

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 414B of 2011

TOWN CLERK, CITY COUNCIL OF NAIROBI 1ST APPLICANT/APPELLANT

CITY COUNCIL OF NAIROBI 2ND APPLICANT/APPELLANT

VERSUS

PETER NJUGUNA KURIA & 214 OTHERSDEFENDANT

R U L I N G

The application before the court is the Notice of Motion dated 2nd July, 2012. The applicant/appellant, under it, sought orders to set aside this court's orders made on 9th May, 2012 dismissing an application dated 30th August, 2011. The latter application itself, sought a stay of execution of a judgment entered against the applicant/appellant by the lower court.

On 4th July, 2012 the Respondent was given leave to file an opposing replying affidavit within 14 days and the applicant would then file a supplementary affidavit within 14 days after service. The applicant was after the above orders have been complied with, ordered to file a written submission within 45 days followed by the Respondent's within 21 days of service.

On 25th September, 2012 the matter was mentioned, when it was observed that the Respondent who had been given time to file a replying affidavit within 14 days had failed to do so. The applicant/appellant nevertheless went ahead and filed his written submission. Mr. Oyalo, counsel for the Respondent apologized and sought further indulgence. The court excused him and gave him more time to file the replying affidavit and the written submissions within a further 14 days thereafter. The Respondent was however to pay court adjournment fee of Kshs.1,000/- and Appellant's costs of Kshs.2,000/- before the next date.

By 7th November, 2012 when the matter came up for hearing as ordered by court on 29th September, 2012, it was observed that Mr. Oyalo had paid the court adjournment fee only that morning but had also filed his Replying Affidavit outside the 14 days granted on 25th September, 2012 without leave of court. In addition, he had filed the written submissions to oppose this application also on 11th October, 2012 which was also out of time. He therefore orally sought further leave to file a formal application for the court to admit the said late Replying Affidavit and written submissions. The oral application was opposed.

I have carefully considered the conduct of the Respondent's counsel, Mr. Oyalo. It is without saying more, unbecoming. It is clearly against his client's interest and liable to undermine his client's interest besides being indiligent. It delays the progress of this appeal and probably the interest of his client in enjoying the judgment if the appellant's appeal will not succeed.

I have agonised over whether or not the Respondent should be given further time to file another application to admit the written submissions and the replying affidavit. I find that there is no point in doing so. Instead I will under the court's discretion, admit the documents, which I hereby do on the condition that the Respondent will meet the Applicant/Appellant's costs assessed by the court at

Kshs.5,000/- and court adjournment of Kshs.1,000/- for 7th November, 2012, both payable by Mr. Oyalo **personally** within 10 days after which this court will fix the application before the court dated 2nd July, 2012 for a ruling. In default of such payment, the court will dismiss the said application dated 2nd July, 2012 and allow the appellant to proceed to execute the order for recovery of the same. Meanwhile, the court fixes the matter for mention on 18th March 2013 to observe compliance. Orders accordingly.

DATED and DELIVERED at Nairobi on the 7th day of March 2013.

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D.A. ONYANCHA
JUDGE