



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 13 OF 2017

**IN THE MATTER OF: APPLICATION BY HAMSAD HUSSAIN MAHMOOD FOR
JUDICIAL REVIEW AND FOR ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI**

AND

**IN THE MATTER OF: ORDER 53 RULE (1) & (2) OF THE CIVIL PROCEDURE RULES,
SECTIONS 3, 3A AND 63(e) OF THE CIVIL PROCEDURE ACT, CAP 21, SECTIONS 8
AND 9 OF THE LAW REFORM ACT, CAP 26 AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

AND

**IN THE MATTER OF: KADHI'S COURT SUCCESSION CAUSE NO. 141 OF 2012
(IN THE MATTER OF THE ESTATE OF RASHID ATHMAN MWAKURUHIRA AND MOHAMED RASHID)**

BETWEEN

JAMSAID HUSSAIN MAHMOOD.....APPLICANT

VERSUS

1. THE HON. ATTORNEY GENERAL

2. HON. KADHI, SHEIKH SAID HAMISI, AT KWALE

3. MWANAHAMISI SAID MWINYIHAJI

4. ALI MOHAMED MWAGANYIKA.....RESPONDENTS

RULING

1. The Notice of Motion application before the Court is dated 3rd April, 2019 seeking the reinstatement of application dated 3rd July, 2018 which was dismissed on 25th January, 2018 for non-attendance. The application is premised on the grounds:

- (i) That the counsel was indisposed.
- (ii) That dismissal owing to counsel non-attendance is a technicality and does not serve the end of justice the litigant aims at.
- (iii) That the action denies the litigant an opportunity to get substantial justice enshrined in the constitution.
- (iv) That the mistake was beyond the control of the counsel and litigant.

(v) That it is fair, just and equitable in the circumstances of the case.

2. The application is supported by affidavit of Edward M. Gichana sworn on 3rd April, 2019. Mr. Gichana is the Applicant's counsel having the conduct of this matter for the Applicant, hence competent to swear the said affidavit. The deponent states that the date for hearing of the application was taken by his firm on 26th September, 2017 and upon service the matter was set for hearing on 16th October, 2017, when it was stood over generally and fixed for hearing on 25th January, 2018 when due to his non-attendance, it was dismissed for want of prosecution. Counsel states that the reason for non-attendance was that he was indisposed and that, he instructed his clerk to ask counsel to hold brief. However, his clerk did not appear in good time or at all. Counsel averred that the Applicant had indicated his willingness and ability to proceed but thwarted by counsel's own inability to be in Court on the material day, hence ought not be punished for a mistake not of his own making. Unless the matter is reinstated, the Applicant stands to suffer irreparable loss and damage since his title, registered in his own name is a subject of consideration for distribution in the Kadhi's Court while he is still alive. Counsel also stated that he is unwell and that sugar level in his body is a matter managed conservatively and had largely caused his work to stall to a large extent which is beyond his control.

The Response

3. The application is opposed by the 3rd and 4th Respondents vide separate Replying Affidavits sworn by the said parties on 28th May, 2019. The Respondents' aver that the Applicant's advocates are not the relevant party to depone to the said affidavit. The 3rd Respondent's affidavit further delves into the merits of the petition and states that granting this application would be a waste of Court's time since the petition herein is weak.

4. I think that it is not proper at this stage to delve into the merit of the petition.

5. In my view the advocate for the Petitioner has shown that he was unwell on the date of the hearing when the application was dismissed. The court also takes judicial notice that Mr. Gichana, the applicant's advocate, was generally unwell during much of the period in question. In the circumstances it would be grossly unjust to condemn the Applicant for the sickness of his counsel. Further, substantive justice must be seen to be done to the matter, and therefore this Court declines to resort to issues of technicality to settle disputes unless there is no other option.

6. In the upshot, the application before the Court dated 3rd April, 2019 is allowed with costs in the cause.

That is the Ruling of the court.

E. K. OGOLA

JUDGE

Dated, Signed and Delivered at Mombasa this 31st day of July, 2019.

P. J. O. OTIENO

JUDGE