



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 58 OF 2002

GIDEON KEFA & 12 OTHERSAPPELLANTS

VERSUS

JOSEPH WAIHARO KURIARESPONDENT

ENG. CHARCHI GITHINJIINTERESTED PARTY

R U L I N G

The application dated and filed in court on 6th June 2002 seeks setting aside this court's order of 5th June 2002 dismissing the application dated 25th February 2002 which sought stay of execution of eviction orders granted by G.N. Ombongi (SRM) on 25.1.2002 pending the hearing and determination of the appeal.

The application for stay had been fixed for hearing on 5th June 2002.

Counsel for the applicant did not turn up on the hearing date but instead he sent in a colleague called Omino who applied for an adjournment on grounds that counsel for the applicant was involved in moving from his previous house to another one at short notice.

Counsel for the respondent opposed the application for adjournment on ground that the applicant had not given an adequate reason and that his intention was to delay this matter.

The court considered the submissions and refused to adjourn the matter.

Counsel who held brief for applicant's counsel had no instructions to proceed, hence that application was dismissed for want of prosecution.

Out of that decision the present application was filed in court on 6th June 2002 seeking to set aside the dismissal order and the reinstatement of the application dated 25th February 2002.

The grounds on which the application was based was that counsel could not avail himself in court in time due to urgent personal problems which he finished at 2.50 p.m. and that the circumstances of such failure to attend court were beyond his control.

The details of the circumstances beyond counsel's control were particularized in the supporting affidavit and they related to him vacating a rented house to move to his own house at very short notice; when his landlord forcefully took possession of the house counsel had been living in.

This then meant he had to forcefully repossess his own house from his tenant on 5/6/2002.

In a replying affidavit, counsel for the respondent disputed that the applicant's counsel had failed to appear in court on account of shifting from one house to the other and maintained that the former was before another court in Milimani Commercial Court on the same afternoon.

Counsel for the parties appeared before this court on 1.7.2002 to either present or oppose this application.

Counsel for the applicant referred to the grounds set out on the body of the application and the supporting affidavit and added that the reason why he was spotted at Milimani Commercial Courts was when he returned the pick-up he had been using in transporting his property from the previous to the new house and also to find out if a ruling in another case he was with counsel for the respondent counsel would be delivered.

That it was after that that he rushed to this court only to find his application had been dismissed.

He prayed that the application dated 25th February, 2002 be reinstated.

Counsel for the respondent opposed the application and said the applicant had demonstrated laxity in prosecuting the application dated 25th February 2002.

That though the application was filed in court under certificate of urgency, it has never been prosecuted.

That the hearing date for this application was taken by consent of counsel for the parties yet counsel for the applicant went to attend to other personal matters.

Counsel referred to the same date and time the application was to be heard and yet counsel for the applicant was seen in another court; thus demonstrating the Milimani Commercial Court matter was more important than this matter. He submitted that the delay in prosecuting this matter was causing his client lots of damages because he cannot develop the suit plot though he had obtained relevant approval.

Counsel prayed for the dismissal of the application with costs.

What is important in this type of application is the exercise of the court's discretion.

It is true after the application dated 25/2/2002 had been dismissed counsel for the applicant rushed to this court to try to explain his delay but was told to take such action as he thought suitable.

He made this application the following day thus showing how serious he viewed the matter.

The dispute involves a town plot and it is only fair that the application dated 25th February 2002 be heard on its merit to give it the seriousness it deserves.

That any damage the respondent has incurred or suffered can adequately be compensated in the award of costs.

For these reason, I hereby exercise the court's discretion to grant the application dated 6th June 2002 and to reinstate that dated 25th February 2002.

Thrown away costs for the dismissed application and those of today's application agreed or taxed to be paid to the respondent.

The applicant is directed to prosecute the application dated 25th February 2002 expeditiously.

Delivered and dated this 26th day of July 2002.

D.K.S. AGANYANYA

JUDGE