



**REPUBLIC OF KENYA**

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

**MISC. NO. 48 OF 2013**

**IN THE MATTER OF SECTIONS 26 OF THE MENTAL HEALTH ACT CAP 248 LAWS OF KENYA**

**IN THE MATTER OF S K**

S K E .....APPLICANT

-VERSUS-

S S J.....RESPONDENT

**RULING**

1. The application that is the subject of this ruling is a Notice of Motion dated 9<sup>th</sup> July 2014, taken out under Section 26(1) of the Mental Health Act. It seeks the setting aside of the order made herein on 3<sup>rd</sup> July 2014 and that the applicant be granted leave, of fourteen (14) days, to file and serve a replying affidavit to the Motion dated 27<sup>th</sup> June 2014. The grounds upon which the application is premised are set out on the face of the application and on the affidavit of the applicant, S K E, sworn on 9<sup>th</sup> July 2014.
2. The applicant deposes that she was on 8<sup>th</sup> July 2014 served with an order made by this court on 3<sup>rd</sup> July 2014, apparently in a Motion dated 27<sup>th</sup> June 2014 filed by the respondent herein. She avers that the said application was served on her advocates on 2<sup>nd</sup> July 2014 for hearing on 3<sup>rd</sup> July 2014 and that in spite of the extremely short notice; her advocates were ready to appear in court on the said 3<sup>rd</sup> July 2014 to seek more time to properly respond to the said Motion. She further avers that the matter did not appear on the cause list of the Family Division for 3<sup>rd</sup> July 2014, and that by the time her advocates located the court file, the matter had already be placed before the judge, heard and the application allowed *ex-parte*.
3. The application is opposed by the respondent. He swore a replying affidavit on 12<sup>th</sup> July 2014. He states that he relies on his earlier affidavits sworn on 9<sup>th</sup> April 2014 and 13<sup>th</sup> May 2014. He avers that the applicant lied in her application and supporting affidavit.
4. The application was heard on 17<sup>th</sup> July 2014 where counsel for the respective parties made their oral submissions. Particulars of the said submissions are on record.
5. From the material set out in the application, the rival affidavits as well as the oral arguments by counsel for the respective parties, I have formed the view that the main issue for consideration is whether the applicant has made out a case for the setting aside or vacating of the orders made on

3<sup>rd</sup> July 2014.

6. The court is being invited to exercise its discretion to set aside or vacate the orders it made on 3<sup>rd</sup> July 2014. The court is aware that the discretion it is clothed with should be exercised judicially. The principles guiding the exercise of discretion in such cases are well settled. The Court of Appeal in *CMC Holdings Ltd vs. Nzioki* [2004] KLR 173 held –

***“In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously..... In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle..... The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside exparte judgment...”***

7. Such discretion should be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error. It is, however, not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. This was clearly articulated in *Pithon Waweru Maina vs. Thuka Mugiria* [1983] eKLR, **Civil Appeal No 27 of 1982, where the court held –**

***“2. The principles governing the exercise of judicial discretion to set aside an exparte judgment obtained in default of either party to attend the hearing are:***

- a. ***Firstly, there are no limits or restrictions on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.***
- b. ***Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah vs. Mbogo [1967] EA 116 at 123B, Shabir Din vs. Ram Parkash Anand (1955) 22 EACA 48...”***

8. The applicant’s case is that the Motion dated 27<sup>th</sup> June 2014 was not on the cause list of the Family Division for 3<sup>rd</sup> July 2014, and that by the time her advocate traced the court file that morning the matter had already been before the judge, heard and the orders in question made.

9. I note that the respondent has not in his replying affidavit responded satisfactorily to the applicant’s averments. He has only stated at paragraph 4 of the said replying affidavit “that the application and the supporting affidavit are full of lies and the same should be dismissed as from the record the court is able to tell who has failed to disclose material facts.” The respondent has sought to rely on his further supporting affidavit sworn on 13<sup>th</sup> May 2014 and the supporting affidavit dated 9<sup>th</sup> April, 2014. These two affidavits, however, do not respond to the instant application which seeks the setting aside or vacating of the orders made on 3<sup>rd</sup> July 2014.

10. In the circumstances, I find that the applicant’s failure to attend court is excusable as the matter was not in the cause list for the material day, and I am persuaded that the matter might have been called out and dealt with whilst the applicant’s advocate was trying to trace the movement of the file from the court registry. I am enjoined to exercise discretion to ensure that the applicant herein does not suffer injustice or hardship as a result of hardship or an excusable mistake.

11. In light of the above, I do hereby find that the application before me is merited and I accordingly allow the same with no order as to costs. For avoidance of doubt, the orders made in the matter are

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- a. That the orders made by this court on 3<sup>rd</sup> July 2014 are hereby vacated;
- b. That the applicant is granted fourteen (14) days to file and serve a replying affidavit to the application dated 27<sup>th</sup> June 2014; and
- c. That thereafter the application dated 27<sup>th</sup> June 2014 be heard on a date to be given at the registry.

**DATED, SIGNED and DELIVERED at NAIROBI this 17<sup>th</sup> DAY OF April 2015.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Kimani advocate for the applicants.**