



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 112 OF 2013**

**PHILIP NJOROGE NGUGI (suing as guardian ad litem of**

**FRED RAMON NGUGI NJOROGE).....PLAINTIFF/APPLICANT**

**VERSUS**

**CHARLES JOHN MUSEE.....DEFENDANT/RESPONDENT**

**RULING**

The defendant herein filed a Notice of Motion dated the 6<sup>th</sup> day of April 2018 seeking orders that the court file herein pending ruling before Hon. Justice Njuguna be recalled. He also sought an order that he be given an opportunity to be heard before the ruling is delivered and that he be allowed to file a replying affidavit and/or grounds of opposition to the plaintiff's Notice of Motion dated 21<sup>st</sup> February 2018.

The application was made on the grounds that the plaintiff has filed an application for review of the judgment delivered on the 20<sup>th</sup> day of December 2017 to claim future medical expenses and he wishes to oppose the same; That the Plaintiff's application was brought before the court after undue and unreasonable delay and if the same is allowed, it will adversely affect the defendant if he is not given a chance to be heard before the ruling is delivered.

In support of the application, counsel for the defendant Messrs. Patricia Khisa, swore an affidavit on 6<sup>th</sup> day of April 2018 wherein she has deponed that their firm was served with the application dated 21<sup>st</sup> February 2018 on 6<sup>th</sup> day of March 2018 and they forwarded the same to their instructing client on 9<sup>th</sup> March 2018 for further instructions.

That they had not received instructions by 14<sup>th</sup> March, 2018 when the application came up for hearing. It has also been averred that the deponent inadvertently failed to diarize the matter in her diary as a result of which she failed to attend court on the date the matter was fixed for hearing. She has therefore urged the court to grant the plaintiff's application, in the interest of justice.

The application is opposed by way of a replying affidavit sworn by Patrick Kimathi Muchena on the 26<sup>th</sup> April 2018 in which he depones that when the application dated the 21<sup>st</sup> February 2018 came up for hearing on 14<sup>th</sup> March, 2018, he sent a counsel to hold his brief but neither the Respondent nor his counsel attended court despite the fact that they had been served and the application proceeded to hearing ex-parte.

Counsel contended that the Respondent had on numerous occasions delayed the matter before it was concluded and has not been keen in pursuing the same. That though the applicant had been aware of the existence of the application, he did not file a response to the same. Counsel averred that the applicant's Counsel could have instructed an advocate to hold her brief when the matter came up for hearing. It was also deponed that the applicant's advocate did not annex the purported letter she wrote to her clients seeking instructions, in the absence of which, it can only be inferred that his averment with regards to the lack of instructions is a red herring from the real issue which is that the Applicant has no valid response to the application dated the 21<sup>st</sup> February 2018. The Respondent further urged that there was a delay in bringing the present application and that mistakes by Counsel are not reason for denying an otherwise deserving applicant a favourable exercise of discretion.

The court has considered the application and the material before it. Counsel for the applicant has sought leave to file a replying affidavit to the application dated 21<sup>st</sup> February 2018, the reason being that her clients delayed in giving her instructions and that her failure to attend court was due to inadvertent omission on her part to diarize the matter on the date when it was scheduled for hearing.

On their part, the Respondents have opposed the application and have contended that the application has no merits and its only meant to delay the matter and that the same has been filed after undue delay of more than three weeks after the hearing date.

The court notes that the reason given for non attendance when the application dated 21<sup>st</sup> February 2018 came up for hearing was that

Counsel inadvertently omitted to diarize it in the diary. She had not filed a replying affidavit to the said application for lack of instructions from her client even after she wrote to them a letter seeking for the instructions. Counsel for the Respondent has argued that the letter said to have been written to the Applicant's Counsel's instructing client has not been annexed to the supporting affidavit. However, I wish to note that mistakes will always occur and as the Court of Appeal held in the case of Haji Ahmed Sheikh t/a Hauliers Vs. Highway Carriers Limited C.A. No. 46/1986 mistake or negligence of Counsel should not be visited on the client and especially in the circumstances of this case where Counsel for the Applicant inadvertently failed to diarize the matter.

In the end, I grant the application dated the 6<sup>th</sup> April 2018 and order the applicant to file and serve a replying affidavit and/or grounds of opposition within 14 days from today. The applicant's Counsel is condemned to pay costs of Kshs.10,000 to the Respondent. The same to be paid within 14 days from today.

Orders accordingly.

**Dated, Signed and Delivered at Nairobi this 14th Day of June 2018.**

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....*For the Plaintiff*

.....*For the Defendant*