



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 435 OF 2013

ANN KAWIRA

KANGA.....PETITIONER

AND

THE ATTORNEY GENERAL.....1st
RESPONDENT

THE COUNTY GOVERNMENT OF NAIROBI.....2nd
RESPONDENT

RULING

1. The Petition herein was filed on 30th August 2013. A Replying Affidavit was subsequently filed by the 2nd Respondent on 20th April 2014. The 1st Respondent never responded to the Petition notwithstanding the courts directions of 25th October 2013 and 11th December 2013.
2. The Petitioner claimed that she had been assaulted by the 2nd Respondent's officers. She also alleged that she had been unlawfully evicted. She had been shot and the bullet tore through her left thigh. She consequently sought declaratory reliefs, inter alia, that her shooting amounted to torture contrary to Article 29 of the Constitution. She also sought a compensatory relief for the alleged violations.
3. On 21st March 2014, Lenaola J directed that the Petition be heard by way of oral evidence pursuant to Rule 20(1) (c) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Thereafter the Petition was listed before the court no less than five times. The Petitioner or the Petitioner's counsel on all the occasions did not attend court. The Respondents, meanwhile, did. Finally, on 27th May, 2015, Lenaola J dismissed the Petition for non attendance. The Judge also granted the Petitioner liberty to apply.
4. Some two months later on 23rd July 2015, the Petitioner filed an application seeking to set aside the orders of 27th May 2015 and to reinstate the Petition. The application was listed for hearing interpartes on 18th September 2015. The Petitioner did not attend court. When the application was relisted for hearing on 3rd November 2015, I directed the Petitioner's counsel to file a Supplementary Affidavit and fully explain what had transpired on 27th May 2015, the day the Petition was dismissed for non-attendance. The Petitioner complied. In the meantime, the 2nd Respondent had filed a Replying Affidavit on 2nd November 2015.

5. The Petitioner asks for this court's discretion to be exercised in her favour and the Petition to be reinstated for hearing on its merits. The Petitioner states that the non-attendance was not deliberate. The Petitioner says that her Petition raised fundamental issues and she deserves an opportunity to be heard on the merits of the Petition. The Petitioner further explains that there was confusion in the law firm handling the Petition on her behalf as a new counsel had taken over the matter the previous one having left the employment of the law firm. Counsel also states that on the material date the Petition had been diarized as coming up for mention yet he was already scheduled to attend a hearing before another court.
6. In the Replying Affidavit, the 2nd Respondent simply stated that there was no good reason for the Petitioners to skip court on the material date. The Respondents also contend that the Petitioner has never been serious in prosecuting the Petition and has simply been indolent.
7. I have read through the application as well as the two Supporting Affidavits. I have also read through the Replying Affidavit. More importantly I have gone through the court record.
8. The court, it cannot be contested, has an unlimited discretion to set aside orders and judgments made *ex parte* with a view to avoiding any injustice or hardships that may result from accidents, inadvertence or excusable error: see **Shah –v- Mbogo & Another [1967] E.A 470**. The discretion is however not to be exercised to assist litigants who deliberately seek to obstruct or delay the cause of justice. The discretion is certainly a free one and has to be exercised judiciously by considering all relevant factors. Also, to be taken into account is Article 50(1) of the Constitution which provides that every person has a right to have any dispute determined fairly. That can only mean, amongst other things, that every person ought to be afforded an opportunity to be heard.
9. The facts of the instant case are relatively clear. Applying the above principles, it is clear to me that the Petitioner had been afforded opportunity to have her dispute and/or claim determined on its merit. The Petition was confirmed for hearing. The Petition was twice directed to be heard through oral evidence to be adduced by the Petitioner. The Petition was listed for hearing on five different occasions. The Petitioner never attended. It was not out of exasperation or frustration that the court dismissed the petition but due to the fact that it was apparent that Petitioner was not interested in prosecuting the Petition.
10. Justice as it were must be dispensed without undue delay: see Article 159(2)(b) of the Constitution. That is an overriding principle in all judicial systems. Litigation also ought to come to an end expeditiously. Consequently, indolence on the part of litigants must not be encouraged. Certainly, the Petitioner's approach was less than encouraging. The Petitioner appeared not to be in a hurry to bring the Petition to a close. For nearly two years the Petition was not substantively prosecuted and the fault appears to have been on the Petitioner.
11. On the material day when the Petition was dismissed for want of attendance, the Petitioner's counsel states that there had been some confusion in his diary. Counsel states in his affidavit of 3rd November 2015 that he had diarized, the matter as listed for mention and not hearing. He however did not attend. That was a blunder in itself. Even if the matter was listed for mention counsel should have attended court. However as was stated by Apaloo J.A (as he then was) in **Philip Keiptoo Chemwolo & Another –v- Augustine Kibunde [1986-9] 1 EA 74,82**.

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits”.

12. In the instant case the broad equity approach to this matter should draw inspiration, not just from the basic approach that the court's discretion is unlimited but also from Apaloo J.A's words. The Petitioner herein certainly has an arguable and prime claim. Even though the Petition was dismissed for non-attendance, the Petitioner exhibited some alacrity and zeal when the instant application was filed almost immediately. That too was an exhibition of interest in pursuing the Petition and the court should not ignore it. I am satisfied that there was no intention to simply ignore the Petition or the court. The non-attendance appears to have been caused by some genuine mistake as to a mix-up in counsel's diary. Counsel could have assumed that at a mention of the matter no drastic or substantive order could be made: see **Central Bank of Kenya –v- Uhuru Highway Development Ltd & 3 Others CACA No. 75 of 1998**. I hold the view that the mistake should be excused. The Petitioner is deserving of another chance but will have to meet the

Respondents costs.

13. The upshot is that, the orders of the court of 27th May 2015 are hereby vacated and or set aside. The Petitioner will bear the Respondents' costs on the application. The Petitioner is also to ensure that the Petition is fixed for hearing within the next three months.

14. Orders accordingly.

Dated, signed and delivered at Nairobi this 14th day of December, 2015

J.L.ONGUTO

JUDGE