



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CIVIL APPLICATION NO. 117 OF 2017

NELSON MWANGI.....APPLICANT

VERSUS

CHRISTOPHER MURIUKI.....RESPONDENT

RULING

1. The application is dated the 28/06/2018 and is premised under the provisions of Order 12 Rule 7 of the Civil Procedure Rules; the applicant sought and prayed for the following Orders;

- a) That the court be pleased to set aside its orders made on the 19/06/2018 dismissing the applicant's case;
- b) That costs of the application be provided for;

2. The applicant relied on the grounds on the face of the application and on a Supporting affidavit dated the 21/12/2017 and made by Humphrey Karoki Ndirangu, Advocate.

3. At the hearing hereof the applicant was represented by learned counsel Mr.Ndirangu whereas the respondent though duly served was absent when the matter was called out; the applicant proceeded ex-parte and made oral presentations; hereunder are the applicant's submissions;

APPLICANT's SUBMISSIONS

4. Counsel submitted that he had personal conduct of the matter; that on the 19/06/2018 the application for leave to appeal out of time was scheduled for hearing;

5. On the same date counsel had another matter ELC No.296 of 2014 that was coming up for hearing at the ELC court; after the mini-call over counsel was given time allocation and at 10.00am he proceeded to High Court 2 and was told that the application had been dismissed for non-attendance;

6. That his failure to attend was attributed to the fact that he had proceeded to the ELC court as the other court had not yet started;

7. Counsel prayed that this court do reinstate the matter for hearing;

ANALYSIS

8. The date fixed for hearing of the application for leave to file an appeal out of time was the 19/06/2018; and this date was given in court in the presence of both counsel for the applicant and the respondent; on that date fixed for hearing of the application after the matter was called out only the respondent was found to be in attendance and there was no appearance by either counsel or the applicant;

9. The respondent was not in favour of the application being allowed and prayed that the application be dismissed and the court accordingly dismissed the application for non-attendance by the applicant; the applicant was condemned to pay the costs;

10. Upon learning of the dismissal counsel for the applicant filed an application for the setting aside of the dismissal order and prayed for the reinstatement of the dismissed application; The record reflects that this application was filed on the 29/06/2018; the reason given therein was that counsel was engaged in an ELC court when this matter was being dealt with by High Court No.2; counsel annexed a cause list of the ELC court to support his claim that he was handling a matter in another court;

11. This court has been given wide and unfettered discretion to make an order for setting aside provided it is necessary for the ends of justice to be met; but this has to be exercised judicially; and in this instance this court has had occasion to peruse the supporting affidavit by counsel for the applicant and the annexed ELC cause list for the 19/06/2018 and is satisfied that counsel's non-attendance to prosecute the application on that date, was not deliberate;

12. This court notes that the application was dismissed on the 19/06/2018 and that the application to set aside and reinstate the dismissed application was filed on the 29/06/2018; this court is therefore satisfied that the application was filed without undue delay and in a timely manner;

13. There has been no proper adjudication of the application and the applicant ought not to be denied an opportunity to prosecute the application for leave to appeal out of time; and a verdict be rendered on merit; the applicant should also not be penalized for the acts of omission of counsel not being in attendance;

14. From the material place before it this court finds the explanation given by counsel for the applicant as to why he wasn't in attendance to be satisfactory, due to the fact that he was engaged in another court; this court finds that this is a suitable case in which it can invoke its discretionary powers and proceed to set aside the order made on the 19/06/2018; and give the applicant an opportunity to prosecute the dismissed application;

DETERMINATION

15. For the forgoing reasons the application is found to have merit and it is hereby allowed;

16. The orders of this court made on the 19/06/2018 dismissing the application are hereby set aside.

17. The applicant shall pay the respondent thrown away costs of Kshs. 5000/- forthwith.

Orders accordingly.

Dated and Signed at Nyeri this 21st day of November, 2019.

HON.A.MSHILA

JUDGE