



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 3 OF 2018

FRANCIS KIIO MWANZAU.....APPELLANT

VERSUS

MWANZAU NZIU.....1ST RESPONDENT

KIVUITI NGUZE.....2ND RESPONDENT

GIDEON MWALUKO KAVYU.....3RD RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate's Court at Machakos in Civil Case No. 556 of 2013

delivered on 7th March, 2018 by Hon. A.G. Kibiru -CM)

RULING

1. This Ruling is in respect to the Application filed by the Appellant dated 19th November, 2018. In the Application, the Appellant is praying for the following orders:

a. The orders made on 14th November, 2018 be set aside and the Appellant's Notice of Motion Application dated 3rd September, 2018 be reinstated and be heard on merit.

b. The Respondents to bear the costs of this Application.

2. The Application is premised on the grounds that on 14th November, 2018, the Applicant's advocate boarded a PSV Shuttle from Nairobi to Machakos; that on that day, there were a record of six (6) road blocks along Mombasa Road to Machakos and that due to the numerous stops, queues, delays and verification of the PSV Shuttles, he was unable to make it to court on time.

3. It is the deposition of the Appellant's counsel that he reached the court at 10.30a.m when the matter had been called out and orders made dismissing the Application; that the Respondents will not suffer any prejudice if the Application is allowed and that the Application should be heard on merits.

4. In response, the Respondents' advocate deponed that it is the Appellant's advocate who fixed the Application dated 3rd September, 2018 for hearing on 14th November, 2018; that the crackdown on unroadworthy vehicles by the police was within the knowledge of the Applicant's advocate and that the Applicant's counsel should have called a counsel to hold his brief once he realized that he was getting late.

5. The Respondents' counsel deponed that since the Appellant filed the Appeal on 14th March, 2018, he has never complied, filed and served the Record of Appeal and that the current Application is a ploy to delay the hearing of the Appeal. Neither the Appellant nor the Respondents' advocates filed submissions.

6. The record shows that the Appellant filed the Application dated 3rd September, 2018 seeking the committal of the 2nd and 3rd Respondents to prison for contempt of the orders of the court. The Appellant's advocate fixed the Application for hearing on 14th November, 2018. When the Application came up for hearing, the Appellant's advocate was not in court. The court therefore dismissed the Application with costs for want of prosecution.

7. The Appellant's advocate has deponed that due to the police crackdown on all PSV on 14th November, 2018, he arrived in court when the matter had already been called out and dismissed.

8. Although this court has unfettered discretion to set aside its orders of 14th November, 2018, the said discretion must be exercised judiciously. Indeed, the court can only set aside the said orders if the Appellant or his advocate gives plausible reasons as to why he was not in court on 14th November, 2018.

9. The Appellant's advocates must have been aware that there will be a crackdown on public service vehicles, on the day of the hearing, and that Mombasa road is always prone to vehicular traffic. That being the case, it was incumbent on the Appellant's advocate to arrange his travelling to Machakos well in advance so that he is not caught up in what he calls "*verification of detailed scrutiny*" of PSV on 14th November, 2018.

10. In any event, and as correctly pointed out by the Respondents' advocate, the Appellant's advocate should have called an advocate in Machakos and requested him to hold his brief. The court would have obliged by placing the file aside and waited for him. He never did this. Furthermore, if indeed he was in court on the same day the matter was dismissed, he should have filed the current Application immediately. However, the current Application was filed a month after the order for dismissal was made. That in my view is not an act of a party who was desirous of having a dismissed Application reinstated due to a *bona fide* mistake.

11. For those reasons, I do not find any merit in the Application dated 19th November, 2018. The Application is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE