



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 155 OF 2009

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| DAVID MBUVI KATHITU..... | 1 ST |
| PLAINTIFF | |
| DAVI OLOO MIRUKA..... | 2 ND |
| PLAINTIFF | |
| JOSEPH K. NZWILI..... | 3 RD |
| PLAINTIFF | |
| ONESMUS MWENDWA WAMBUA..... | 4 TH |
| PLAINTIFF | |
| MARGARET GACHANJA..... | 5 TH |
| PLAINTIFF | |
| PAUL KATHYAKA..... | 6 TH |
| PLAINTIFF | |
| MOSES MUTINDA..... | 7 TH |
| PLAINTIFF | |
| EZEKIEL MUNDIA NJENGA..... | 8 TH |
| PLAINTIFF | |
| TABITHA WAMBUI..... | 9 TH |
| PLAINTIFF | |
| JANE MUTHONI..... | 10 TH |
| PLAINTIFF | |
| JAPHETH NYAMONGO..... | 11 TH |
| PLAINTIFF | |
| MWAURA NGOMBE..... | 12 TH |
| PLAINTIFF | |
| SAMUEL KURIA MUIGAI..... | 13 TH |
| PLAINTIFF | |
| JOHN MUTUNGA..... | 14 TH |
| PLAINTIFF | |
| JULIANA MUTUKU..... | 15 TH |
| PLAINTIFF | |

(suing on their own behalf and on behalf of other persons)

V E R S U S

| | |
|-------------------------------------|-----------------------|
| CITY COUNCIL OF NAIROBI..... | 1ST |
| DEFENDANT | |
| STEPHEN MAINGI MUREITHI..... | 2ND |
| DEFENDANT | |
| RIITHO MUREITHI..... | 3RD |
| DEFENDANT | |
| NYAGATHUGU LIMITED..... | 4TH |
| DEFENDANT | |

R U L I N G

On 25th November 2010 Justice Sitati found the 3rd and 4th Defendants to be in contempt of the orders of court issued on 8th April 2009. She found the orders had been served upon them but that they had been disobeyed. On 9th December 2010 the Defendants filed this chamber application under Order 9B rules 3 and 8 of the Civil Procedure Rules to have the Ruling and all subsequent proceedings and orders set aside so that the application dated 24th February 2010 to be heard *interparties* and the Defendants heard on their defence. In the supporting affidavit sworn by the 3rd Defendant on his behalf and that of the 4th Defendant, it is deponed that throughout the proceedings that led to the decision that they were in contempt they and their advocates were not informed and therefore they did not participate and yet they had a defence to the application; that they were unaware of the order and did not breach it.

The replying affidavit by the 1st Plaintiff shows that the application for leave to bring contempt proceedings against the Defendants came for hearing on 15th February 2010 and was allowed. On that day the Defendants were represented by counsel. The main application was ordered to be filed and served within 14 days and the Defendants allowed 14 days from the date of service to file responses. The parties were also asked to file skeletal arguments to be highlighted on 11th May 2010. On 11th May 2010 the Defendants advocates did not attend and submissions had not been filed or exchanged by the parties. The court ordered for the filing and exchange of submissions. The matter was fixed for mention on 14th June 2010. It was mentioned on 23rd June 2010. The Defendants were not represented and sent no word. Ruling was scheduled for 22nd July 2010. It was eventually delivered on 25th November 2010 following notice. The affidavit shows that on 1st March 2010 the motion for contempt was served on the Defendants advocates and on 17th June 2010 the mention notice was served. “DM 1”, “DM 2” and “DM 3” refer.

It is clear to me that all the time the Defendants were aware of the application but did not care to respond to it in any way, and yet they were represented. There is no explanation from the advocates why they were unable to act.

Regarding their defence, the court found that the Defendants were served with the order in question and that they had breached it. The court has not been asked to review the finding. In any case, this Court was informed that the Defendants have appealed the entire decision of Justice Sitati to the Court of Appeal. One wonders what the value of this application is in view of the pending appeal.

I am aware that the court has unfettered discretion to set aside or vary any *ex parte* order obtained in default of either party to attend the hearing (**Maina –Vs- Mugiria [1983] KLR 78**). The main concern of the court is to do justice to the parties. The discretion is intended to be exercised to avoid injustice resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice (**Shah –Vs- Mbogo [1962] EA 116**). I also bear in mind that to deny a subject a hearing should be the last resort of a court.

I find that what the Defendants are engaged in are acts to delay justice. It should also be pointed out a party who has been served with an application and does not respond, then appears in court on date for hearing and is granted opportunity to file a replying affidavit and written submissions and does not act, cannot turn around and say there was a denial of his right to be heard. He was given an opportunity to be heard and did not take advantage of it. In conclusion, the application is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MARCH 2011

A. O. MUCHELULE

J U D G E