



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HIGH COURT MISC. APPL. NO. 251 OF 2017

EVANS OLENYO MALANDE.....APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE DCIO MAKUENI.....2ND RESPONDENT

REPUBLIC.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. By Notice of Motion dated 19/06/2018, the Applicant seeks the Order for reinstating his Application dated 22/09/2017 and dismissal Orders of same application of 23/05/2018 be set aside or reviewed plus costs.

2. The Application is anchored on the provisions of Order 12 Rule 7 and Order 51 CPR plus Section 1A, 1B and 3A CPA.

3. The same is based on the following grounds on the face of the motion:-

a) ***THAT*** the Applicant instructed the firm of Messrs. Gladys Gichuki to file an application seeking the release of his motor vehicle registration number KAU 613Q which was in custody of the 2nd Respondent as well as declaration that the Respondent's actions amounted to violation of the applicant's Constitutional Rights.

b) ***THAT*** the application which is dated 22/09/2017, was filed in court on even date.

c) ***THAT*** the court issued an Order directing for the release of the motor vehicle pending the hearing and determination of the suit.

d) ***THAT*** inter-parties hearing was fixed on 25/05/2018.

e) ***THAT*** the Applicant took the hearing date in person and informed his said advocate of the hearing date.

f) ***THAT*** the Applicant was advised by his advocate said that there was no need for the Applicant to attend court on that day since the application was to be argued by the advocates and did not require his personal attendance.

g) ***THAT*** the Applicant later found out that the application had been dismissed with costs for nonattendance and want of prosecution.

h) ***THAT*** the Applicant called the said advocate informing her that the application had been dismissed with costs for want of prosecution and nonattendance and in response the said advocate said that she had forgotten to diarize the hearing date hence her absence in court on that day.

i) ***THAT*** the mistakes of an advocate should not be borne by the plaintiff.

j) ***THAT*** the advocate's mistake has a heavy bearing on this matter as the Applicant stands to suffer hardship and untold anxiety as

his rights stand to be violated by the Respondents.

k) ***THAT*** it is only fair and just that the application be reinstated.

4. The Application is supported by Affidavits of Evans Mulande and Gladys Gichuki both sworn on 19/06/2018, which reiterates the contents of the grounds above.

5. The Application is opposed by Replying Affidavit sworn by Njeru Mugambi sworn on 22/06/2018.

6. The same in sum states that the matter was fixed for hearing by consent between Applicant and the Respondent's advocate but both Applicant and his advocate failed to attend to court for hearing of the same application. This court dismissed same as provided by law.

7. He further contends that the motion sought to be reinstated is a non-starter since the substantive prayers were granted save one for compensation which in any case cannot be sought via miscellaneous application form.

8. Thus there is no justifiable cause to warrant setting aside of the dismissal orders.

9. The Applicant agrees that he fixed the application for hearing together with the Respondent's advocate and he informed his advocate of the hearing date.

10. The Applicant Advocate via her affidavit confirms the same that she was informed of the hearing date and she instructed Applicant not to attend court during the hearing.

11. However, she failed herself to attend court on the basis of what she states to be her mistake as she forgot about the hearing date.

12. It is argued that the mistake of an advocate should not be visited on the litigant.

13. However, court has to consider the circumstances of the matter. First the application sought to be reinstated had the one major substantive order sought which was granted as No. 2, thus putting the motor vehicle KAM 613Q subject herein in applicant's possession.

14. The remaining substantive Order No. 3 is in a declaration form and for compensation the court is moved via a Criminal Miscellaneous Application.

15. Of course to enforce a fundamental right one has to move via a form of a petition to enable parties to be heard and court to determine the issues of declaration and compensation thereof vide provisions of Article 23 and Mutunga Rules.

16. These rules (Mutunga Rules) are **the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.**

17. Rule 4 provides;

(1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

18. Rule 10. (1) provides that;

An application under rule 4 shall be made by way of a Petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following:-

a) The petitioner's name and address;

b) The facts relied upon;

c) The constitutional provision violated;

d) The nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

e) Details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

f) The petition shall be signed by the petitioner or the advocate of the petitioner; and

g) The relief sought by the petitioner.

19. The remaining relief pending in the dismissed application cannot be ventilated in the dismissed application in its form.

20. Thus to reinstate the same will be purely academic exercise. Thus the court finds that there is nothing to be ventilated in the notice of motion dated 22/09/2017.

21. The court will thus decline to reinstate the said application but hold that the Applicant will retain the motor vehicle subject herein unless otherwise Respondents are able to file Criminal Charges over the same motor vehicle against same and seek to have the same as an exhibit or any court in subsequent matter orders otherwise.

22. If ownership of the same motor vehicle is in issue, let same be lodged in court by whoever stakes his or her claim thereof.

23. Thus the court makes the following Orders:-

1) The application dated 19/06/2017 is hereby dismissed.

2) The Applicant will retain motor vehicle KAM 613Q until there are charges over same motor vehicle and Respondents seek to have same as an exhibit.

3) Any party staking any claim on same motor vehicle is at liberty to lodge same in appropriate court and a court seized of matter will deal with it appropriately.

4) Parties to bear their own costs.

SIGNED, DELIVERED THIS 11TH DAY JULY OF 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE