



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 13 OF 2015**

**MARY MUTHONI.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. **Mary Muthoni Kinyua** has brought an application through a Notice of Motion dated 27<sup>th</sup> January, 2016 before this Court asking for the following orders:-
  - i. ***That her application dated 11<sup>th</sup> August, 2015 dismissed for want of prosecution be reinstated.***
  - ii. ***That the orders made by this hon. Court on 25<sup>th</sup> January, 2016 dismissing the application for want of prosecution be set aside.***
2. The main ground for the application before court is that when the application dated 11<sup>th</sup> August, 2015 came up for hearing on 25<sup>th</sup> January, 2016 before this Court the appellant/applicant's counsel was absent as a result of which the said application was dismissed for want of prosecution. The applicant has stated that her failure to attend court was due to circumstances beyond her control.
3. The application is supported by the affidavit of applicant's counsel, Maureen Kibe sworn on 27<sup>th</sup> January, 2016 where she has deposed that on the material date when the application dated 11<sup>th</sup> August, 2015 was slated for hearing, she got late as she was using public means which got delayed on the way due to crack down by traffic police on matatus flouting traffic regulations. The applicant's counsel has deposed that she was taken aback when she arrived late to find that the application had been dismissed for want of prosecution. It was submitted that her failure to attend court on time should not be visited on an innocent applicant who wants to be heard.
4. Mr. Omayo opposed the application faulting the applicant's counsel for swearing an affidavit in a matter where she was not a party. This in his view contravened the provisions of the law which he cited as Oaths and Statutory Declaration Act. He further submitted that the application which the present application seeks to reinstate belongs to the applicant who should have sworn an affidavit to be supported by a further affidavit by counsel. The Respondent contended that the affidavit by counsel in support of the application before court is defective and should be struck out which would then leave the application fatally defective as it could not stand without an affidavit in support.
5. I have considered the application and submissions made. I have also considered the opposition mounted by the State through Mr. Omayo from the Office of the Director of Public Prosecutions. There are two issues for determination in this application which are:
  - i. Whether the reasons given by the applicant's counsel for failure to attend court in time to

argue the scheduled application on 25<sup>th</sup> January, 2016 are plausible and excusable in the circumstances.

- ii. Whether the application before court is defective for having been sworn by an advocate who is not a party in the application.
6. On the first issue, I find that the reasons given for the lateness of counsel in attending court on 25<sup>th</sup> January, 2016 are well explained. The counsel for the applicant was travelling by public means from Nairobi to Kerugoya Law Courts on the same day. I find the explanation given by counsel was not challenged by the Respondent and this Court is satisfied with the explanation given for turning up late in court. It is true that MS Maureen Kibe arrived in Court on 25<sup>th</sup> January, 2016 when this Court was still in session but having already dealt with the application dated 11<sup>th</sup> August, 2015 slated for hearing on that date. The applicant's counsel ought to have avoided the attendant inconveniences or consequences of coming late by perhaps alerting any of her colleague to hold her brief and explain the difficulties or challenges she was facing on her way to court but nonetheless I do find that the said circumstances facing her were beyond her control and the applicant should not be prejudiced by the same.
  7. On the question of competency of the affidavit in support of the application, I am not convinced by the Respondent's contention that the affidavit is defective in law just because it is sworn by the counsel representing the applicant. The affidavit has not breached any provision of Oaths and Statutory Declaration Act Cap. 15 in any way. The applicant's counsel has sworn an affidavit on facts which are clearly within her knowledge and definitely unknown to the applicant. The dismissal of the application was caused by the applicant's counsel and there is nothing wrong with the same counsel giving reasons why she was late in court. Justice is always administered without undue regard to technicalities as correctly submitted by applicant's counsel pursuant to **Article 159 (2) (d)** of the **Constitution**. I do find that the Respondent's objection to the application is purely hinged on a technicality and the same lacks any merit.

In view of the foregoing I find merit in the application dated 27<sup>th</sup> January, 2016. The same is allowed as prayed. I further direct that the application dated 11<sup>th</sup> August, 2015 be fixed for hearing.

***Dated and delivered at Kerugoya this 25<sup>th</sup> day of February, 2016.***

**R. K. LIMO**

**JUDGE**

25.2.206

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Applicant absent

Abubakar holding brief for Ndambiri for applicant.

Sitati for State present.

**COURT:** Ruling dated, signed and delivered in the open court in the presence of Abubakar holding

brief for Ndambiri Advocate for the applicant and Mr. Sitati for Respondent.

**R. K. LIMO**

**JUDGE**