



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 88 of 2009

1. FATUMA HAMED MOHAMMED

2. MARIAM AHMED MOHAMMED.....PLAINTIFFS/APPLICANTS

VERSUS

ISMAEL OLE PASHA.....DEFENDANT/RESPONDENT

RULING

1. On 31.3.2009 I discharge the interim orders issued in respect of the Plaintiff's Application for injunctive reliefs. The same was dated 24.3.2009 and the reason I did so was that on that date, no appearance was made for or on behalf of the Plaintiff and yet one Mr. Onyango, advocate appeared for the Defendant.
2. By Notice of Motion dated 13.5.2009, the Plaintiff seeks reinstatement of that Application for hearing. The Motion is premised on the provisions of Order L Rule 1 of the Civil Procedure Rules. In her Supporting Affidavit sworn on 13.5.2009, the Plaintiff/Applicant states that on 31.3.2009, her advocates were unable to attend court "*due to circumstances beyond their control*" but that in fact her advocate "*arrived in court behind schedule by which time this honourable court had already*" discharged the interim orders granted by Osiemo, J on 24.3.2009. That she should not be penalized for the actions of her advocates and that unless the orders are reinstated, the Respondent may evict her from the suit land.
3. One Richard Mobisa Ongegu advocate, in his Affidavit sworn on 13.5.2009 states that he was unable to attend court on time because his motor vehicle developed mechanical complications on his way to Machakos.
4. The issues before me call for a fair exercise of discretion and I note that the Applicant and her advocate claim that on 31.3.2009, the advocate was in court but had arrived after the Application dated

24.3.2009 had been dismissed. In the Replying Affidavit filed on 1.7.2009, the Respondent argues that the explanation given cannot justify the orders sought. The submissions by his advocates were however wholly misguided because I am neither presently seized of the Originating Summons for adverse orders against the Respondent neither am I seized of the Application for injunctive reliefs. I am merely seeing whether I should set aside the alleged order for dismissal and reinstate the injunction Application for hearing.

5. I have one problem with the present Application; if the advocate for the Applicant was in court on 31.3.2009, why wait until 15.5.2009 to seek reinstatement of the alleged dismissed Application? The delay of 45 days is to my mind unreasonable and does not lend credence to the explanation given by the Applicant. *Waweru, J.* in *E.A Portland Cement Company Ltd vs Philip Mongony HCCC No. 218/2005(Milimani)* and *Azangala,J.* in *Corner House X-Ray & Diagnostic Centre vs NIC Bank HCCC 859/2002* found that the haste with which a party moves to set aside a dismissal order is an important consideration in exercise of discretion. I am unconvinced about the reasons for the laxity displayed by both the Applicant and her advocate in this matter. It would seem that they only woke up to their reality when the Respondent threatened some action and then they rushed to court to seek the reinstatement of the dismissed Application.

6. A party that is less than candid cannot expect a favourable exercise of discretion and this is one case where there is a glaring lack of good faith.

7. Lastly, in fact I never dismissed the Application dated 24.3.2009. I only discharged interim orders issued! The Applicant ought to have read the record a lot more closely.

8. The Application dated 13.5.2009 on all fronts is misguided and is dismissed with costs.

9. Orders accordingly.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this **12th** day of **March 2010**.

H.P.G. WAWERU

JUDGE