



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
JUDICIAL REVIEW MISC. NO.304 OF 2005

BETWEEN

JAMES MWAURA GATHII.....PETITIONER

AND

FRANCIS NJUGUNA ITUBIA.....RESPONDENT

RULING

1. This matter was filed on 28th February 2005 by way of an Originating Summons and the Applicant, James Mwaura Gathii, sought orders that the execution of a decree issued in **Kiambu SRM's Case No.1984 of 1996** be declared to be unconstitutional and that a declaration ought also to issue that he is not liable to pay the said decree.
2. After a number of appearances before Emukule and Nyamu JJ, the last being on 29th July 2008, Korir J. dismissed the same for want of prosecution on 17th February 2012,
3. By a Notice of Motion dated 24th February 2016, the Applicant is now seeking orders that the dismissal order be set aside and a stay order be granted in the civil suit aforesaid.
4. In his Supporting Affidavit sworn on 24th February 2016, it is the Applicant's case that he had instructed the law firm of M/s. Samwel Njeru Mwaniki and Co. Advocates to act for him in the matter and had been informed by the said advocates that the matter was awaiting judgment and that the same had been delayed. That later, he found out that his advocate had ceased legal practise and on visiting this Court's registry, he was informed that his Summons aforesaid had been dismissed and it is his further case that his present Application is merited as he trusted his erstwhile advocate with all matters to do with it but he had failed to protect his interests. Further, that he will suffer irreparable harm and injury if the Originating Summons is not reinstated for hearing on its merits.
5. In response, the Respondent states that the present Application was filed four years after the dismissal order was made and that such a delay is inexcusable. Without extrapolating on them, the Respondent also states that the Application is bad in law, is frivolous and lacks merit.
6. On my part, I have read the record and it would seem that the reason why the matter kept being adjourned from 2005 to 2008, was because a certain "**test case**" was being handled by Ang'awa J. and previously by Kihara J. On 29th July 2008, Nyamu J. recorded that since Ang'awa J. had delivered her judgment in the test case, Parties in this matter were to file their submissions within 30 days. No

Submissions were filed by either Party.

7. In the above context, setting aside of a dismissal of a suit is a matter of discretion exercisable in the interest of justice and depending on the operative facts and in the present case, the record would show that the Applicant was represented at all times save on 29th July 2008 when his Counsel failed to turn up in Court. Thereafter, until dismissal on 21st February 2012, there is no indication that the said Counsel took any action on behalf of the Applicant to have the matter finalised. It would seem therefore that it is most likely than not that by entrusting to his Counsel the conduct of the matter, the Applicant left the said Counsel to pursue the same but he was failed in that regard. I have no reason (and the Respondent in his grounds of opposition did not do so) to doubt the Applicant's claim that his advocate misled him into believing that after filing submissions, (which was not done anyway) the matter would then proceed to finalisation of the judgment.

The said advocate, having left legal practise also left the Applicant without his counsel hence his present predicament. It has been held more than once that barring special circumstances obtaining, the mistake of Counsel should not be visited upon his client.

8. Lastly, the Respondent's objections to the grant of the Application were bare and save for the issue of inordinate delay which I have addressed, the resistance to the said Application was lame.

9. In the event, I will exercise discretion and grant the prayer to reinstate the Originating Summons dated 25th February 2005.

10. I shall not grant orders of stay as prayed as no basis for such a prayer has been laid when the decree sought to be stayed was issued on 9th November 1999.

11. The Notice of Motion is determined in the above terms and each Party shall bear its own costs.

12. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF NOVEMBER, 2016

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2016

EDWARD MURIITHI

JUDGE

In the presence of:

Victor – Court clerk

Mr. Mbithi for Respondent

Petitioner in person

Court

Ruling delivered.

EDWARD MURIITHI

JUDGE