

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 33 OF 2019

BENSON IRUNGU MWANGI.....1ST APPELLANT

ABRAHAM MWANGI.....2ND APPELLANT

EUNICE NYAMBURA.....3RD APPELLANT

VERSUS

VINCENT ODUOR OMUGA.....1ST RESPONDENT

EMERENZINA MUNYIVA MAKAU ODUOR.....2ND RESPONDENT

JUDITH ABRAHAMS GUSERWA.....3RD RESPONDENT

RULING

On 22nd July, 2019 the application by the applicant dated 17th June, 2019 was listed for hearing but only the counsel for applicant appeared. On submitting that no reply had been received relating to the application, and confirming the same from the court record, the court was persuaded that the application was unopposed and that the averments in the affidavit of support thereof remained uncontroverted. For those reasons the application was allowed as drawn.

On 25th July, 2019 the respondent presented an application under certificate of urgency dated 23rd July, 2019 seeking the order that order made on 22nd July be set aside, reviewed and or varied. The reasons for seeking the said order are set out on the face of the application which included that, the nonattendance by the applicant's advocate on that material day was not deliberate, and that the advocate was prevented by sufficient cause from appearing before the court. Above all, the applicant is interested in pursuing the case to its logical conclusion and therefore in the interest of justice, the orders should be granted.

There is a supporting affidavit sworn by the advocate for the applicant in which she said that, after service of the application the clerk failed to diarise the same, and the non-attendance was not intentional nor intended in the circumstances. The orders given on 22nd July were also said to be prejudicial to the applicant if not set aside.

The application is opposed and there is a replying affidavit sworn by the 1st defendant herein on behalf of the all the defendants. The thrust of the reply is that the application is frivolous, vexatious and an abuse of the court process and therefore it should be dismissed. There was no satisfactory reason given for non-attendance of the advocate and in any case, even at the time of filing the present application, no response had been made to the application that was allowed. Both counsel addressed the court orally in respect of the present application.

The application that was allowed sought the stay of proceedings in the lower court pending the hearing and of the intended appeal and that the lower court do stay vary or review its ruling made on 14th December, 2018 relating to the filing of the proposed amended defence by the defendants. The defendants in the lower court have filed an appeal following the ruling of the lower court dated 14th December, 2018 which is yet to be heard.

At the same time, I recognize rights of the parties to be heard before any determination is made by the court, provided that such a party does not participate in delaying the court process because in any case, courts exists to do justice. I also recognize the fact that a mistake by counsel should not be visited upon the litigant unless it is shown there was complicity between the two parties.

The explanation given by the counsel for the applicant herein is persuasive, in the absence of any evidence that there is no truth in that allegation. Above all, I have not seen any prejudice that has been demonstrated shall be visited upon the respondents if the order sought is granted. I believe that an order for costs under such circumstances should be sufficient to compensate the offended party, and in view of what I have said I am persuaded that the orders made on 22nd July 2019 should be set aside. It is so ordered.

The application dated 17th June 2019 shall therefore be heard on a date to be agreed between the parties. The costs of this application shall be paid by the applicants to the respondents.

Dated, signed and delivered at Nairobi this 19th day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE