



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Civil Application 233 of 2009

MANASSEH LUMUMBA SHIVALUAPPLICANT

=VERSUS=

GARI TOO BARNORESPONDENT

RULING

This is an application for setting aside the court order made on 21st September, 2010. The Court then dismissed the applicant's application dated 1st July, 2010 for non-attendance. That application also sought an order setting aside another Court Order made on 16th June, 2009, dismissing the applicant's application dated 21st April, 2009. The latter application sought leave to file an appeal out of time. The application under consideration is made under Order 10 rule 11 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law.

The main grounds upon which the application is based are that the applicant indeed attended the court on the date appointed for the hearing of his application but was informed that his application would be heard in a different court from the court in which the matter was indeed listed for hearing. He sat in the wrong court but his matter was not called out for hearing. On further inquiry, he was informed that his application had been dismissed.

The applicant has supported his application with his affidavit sworn on 23rd March, 2012, in which the above grounds are reiterated. The application is opposed and there is a replying affidavit sworn by **Abigael Lusinde Khayo**, Counsel for the respondent. The gist of the reply is that the applicant is abusing the process of the court given that he has made similar applications previously and that he is guilty of inordinate delay.

I heard the application on 9th October, 2012 when the parties' respective positions in their said affidavits were rehashed.

I have considered the application, the affidavits filed and the submissions made to me. Having done so, I take the following view of the matter. The plea of *res – judicata*, I think, was not well taken as the previous application - sought the setting aside of a different order made on a different date. The mere fact that both applications sought the setting aside of orders previously made does not make this application *res – judicata*.

The applicant's application seeks to set aside an order dismissing his application to reinstate a similar application dated 21st July, 2010. That order was made on 21st September, 2010. Yet, this application was

lodged on 28th March, 2012 about six (6) months thereafter. The delay in lodging this application would, *prima facie*, appear long. However, in my view, it is not inordinate given that the applicant is a lay person. The respondent has not also demonstrated that substantial loss will result to him if the dismissed application is reinstated.

In the premises, I allow the application by setting aside the order made on 21st September, 2010. The result is that the applicant's application dated 1st July, 2010 is reinstated.

I order that costs be in the cause.
It is so ordered.

DATED AND DELIVERED AT ELDORET THIS

6TH DAY OF NOVEMBER, 2012.

F. AZANGALALA
JUDGE

Read in the presence of:-

The applicant in person and **Mr. Magare** holding brief for M/s **Khayo** for the respondent.

F. AZANGALALA
JUDGE
6/11/2012