



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 414B OF 2011**

**TOWN CLERK, CITY COUNCIL OF NAIROBI. .... APPLICANT/APPELLANT**

**VERSUS**

**PETER NJUGUNA KURIA & 214 OTHERS. .... RESPONDENTS**

**RULING**

The application before the court is the Notice of Motion dated 2<sup>nd</sup> July, 2012. It seeks mainly that the orders of this court dated 9<sup>th</sup> May, 2012 dismissing an earlier application under a Notice of Motion dated 30<sup>th</sup> August, 2011, be set aside and the said application be reinstated.

The perusal of facts on record show that the application dated 30<sup>th</sup> August, 2011 was fixed for a hearing by highlighting on 13<sup>th</sup> February, 2012 but could not be reached. It was fixed also on 20<sup>th</sup> February, 2012 but could again not be reached. It was finally fixed for a hearing in the presence and consent of both parties counsel on 9<sup>th</sup> May, 2012.

On 9<sup>th</sup> May, 2012, the record confirms that the respondent attended court but the applicant did not. The respondent sought that the case be dismissed for want of prosecution since the applicant's counsel who would prosecute it was absent. The court went ahead to dismiss the said application for want of prosecution.

In this application the applicant depones that his counsel actually attended court but on finding that the court file was not before the court and because the application was not listed in the day's cause list, he walked away and went to the registry to find out why the matter was not listed and why the file was not in court.

The applicant's counsel further deponed that the Registry clerk apologized for not listing the application for a hearing and advised the applicant's counsel to seek a mention date to fix a fresh hearing date. That he later wrote to court on 15<sup>th</sup> June, 2012 seeking a mention date but on failure to get response, the advocate's clerk learnt on 27<sup>th</sup> June, 2012 that the application had been dismissed on 9<sup>th</sup> May, 2012 as aforesaid. The Applicant's counsel further deponed that the court-clerk to this court had informed the applicant's court clerk that it was the Respondent's counsel who had arranged for the retrieval of the court file from the registry before the court dealt with it to dismiss the application which a dismissal the counsel did not disclose to the Applicant's counsel. The latter termed the obtainance for the dismissal order improper and on that basis and on the basis that the respondent will suffer no prejudice and will be compensated on costs, he sought the vacation of the dismissal order.

The application is strongly opposed on the basis that the applicant had no reasons for not attending court to prosecute his application. That the matter had been fixed for a hearing in court and with the consent of both parties and that the mere fact that it was not listed in the cause list, did not give the applicant any excuse not to attend court. The Respondent also raised the fact that the granting of the application as it stands will not assist the applicant since the orders made by the lower court and appealed from were directed to individuals against whom the order cannot be enforced since they no longer hold the same offices against which the orders would be enforced.

I have carefully considered the prayers in this application. The orders made by the lower court which

is the subject of appeal were made specifically against the Town Clerk who was ordered by the lower court to effect the orders granted by that court. The names of specific town clerks who were to carry out the order were given. They soon left their offices and could not be expected to effect the court orders in question. Any proceedings directed at them would not be of any use to the applicant. That would in my view, include the proceedings and orders that are likely to be generated by this application. It is possible to conclude accordingly, that any orders granted to reinstate the dismissed application will themselves be futile or in vain. That is to say that even if this court allows this application, the same will not be useful to the applicant. All that will cause a prolongation of litigation which will be delaying the substantive justice of the case and increase costs to the parties for no good purpose.

On the other hand the court is not satisfied with the explanation given by the Applicant for his failure to turn-up in court and prosecute the application on 9<sup>th</sup> May, 2012 as ordered by the court with the consent of both parties. The story told by the applicant's counsel, does not add up. He claimed to have attended court and found the court file missing and the matter not being listed. He claimed to have gone to the Registry to look for the file and to seek explanation as to why the matter not appearing in the cause list.

The court is not persuaded that what counsel deponed in the supporting affidavit is true. It is possible that the matter may not have been listed and reasons for that could be given. However, the hearing was fixed in court to the convenience of the parties and an order to that end made. The applicant's counsel does not explain to the court why he did not draw court's attention to his presence and to the missing of the file, if the file was indeed missing at all. He filed no supporting affidavits from the court and registry clerks whom he quoted to have given him the relevant information. He neither mentioned their names so that responsibility would be laid where it belongs by investing his allegations. In short, what he claimed happened did not make good sense and amounted to hearsay which this court is not persuaded to rely on.

On the above reasons this application shows little merit. The worst the applicant will suffer is to continue paying a little higher rent, a matter which the court can easily reverse if the applicant wins the appeal by ordering a refund of any extra rents paid. This application is dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 23rd day of September, 2014.

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**D A ONYANCHA**

**JUDGE**