



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 10 OF 2018

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI**

AND

IN THE MATTER OF: THE RESIDENT MAGISTRATE'S MOMBASA

BETWEEN

- 1. JOSEPH OBURA NYANGAGA**
- 2. HUDSON KARIUKI NGUORO**
- 3. ANWAR ALIISLAM.....APPLICANTS**

AND

- 1. RESIDENT MAGISTRATE'S/COUNTY COURT, MOMBASA**
- 2. THE D.P.P.....RESPONDENTS**

AND

AMIRALI HASSANALI MOHAMED.....INTERESTED PARTY

RULING

The Application

1. The application before the court is a Notice of Motion dated 6th April, 2018. The motion seeks as the main order that the order made on 12th March, 2018 dismissing the Applicants' application dated 13th February, 2018 for want of prosecution and/or non-attendance be set aside and the said application be reinstated. The application is premised on the grounds set out therein and is supported by affidavit of Samuel Odhiambo Eleakim sworn on 6th April, 2018.

2. The Applicants' case is that the counsel handling the matter instructed Mr. Obara Advocate to hold his brief and Mr. Obara also requested Mr. Mutiso Advocate to deal with the matter but the matter was called out/mentioned when Mr. Mutiso Advocate had stepped out of court. The Applicant's case is that leave to file an application for certiorari and prohibition was given on 16th February, 2016 and which application was filed on 5th March, 2018 what remains is the hearing of application for orders that leave do operate as stay. The Applicant avers that failure to attend court was not intentional but due to the fact that the counsel who was holding brief was not in court when the matter was called out. It is submitted that the application is merited and the Nominal Applicants stand to be prejudiced if the criminal case in the lower court proceeds yet the Notice of Motion has been filed and that no prejudice will be caused and/or suffered by the Respondents and Interested Party as the reinstatement of the application will allow the court to determine whether or not leave should operate as stay.

The Response

3. The application is opposed, ironically, by an affidavit sworn by one of the Applicants Hudson Kariuki Nguuro on 12th June, 2018 and Grounds of Objection filed on 13th February, 2018. Mr. Nguuro brings in a new element to the suit by claiming that the suit allegedly filed on his behalf was not done with his authority.

4. Mr. Masila for the Interested Party submitted that the application was dismissed on merit for non-attendance and should not be revived. On their part Mr. Mwandeje for the 1st Respondent supported the application in his submissions but did not file a response.

The Determination

5. I have carefully considered the application. In my view the reasons given by Mr. Odhiambo for failure to attend the court are justified. The affidavit of Mr. Hudson Kariuki Nguuro raises serious issues but with the main application.

6. For now I am satisfied that the application before the court is merited and should be allowed for the just determination of the issues raised in the main motion,

7. Accordingly therefore, I make the following orders:

(a) The Notice of Motion application dated 6th April, 2018 is allowed as prayed with costs in the cause.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 23rd day of July, 2018.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Obara holding brief Odhiambo for Ex parte Applicant

Ms. Kitoo holding brief Masila for Interested Party

Mr. Mwandeje for 1st Respondent

Mr. Kaunda Court Assistant