



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

**CIVIL CASE NO. 687 OF 2002**

**GEORGE MWAI MBURU.....PLAINTIFF/APPLICANT**

**V E R S U S**

**MARY WAMAITHA KAITAN.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NAIROBI CITY COUNCIL.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1) George Mwai Mburu , the plaintiff/applicant herein, took out the motion dated 2<sup>nd</sup> December 2015 in which he sought for the following orders

***1. That the ex-parte order dismissing the applicant's applications dated the 26<sup>th</sup> October 2015 and 3<sup>rd</sup> November 2015 be set aside and the said applications be deemed to have been reinstated.***

***2. That the costs of this application be in the cause.***

2) The aforesaid motion is supported by the affidavit of Allan George Njogu Kamau. When served with the motion, Mary Wamaitha Kaitany, the 1<sup>st</sup> defendant/respondent filed the replying affidavit of Sheila Olmu. The Nairobi City Council, the 2<sup>nd</sup> defendant herein, filed grounds of opposition to oppose the motion.

3) When the motion came up for interpartes hearing, learned counsels appearing in this case recorded a consent order to have the motion disposed of by written submissions.

4) I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival submissions. It is the submission of the plaintiff/applicant that the motions dated 26.10.2015 and 3.11.2015 were placed before Justice Ombija, as he then was, for hearing. The honourable judge recused himself and made an order referring the file to Lady Justice Aburili for mention for further orders and directions. It is said that when the matter was placed before Lady Justice Aburili, the honourable judge proceeded to hear the 1<sup>st</sup> respondent and the auctioneer and eventually had the two motions dismissed for want of attendance with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents. The applicant stated that Lady Justice Aburili had shown open bias against the plaintiff/ applicant and in favour of the 1<sup>st</sup> defendant. The plaintiff/ applicant beseeched this court not to shut him out of this matter by allowing the motion since he deserved to be heard on the merits of the applications. It was pointed out that Justice Ombija had stated *suo moto* that the 1<sup>st</sup> respondent did not want him to continue with the matters as he preferred the application to be handled by Lady Justice Aburili which information was confirmed by M/s Okumu Advocate for the 1<sup>st</sup> respondent. He argued

that he could not be faulted for drawing the inference that the application before Justice Ombija had prior knowledge to the date of hearing been discussed by both Justices Ombija and Aburili and the 1<sup>st</sup> respondent. It is the plaintiff's submission that in view of the foregoing account it would not be expected on the basis of the rules of fair play for the applicant to have submitted himself to the jurisdiction of Lady Justice Aburili as she was clearly the judge of the 1<sup>st</sup> respondent's choice and could therefore not be expected to do justice on the matter.

5) The 1<sup>st</sup> respondent strenuously opposed the motion. The 1<sup>st</sup> respondent pointed out that the matter was placed before Justice Ombija as the duty judge and since the honourable judge had recused himself, he directed the file to be placed before Lady Justice Aburili and directed the parties to appear before her. It is said that when the file was called before Lady Justice Aburili's court only the advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents were present and Lady Justice Aburili proceeded to dismissed the applicant's for want of attendance after waiting for more than half an hour.

6) The main application which is rightly before this court for hearing and determination is the motion dated 2/12/2015. However I have noted that both sides have filed submissions beseeching this court to also determine the merits of the applications dated 26.10.2015 and the other dated 3.11.2015. I am not ready to take up the invitation but will instead determine the motion dated 2/12/2015. There is no dispute that these two motions dated 26.10.2015 and the other dated 3.11.2015 were both listed for hearing before Justice Ombija on 12.11.2015. On the aforesaid date Justice Ombija referred the file to Lady Justice Aburili for further orders. It is important to note that all advocates appearing in this matter were all present before Justice Ombija. When the file was placed before Lady Justice Aburili, learned advocates appearing for the 1<sup>st</sup> and 2<sup>nd</sup> defendants were present but Mr. A. G. N. Kamau was absent. Lady Justice proceeded to dismiss the two application for want of attendance. Mr. A.G.N. Kamau has now beseeched this court to set aside the dismissal orders. He has openly said that he intentionally absented himself from appearing before Lady Justice Aburili because he had formed an opinion that she was biased against the plaintiff. It is also apparent from the record that Lady Justice Aburili proceeded to dismiss the matter for want of attendance, yet the matter had actually been directed to be placed before her for mention for directions. The question is whether or not his court should exercise its discretion in favour of the plaintiff/applicant the circumstances of this case? The plaintiff's counsel appears to have formed an opinion that he will not get a fair hearing from Lady Justice Aburili and he decided to be absent from court. There is no evidence that the learned advocate had consulted his client before deciding to absent himself from court. What is clear in my mind is that Mr. A. G. N. Kamau formed an opinion that the court would not be fair which view in my humble understanding was mistaken and unfounded. A careful reading of the lengthy affidavit he swore in support of the motion reveals that the learned advocate did not take time to reflect on what should be the next step to take instead of boycotting attending court. A prudent advocate would have attended court and probably apply for the judge to disqualify herself from hearing the matter. The learned advocate simply abandoned his client's case. In the circumstances, I will not allow the client to suffer for the mistakes of his advocate. The question as to whether or not the learned judge properly exercised her discretion in the circumstances of this case is a question which can only be determined on appeal or by way of review.

7) I therefore decline to make a finding on it to avoid sitting on an appeal in decisions of a court of concurrent jurisdiction.

8) In the end, I allow the motion dated 2/12/2015 as prayed save that costs of the motion shall be paid by the plaintiff/applicant to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The motions dated 26.10.2015 and 03.11.2015 to be fixed for interpartes hearing.

Dated, Signed and Delivered in open court this 16<sup>th</sup> day of August, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant