



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 1041 OF 2013

SAMUEL GATE MWANGIPLAINTIFF
(T/A REAL FEEDS ENTERPRISES)

VERSUS

TONY MUNENE..... 1ST DEFENDANT

ELIUD C. WAMBU2ND DEFENDANT

(T/A CHADOR AUCTIONEERS)

RULING

Coming up before me for determination is the Notice of Motion dated 1st November 2013 (hereinafter referred to as the “Review Application”) in which the Plaintiff/Applicant seeks that the order made on 28th October 2013 dismissing the Plaintiff/Applicant’s Notice of Motion dated 29th August 2013 (hereinafter referred to as the “Dismissed Application”) be set aside and that the Dismissed Application be heard on its merits. The Plaintiff/Applicant also seeks for costs of the Review Application be provided for.

The Review Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Samuel Gate Mwangi, the Plaintiff herein, sworn on 1st November 2013 in which he averred that on 28th October 2013, he proceeded to the High Court accompanied by one Peter Kanyagia, a clerk employed by the firm on record. He further stated that his Advocate, Ms. Lucy Mwihaki Njuguna, had informed him that an Advocate by the name Geoffrey Maina would hold her brief and argue the Dismissed Application. He further stated that when the matter was called out before Justice Gitumbi, the said Geoffrey Maina was informed by the court that he would be heard at 12 pm. He further stated that after this time allocation, the said advocate Geoffrey Maina left the courtroom after informing him that he was going to attend to another matter and would be back by 12 pm. He further indicated that at 11.54 a.m., counsel for the Defendant arrived in court and requested the matter be mentioned but that he was informed by the court that the matter was slated for 12 pm hence Justice Gitumbi told him to wait for 6 minutes. He further stated that come 12 pm, the matter was called out but there was no other Advocate in court save for the Defendant’s Advocate. He further stated that he stood up and raised his hand with a view to informing the court that he was the Plaintiff but that the court did not seem to notice him and the Dismissed Application was dismissed for non-attendance. He further stated that the

Dismissed Application sought to have him reinstated into the suit premises where he carried on his business after he had been illegally and unlawfully distrained for rent by the Defendant and had been denied access. He stated further that he stands to suffer immeasurably if the order dismissing his application were to remain as his business is his sole source of income and he would be left destitute.

The Review Application is further supported by the Supporting Affidavit of Geoffrey Maina sworn on 1st November 2013 in which he stated that on 27th October 2013, one Lucy Mwihaki Njuguna, the Advocate on record for the Plaintiff herein requested him to hold her brief and argue on her behalf the Dismissed Application which was scheduled to be heard on 28th October 2013 before Justice Gitumbi. He further stated that he had several matters on the 28th October 2013 being **HCCC No. 386 of 2013** before Onyancha, J. as well as **Milimani CMCC No. 1779 of 2008** and **Divorce Cause No. 190 of 2013** both before C. Obulutsa, Ag. Chief Magistrate. He further averred that when he appeared before Gitumbi, J. on this matter, he was allocated 12 pm which though he was not comfortable, he acceded to the time given as he thought he would have been heard on the Divorce Cause by then. He further indicated that Hon. C. Obulutsa took a break and came back at around 11.30 a.m. and began with another matter which was still proceeding at 12 pm. He further stated that he requested the said Ag. Chief Magistrate to hear his matter as he had this matter before Justice Gitumbi, which request was granted. He then indicated that he dashed out and upon arriving to Justice Gitumbi's court at around 12.05 pm, he was informed that the Dismissed Application had been dismissed.

The Review Application is opposed. Norah Anindo Owino, the Advocate on record for the Defendants/Respondents, filed her Replying Affidavit sworn on 12th November 2013 in which she averred that the Plaintiff/Applicant is the one who served her with a hearing notice indicating that the Dismissed Application was scheduled for hearing on 28th October 2013. She further averred that despite having other matters in the lower courts, she opted to give this matter priority as it was before the High Court. She further stated that this matter was called before Justice Gitumbi who gave a time allocation of 12 pm. for the hearing of both counsels. She further averred that when the matter was called out at 12 pm., both the Plaintiff/Applicant and his counsel were absent and so the Dismissed Application was dismissed for want of prosecution. She further averred that it was dishonest for the Plaintiff/Applicant to purport to blame Justice Gitumbi for not seeing him in court on the fateful day.

Both parties filed their written submissions which have been read and taken into account in this ruling.

I have looked at the court record again to ascertain what transpired in court on 28th October 2013. On that date, the Dismissed Application was coming up for hearing before me. I recorded the Coram which comprised of Mr. Maina holding brief for Ms. Njuguna for the Plaintiff/Applicant and Mr. Nguru holding brief for Mr. Wanyanga for the Defendant/Respondent. Both Counsels indicated to me that they were both ready to proceed with the hearing of the Dismissed Application and I allocated them 12 pm for that purpose. I returned back to court at 11.55 a.m. and when this matter was called out, only Mr. Wanyanga for the Defendant/Respondent was in court. There was no appearance for the Plaintiff/Applicant. I ordered that the court do wait for 12 pm to enable the Plaintiff/Applicant's counsel to arrive at this is the time allocation I had given earlier. I must add that the Plaintiff/Applicant did not at this time indicate his presence in court. When 12 pm arrived, this matter was again called out and again, only Mr. Wanyanga for the Defendant/Responds was present in court. There was no appearance for the Plaintiff/Applicant. Mr. Wanyanga proceeded to request the court to dismiss the Dismissed Application for want of prosecution. I proceeded to dismiss the Dismissed Application as requested.

The issue I must determine is whether I should allow the Review Application by setting aside the order that I issued on 28th October 2013 and allowing the Dismissed Application to be heard on its merits. The applicable law is to be found in **Order 45 rule 1(1)** of the **Civil Procedure Rules, 2010** which provides as follows:

“Any person considering himself aggrieved by ... an order ... but from which no appeal has been preferred and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by

him at the time the order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the ... order, may apply for a review ... to the court which ... made the order without unreasonable delay.”

I have considered the reason advanced on behalf of the Plaintiff/Applicant as to why his Advocate was not in court at the allocated time for the hearing of the Dismissed Application. The main reason advanced is that the Advocate holding brief for the Advocate on record had other matters before other courts which prevented him from being in court at the time allocated. I must say I am not satisfied with this reason. It is incumbent upon an Advocate to manage his time well so that he can be present in court when matters he is handling are called out. It is not an excuse that such Advocate has other matters before other courts. Failure to attend court at the time allocated is detrimental to the interests of the clients represented by such Advocates. If the time allocated was not convenient to the Advocate for the Plaintiff/Applicant, he should have informed the court beforehand and the court would have allocated another time or date for the hearing of the Dismissed Application. However, this was not the case. The blame for this lies squarely with the counsel and not with the court or the Defendants/Respondents. I am therefore not convinced that there is sufficient reason why I should allow the Review Application.

Arising from the foregoing, I hereby dismiss the Review Application with costs to the Defendants.

DELIVERED AND SIGNED IN NAIROBI THIS 25TH DAY OF JULY 2014.

MARY M. GITUMBI

JUDGE