



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE MISCELLANEOUS APPLICATION NO. 14 OF 2019

JOSEPH MBITIRU.....APPLICANT

VS

FRANCIS GITHAIGA MBURU.....RESPONDENT

RULING

1. **JOSEPH MBITIRU** (the applicant) desired to appeal before this Court the judgment delivered on 27th September, 2018 of the Chief Magistrate's Court Limuru in Civil Case No. 267 of 2014. He sought by his application, in this matter, dated 15th January, 2019 leave to appeal that judgment out of time. That application was first before this Court on 8th March, 2019 when this Court ordered it be fixed for hearing at the registry inter partes. On 21st May, 16th September and 17th October, 2019 this Court adjourned that application because the respondent, who by then was acting in person had not been served with the application. The application was fixed for hearing on 19th February, 2020. On that day, there being no representation for the applicant the application was dismissed for non-attendance.

2. The applicant has presented a Notice of Motion application dated 17th March, 2020 seeking an order to set aside the dismissal of his application to file an appeal out of time. That application is the subject of this ruling.

3. The application was not opposed and on the day of hearing the respondent, though served failed to attend court.

4. The application is supported by an affidavit sworn by the applicant's advocate, *E. Supeo Karei*. The reason given by that advocate, for failing to attend court on 19th February, 2020 are in the following paragraphs of his affidavit:-

1. That I am an advocate of the High Court of Kenya practicing as such in the firm of Patricks Law Associates who are seized of the conduct of this matter on behalf of the plaintiff and hence competent to swear this affidavit.

2. That on 19th February, 2020 I left Nairobi for Kiambu Law Courts to attend this matter which was coming up for hearing of our application dated 15th January, 2019.

3. That on the way and some kilometres before Kiambu my car developed a mechanical problem. Time had passed by far by the time I got help from a mechanic based at Kiambu.

4. That for the above reason I arrived in court late when the matter had already been called and dismissed.

ANALYSIS

5. The reproduced paragraphs of the affidavit in support of the application falls short of giving clear explanation of the failure of the advocate to attend court on 19th February, 2020.

6. The affidavit failed to state what time the alleged vehicle broke down. And if it broke down between Nairobi and Kiambu High Court, which distance is relatively very short, the advocate failed to state why he did not get alternative means, such as public transport to enable him get to Kiambu High Court and attend to the matter. The explanation of the advocate falls sort of candidness. The explanation does not suffice to lead this Court to exercise its discretion to set aside the dismissal of the applicant's application.

7. However, what much more shows lack of candidness is the fact that the application under consideration is dated 17th March, 2020 but it was filed in this Court until 16th September, 2020. The dating of the application of 17th March, 2020 but which was filed on 16th September,

2020 is no doubt a cover up to disguise the obvious delay in approaching this Court. This conduct of deliberately dating the application six months prior to the date of its filing goes to the very heart of the matter. It reveals a party who does not deserve the exercise of the court's discretion.

DISPOSITION

8. The applicant having failed to disclose with particularities the reason there was no attendance before court on 19th February, 2020 and because of his lack of candour in the date of the application the Notice of Motion dated 17th March, 2020 filed on 16th September, 2020 is dismissed with no orders as to costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF JUNE, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Ndege

For the Applicant: Mr. Mwangi

For the Respondent : No Appearance

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE