

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Civil Case 103 of 2008

JOSEPH PERMINAS MWAI

WAMBUGU.....PETITIONER

VERSUS

ROMANO NGATIA

MUNUHE.....OBJECTOR

R U L I N G

In the motion dated 5th October 2011, Romano Ngatia Munuhe, the Defendant/Applicant herein, applied for the following orders:

- 1. That this Honourable Court do certify this application urgent and it be heard ex-parte in the first instance.***
- 2. That the Honourable Court be pleased to order stay execution of the decree in this suit pending hearing and determination of this application.***
- 3. That the Honourable Court be pleased to set aside the ex-parte order made on 23rd June 2011 dismissing the defendant's counter-claim and the counter-claim be reinstated.***
- 4. That the Honourable Court be pleased to set aside the judgment made on 23rd September 2011 and the defendant be granted leave to tender evidence in defence and in support of his counter-claim.***
- 5. That the Honourable Court be pleased to grant such further order as may be necessary to meet the ends of justice in this case.***
- 6. That costs of this application be provided for.***

Joseph Mwangi, learned advocate for the defendant filed two affidavits he swore in support of the motion. Joseph Perminus Mwai Wambugu, the Plaintiff/Respondent filed a replying affidavit to oppose the motion. He also filed a replying affidavit sworn by his advocate, Mr. Charles Wahome Gikonyo to resist the application.

The main argument put forward by the defendant is that his advocate had a mechanical breakdown while on his way to court on 23.06.2011, hence he failed to be in court. The Plaintiff accused the Defendant of taking too long to file the application. He claimed that the Defendant in hellbent to delay the conclusion of this case. I have carefully considered the rival submissions and the averments contained in the affidavit evidence. It is not controverted that the Defendant's advocate had a mechanical problem on 23rd June 2011 hence he failed to turn up in court thus the defence case was closed and the counter-claim dismissed. I am convinced that this is a good reason to grant the defendant the orders sought. Judgment in this case was delivered on 23rd September 2011 and the motion herein was filed on 6th October 2011. I am satisfied the same was timeously filed.

In the end I allow the motion dated 5th October 2011 in terms of prayer 3 and 4 with costs abiding the outcome of the suit.

Dated and delivered this 17th day of August 2012.

J. K. SERGON

JUDGE