions by stating that they were uploaded on the CTS in the wrong file. That in my considered view is not a mistake worthy of being excused.

18. In order to do substantive justice to the respondent, I find that the instant application is partly merited. As a result, I make the following orders –

    i. Leave is hereby granted to the respondent to file its replying affidavit sworn on 29th November 2022 in opposition to the petition and a response to petition dated 29th November 2022; and

    ii. The respondent shall pay thrown away costs of 30,000/= to the petitioner. The said costs shall be paid within seven (7) days from today.

    It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF FEBRUARY 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ndungu h/b for Mr. Kimathi for the respondent/applicant

Ms Muthoni Kinuthia h/b for Mr. Gitonga for the petitioner/respondent

Ms Lucy Njeru – Court Assistant.