



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC.MISC.CR.APPL. NO. 71 OF 2018

JOSEPH MAKAU NDAMBUKI.....1ST APPLICANT

VERSUS

THERESIA MUTINDI MULWA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The Applicants' application dated 1st August, 2019 seeks the following orders: -

- 1) **That** the Order of the Honourable Magistrate made on the 15th day of July, 2019 dismissing the application filed herein on 19th day of September, 2018 together with all other consequential Orders be reviewed varied and / or set aside.
- 2) **That** the application filed herein on 20th day of September, 2018 be reinstated for hearing and final determination on merits.
- 3) **That** this Honourable court be pleased to grant any other or further orders as it may deem fit to grant.

2. The application is supported by the grounds on its face and the affidavit by **Edna Gesare Oginda**. The main ground is that the application dated 19th September 2018, was slated for hearing on 15th July, 2019 but the Applicant misinformed them that it was for hearing on 13th July, 2019.

3. Edna G. Oginda has deponed that she attended court on 13th July 2019 and did not find the matter cause listed. On inquiry from the registry, she was informed that the matter was for hearing on 15th July, 2019. Neither her nor the Applicant attended court on 15th July, 2019 and the matter was dismissed. She says that the failure to attend court was not intentional but an oversight on their part.

4. The application was opposed by the Respondent who filed a replying affidavit by Monica Owenga. She depones that had the Applicant been serious he could have appeared in court on 13th July, 2019, when he could have been told that the matter was for hearing on 15th July, 2019.

5. In a nutshell, she has deponed that the Applicant has not shown any good reasons that would make this court grant him the orders sought.

6. From the record, the application dated 19th September, 2018 was filed on 20th September 2018. It was fixed for hearing on 24th October 2018. There is nothing on record to show what may have transpired on that date. Its however clear that the application was never served on the Respondents. This court on its own motion on 30th April, 2019 gave directions for the Respondent to be served and the application to be heard on 16th May, 2019.

7. The matter came before the court on 8th May, 2019 when the court reiterated that the orders of 30th April, 2019 had to be complied with.

8. On 16th May, 2019 the matter came for hearing and the Applicant was absent. The court directed that a notice do issue to the Applicant's counsel for him to come and prosecute his application on 6th June, 2019.

9. On 6th June 2019, the Applicant appeared and informed the court that his advocate had been involved in an accident. The court also learnt that the 1st Respondent had not been served with the application. An order was given for the 1st Respondent to be served within 14 days and

responses be filed within 14 days of service. Another order was given for a mention for directions on 15th July, 2019.

10. On 15th July, 2019 the Applicant and counsel did not attend court. The court then dismissed the application for non-attendance.

Determination

11. I have considered the application and the affidavits. The Applicant in his prayer 2 requests that the order issued by the Hon. Magistrate on 15th day July 2019 be reviewed/varied or set aside. Did a magistrate issue any orders in this matter on 15/7/2019? To my understanding it is this court that issued the order dismissing the application dated 19th September, 2018.

12. Secondly, the Applicant was well aware that his application was coming before the court on 15th July 2019. Edna who swore the supporting affidavit and is also an advocate for the Applicant said on learning that the matter was not cause listed for 13th July, 2019 she made inquiries at the registry and was informed the matter had been cause listed for 15th July, 2019.

13. I therefore find no good reason given as to why both the Applicant and his advocate failed to attend court on 15th July 2019. The Applicant had seemingly lost interest in the matter as it's the court that appears to have been pushing them to come for directions. It is also clear that inspite of the orders given by this court the Applicant has never served the Respondents with the application dated 19/09/2018. What the Applicant has engaged himself in, is an abuse of the due process.

14. I find no merit in the application dated 1st August, 2018 which I hereby dismiss.

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 3RD DAY OF OCTOBER 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE