



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL SUIT NO. 60 OF 2012**

**JOSEPHINE THIRINDI ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**ELIAS KUBAI ..... DEFENDANT/APPLICANT**

**RLING**

1. Before me is a Notice of Motion dated 17/6/2019 expressed to be brought under section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Order 51 Rule (1) and rule 10(2), of the Civil Procedure Rules. Other than costs, the significant order sought in the Motion is: -

**a. Reopening of the defendant's case in order to take evidence**

2. The grounds for the application are set out in the application and the supporting affidavit and supplementary affidavit dated 6/8/2019 of Elias Kubai who averred that on 16/5/2019 his advocate called him for a pretrial briefing and informed him that he had taken a hearing date of 30/5/2019. On 30/5/2019 he together with the witnesses attended and had had a briefing session with his legal counsel ahead of the hearing. However when they went for the hearing they found that the matter was not listed. On investigation his advocate found that he mistakenly diarized the matter for 30/5/2019 instead of 23/5/2019.

3. The application was opposed by the replying affidavit of Josephine Thirindi Elias dated 22/7/2019 where she stated that she vehemently opposes the application as the applicant has on several occasion failed to attend court. That this matter has taken a long time in court and it is about time that litigation of the same came to an end. Additionally she is straining financially to pay her legal fees and transport to court. That since the defendant chased her away from their matrimonial home.

4. The court on 25/7/2019 ordered that the application be heard vide written submissions. The applicant in their submissions argued that confusion in taking down the date for hearing of case made him not to be present in court on the appointed date. He stressed that every other time the matter was in court he was present together with his witnesses. Section 3A and 63 of the Civil Procedure Act gives this court powers to meet the ends of justice. The defendant and his advocate since appointment have taken all the steps to expedite the determination of the matter including, regularization of pleadings save for the current mistake.

5. The plaintiffs on the other hand argued that the applicant is causing unnecessary delays as the court record could bear witness there have been frequent adjournments by the defendant. That this court certainly has discretion to re-open the case but such discretion should be exercised judiciously.

6. Section 3A of the Civil Procedure Acts gives this court inherent power to make orders as may be necessary for the ends of justice to be met. Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex-parte. The courts discretionary power should, however be exercised judiciously with the overriding objective of ensuring that justice is done to all the parties.

7. The guiding principle in the courts exercise of this judicial discretion was laid down in **Mbogo & Another v. Shah (1968) EA page 195**. The exercise if a court discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vain this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

**ANALYSIS AND DETERMINATION**

8. Counsel for the applicant herein has admitted that he took down the wrong hearing date which led to his and his client's failure to attend court on the duly appointed date. He also stated that, without delay he presented this application seeking to rectify his mistake. But despite the seemingly quick remedial action by counsel, the applicant has on a number of occasions for one reason or other, caused adjournment of hearing of the case. He has also been absent on a number of times the case was listed for hearing. I note from the record that legal counsel for the plaintiff has submitted that the applicant keeps on making death threats to her client and vowed never to allow this case to be concluded.

See the record for these things I am saying. Needless to state that parties as well as legal counsels bear a statutory obligation to assist the court to attain the overriding objective of the court. The defendant seems to go against this obligation. This application may well be one of his ways of stalling this case.

9. Sometimes, even if it is most unpleasant, courts should be prepared to stop a party who is bent at delaying a case if the command of the Constitution in article 159 that is; *justice shall not be delayed*; is to be adhered to. Delay and its effect on administration of justice was aptly described by Warsame J. (as he then was) in the case of **London Distillers (K) Ltd V Philip Kipchirchir & 2 Others [2007] eKLR** that;

**“In my view delay is affront to the administration of justice, delay is something to be deplored, delay is repugnant to justice, delay spoils the image of the judiciary, delay forments public outcry against the judiciary, delay creates disharmony between the consumers of justice and the courts. Delay is a disguised disinterest in the disposal of the suit. Delay creates desolate and despair in the minds of the party affected by the delay. It is a despicable attempt to enslave a party to an endless contest. That contest must come to an end if the instigator is unwilling to end it”.**

10. Nonetheless, and at the risk of looking abrupt; purely in the interest of justice, I will reopen the case but on stringent conditions. The applicant shall present all his witnesses on a day I shall appoint which failing, this order of re-opening the case shall lapse and the original position shall revert; that is to say, the defence case shall remain closed as was ordered on 23<sup>rd</sup> May 2019. I therefore allow the application herein in the terms I have stated above, for good reason. The applicant will also pay costs of the application. It is so ordered.

**Dated, signed and delivered in open this 2<sup>nd</sup> day of March 2020**

**F. GIKONYO**

**JUDGE**

**IN PRESENCE OF**

Karanja for Ojiambo for defendant

Defendant – present

M/s Kiome for plaintiff – absent

Plaintiff – present

**F. GIKONYO**

**JUDGE**