



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL APPEAL NO. 64 OF 2016**

**JAYNE WASIKE.....PLAINTIFF**

**VERSUS**

**GRACE MOKAYA.....RESPONDENT**

**RULING**

**Case Background:**

By way of Notice of Motion dated 28<sup>th</sup> November 2016 the Applicant filed this application against the Respondent seeking the following prayers:

- i. That this Honorable court be pleased to grant leave to the Appellant/Applicant to lodge/file her appeal out of time in relation to WEBUYE PMCC NO.64. OF 2016.***
- ii. That there be a stay of execution of a decree/orders issued in WEBUYE PMCC NO.64. OF 2016 on the 25<sup>th</sup> day of October 2016 against the Appellant/Applicant herein pending the hearing and determination of this application.***
- iii. THAT on the interpartes hearing in paragraph 3 above be confirmed pending the hearing and determination of the appeal.***
- iv. THAT the cause of the application to abide by the action of the intended appeal.***
- v. THAT cost of this application be provided for.***

However, the above application was dismissed on 4.10.2017 for non attendance and want of prosecution and Applicant herein simultaneously filed a Notice of Motion application dated 16.10.2017 seeking the following prayers;

- i. That this Honourable court be pleased to set aside the order of dismissal for want of prosecution issued on the 4/10/2017 and all other consequential orders.***
- ii. That the application dated 28<sup>th</sup> of November 2016 filed herein be re-instated.***
- iii. That the costs be in the cause.***

From the above, the pleadings, the application, the affidavits, I am in a position to decipher the major issues for determination is;

- i. The two issues for determination is whether this Honorable court can set aside order of dismissal for want of prosecution issued on the 4/10/2017 and whether application dated 28<sup>th</sup> November 2016 filed herein can be reinstated.***

**Setting aside of orders:**

The applicant has given reasons why he was unable to attend court on the material date when his application dated 28<sup>th</sup> November 2016 was dismissed. It is Applicant's advocate contention that he was engaged in election Petition No.8 and 12 of 2017 when case herein was called for hearing and thereof the application was not heard on merit and urge this court to reinstate his matter.

The Respondent opposed the application and filed replying affidavit dated 8.12.2017 sworn by Grace Mokaya opposing the application and briefly stating that the application is inept, unmeritorious, frivolous bad in law hence should be struck out. She stated that the matter was called out on hearing date and advocate holding brief indicated to the court that the application to heard at 11.00am when advocate on record will be present and the file was set aside.

It is her contention that the advocate did not state to court on material date that that he was engaged in an election petition and reasons adduced by the applicant is not plausible as the same is after thought.

On determination of issues at hand I wish to draw attention of the parties to the relevant applicable law.

**Order 12 Rule 7** drawn as follows :-

***Setting aside judgment or dismissal [Order 12, rule 7.]***

***Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.***

This court has perused the record of proceedings and noted that the Respondent has been absent from most of the proceedings and even on 4.10.2017 material date of hearing of the application that was dismissed advocate did indicate to court he was engaged in an election petition. This court has considered the application dated 16.10.2017 and reasons for non-attendance by counsel for the applicant. I allow the application and set aside order of dismissal dated 4.10.2017 on terms that the applicant pay the respondent throw away costs of Kshs.10,000/=.

It is so decided.

**Dated and Delivered at BUNGOMA this 22<sup>nd</sup> day of July, 2019.**

**S.N.RIECHI**

**JUDGE**