



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**MISC. CIVIL SUIT NO. 56 OF 2019**

**BETWEEN**

**TOBIAS OCHIENG ONGÓNGÁ.....APPLICANT**

**AND**

**SOPHIA ATIENO MUCHA.....RESPONDENT**

**RULING**

1. By a notice of motion dated 29<sup>th</sup> May, 2019 brought under Order 21 Rule 7, Order 51 Rules 3 and 15 of the Civil Procedure Rules and Sections 3(A) and 63 (e) of the Civil Procedure Act, the applicant prays for orders **THAT**: -

**1) The dismissal of the application dated 24<sup>th</sup> April, 2019 on 29<sup>th</sup> May, 2019 be set aside and the application be reinstated for hearing and determination on merit**

**2) Costs be provided for**

2. The application is based on the grounds among others that the applicant's advocate sent a clerk to get an advocate to hold his brief but she did not and further that the application raises serious triable issues. The application is also supported by an affidavit sworn on 29<sup>th</sup> May, 2019 by DENNIS CHERUIYOT advocate for the applicant who reiterates the grounds on the face of the application.

3. The application is opposed by way of an undated replying affidavit sworn by HELLEN ADOYO KUKU and filed on 27<sup>th</sup> May, 2019 who avers that the delay caused by the Applicant is denying the Respondent the fruits of her judgment.

4. I have considered the notice of motion in the light of the affidavits on record and submissions filed on behalf of the Applicant.

5. This application was filed on the same date that the dismissal order was issued and was therefore brought without delay. In ***Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76***, Sir William Duffus P held:

***“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.***

6. It should be the court's last resort to deny a party a chance to be heard. The overriding objective of the civil procedure rules is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Judicial authority to do justice to all, vested on this court by Article 159 of the Constitution cannot be said and be seen to be exercised if the court were to deny a party a chance to be heard on merit especially where failure to attend court has been explained and the party has moved the court without delay.

7. Failure by counsel to attend court has been explained to the satisfaction of the court. The prejudice suffered by the Respondent can be compensated by an award for costs.

8. Consequently, the notice of motion dated 29<sup>th</sup> May, 2019 is allowed in the following terms: -

**a) The order of dismissal issued on 29<sup>th</sup> May, 2019 is hereby set aside and the application dated 24<sup>th</sup> April, 2019 is hereby**

*reinstated for hearing on merit*

*b) The applicant is condemned to pay Kshs. 5,000/- to the Respondent as throw away costs within 14 days from today's date.*

**DATED AND DELIVERED IN KISUMU THIS 31<sup>st</sup> DAY OF July 2019**

**T.W. CHERERE**

**JUDGE**

**Delivered in open court in the presence of-**

**Court Assistant - Felix & OKodoi**

**For the Applicant - N/A**

**For the Respondent - N/A**