

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 398 OF 2012

SHOP ONE HUNDRED LIMITEDAPPLICANT

VERSUS

KULISAM KASSAM.....1ST DEFENDANT

JASON ONDABU t/a ONDABU &

COMPANY ADVOCATES.....2ND DEFENDANT

ZACHARIA BARAZA t/a

SIUMA TRADERS3RD DEFENDANT

RULING

The 2nd respondent filed an application by way of Notice of Motion dated 5th February, 2015 for orders that there be a stay of execution of orders made on 20th December, 2012 and that an order be issued compelling the 1st respondent to allow the applicant back into the suit premises.

There was also a prayer that the said order of 20th December, 2012 be reviewed, set aside or varied. That application was set down for hearing on 5th June, 2015. However, on that date the advocate for the 2nd respondent did not appear and Ougo J dismissed the application for want of prosecution.

The 2nd respondent has now moved the court for setting aside of the dismissal order and reinstate the application for hearing. The application is opposed and parties have filed written submissions. I have considered the material before me. The reason given by 2nd respondent is that his secretary and court clerk forgot to diarize the application leading to its dismissal for non attendance.

It is submitted the 2nd Respondent having obtained orders for stay of execution deliberately stayed away to enjoy the said order without due regard of their rights of the other parties. He is also accused of delaying in applying to set aside the dismissal order.

Ordinarily the courts endeavour to maintain a suit rather than dismissing the same so that any party has his or her day in court. The non attendance of the 2nd respondent and the reasons given therefor are not unique. Indeed the Court of Appeal in Nyeri Civil Appeal No. 295 of 2009 Harrison Wanjohi Versus Felistus Wairimu and Another had this to say,

“Bladders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court has often said exist for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”

The order sought by the 2nd respondent is dependent on the discretion of this court. The reasons given are

plausible and often occur in the chambers of legal practitioners. I have noted the submission by the learned counsel Mr. Shah that the premises have already been given out to another tenant. That is a submission that belongs to the hearing of the main application. For now I am persuaded that the dismissal order should be set aside as prayed. It is so ordered.

The 2nd respondent shall pay the costs of the applicant and the 1st and 3rd respondents occasioned by this application. The application dated 5th February, 2013 shall be listed for hearing within the next 45 days failure of which it will stand dismissed with costs.

Dated and delivered at Nairobi this 3rd day of December, 2015.

A.MBOGHOLI MSAGHA

JUDGE