



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC NO. 63 OF 2008**

**W.G. WAMBUGU.....APPLICANT**

**VERSUS**

**ANN WANJIKU MUNGA.....RESPONDENT**

**RULING**

1. The Motion dated 26<sup>th</sup> June 2013 seeks a stay of a ruling that was due to be delivered by the Deputy Registrar and a stay of further proceedings in the matter. The respondent is asking for unconditional leave to be defend and to be heard in reply to the notice to show cause.
2. The application is supported by the affidavit of the counsel for the respondent sworn on 26<sup>th</sup> June 2013 and that of her clerk sworn on even date. Both seek to explain the instances under which proceedings were conducted by the Deputy Registrar on 26<sup>th</sup> June 2013 in the absence of counsel for the respondent.
3. On the said 26<sup>th</sup> June 2013, the matter was due for notice to show cause before the Deputy Registrar. It proceeded in the presence of counsel of the applicant, the respondent was recorded as being absent.
4. In her affidavit, counsel for the respondent explains that she was unwell on 26<sup>th</sup> June 2013 and was rushed to hospital, and was put on bed rest. She has attached a medical note dated 26<sup>th</sup> June 2013. It says she was diagnosed as having “a medical/surgical condition”, and was allowed sick off for a period of three (3) days. She explains that she informed her assistant that she would be unable to attend court.
5. On his part, the assistant explains that upon being informed that the advocate was not able to attend court, he rushed to court and sought to have the matter handled by counsel instructed to take it out. He presented himself before the Deputy Registrar, but was told that he could not address the court as he was not an advocate. He failed to get an advocate to hold his brief and the notice to show cause proceeded *ex parte*.
6. The applicant has responded to the application by filing two (2) documents – a notice of preliminary objection and a replying affidavit. She argues that the court has no jurisdiction. She explains that there was proper service of the notice to show cause, that the matter has been adjourned on previous occasions at the instance of the respondent and that the clerk of the respondent’s counsel had been given opportunity to get an advocate to hold brief but failed to do so.
7. I have perused the record and considered the affidavits on record as well as the written submissions filed by counsel for both sides. I am not satisfied that a case has been made out for the orders sought. No good reason has been advanced to explain the absence of the respondent or his counsel from court on 26<sup>th</sup> June 2013. Counsel alleges that she was ill, so serious that she was put on bed rest for three (3) days, yet the medical note availed to court does not disclose the illness she was suffering from – it mainly talks of “ *a medical/surgical condition.*”
8. Notices to show cause are directed personally to the parties. It is the parties who are expected to show cause personally, not through counsel. The record shows that the respondent was not in court on 26<sup>th</sup>

June 2013. The affidavits of both counsel of the respondent and her clerk are silent on whether the respondent was present in court.

9. I am persuaded that the respondent and his party have been indolent in their approach to the whole matter. Equity aids the vigilant not the indolent. I am not minded to exercise discretion in favour of the indolent. I find that the application dated 26<sup>th</sup> June 2013 is wholly without merit and I hereby dismiss the same with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 26<sup>th</sup> DAY OF September 2014.**

**W. MUSYOKA**

**JUDGE**