



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 4 OF 2013

ESTATE OF PHILOMEN CHEPETUI (Represented by

JOSEPH MARIACH.....PLAINTIFF

VERSUS

MIRIAM CHEMAINDEFENDANT

RULING

1. By an application dated **3/6/2019** and filed on the same date, the applicant seeks the following orders against the respondent:

(1) ...spent

(2) That this court does reinstate the application dated 5th March, 2019 for hearing and the discharged orders previously obtaining be reinstated.

(3) That this court be pleased to grant leave upon prayer (2) above for submissions to support the original motion dismissed at mention for non-attendance and owing to the discharged orders.

(4) That the costs of this application be in the cause.

2. The grounds on which the application is based are that an application dated **5th March, 2019** was listed for hearing on **13th May, 2019** but by the time the applicant's counsel came to court the matter had been dismissed for want of attendance.

3. The application is supported by the affidavit of the counsel of the applicant sworn on **3/6/2019**. The main ground that counsel relies on is alluded to in paragraphs 3, 4 and 5 of his supporting affidavit. Though poorly drafted, in my view, those paragraphs appear to convey the impression that counsel wrongly diarized the matter for **13/6/2019** and not **13/5/2019**.

4. The respondent filed a replying affidavit dated **23/7/2019** on **24/7/2019**. His response is that the application is devoid of merit and in bad faith; that the applicant had earlier on undertaken to pay the costs within 61 days but has not done so to date; that the applicant only galvanized herself into filing the instant application when warrants of attachment were issued against her; that a consent was filed on 11/1/2016 by which the costs were taxed at Kshs.250,000/= with a stay of 60 days and that the application only seeks to delay the matter; that another application dated 21/9/2017 had been filed by the applicant seeking to lift the warrant of arrest for non-payment of the costs, which application was allowed and the applicant ordered to pay costs which she has failed to do; that the purpose of mention on 13/5/2019 was to confirm the filing of submissions and no submissions had been filed nor was there attendance by counsel on that day and that the respondent is equally entitled to justice and the inadvertent mistakes of the applicant and her counsel should not be foisted onto his shoulders. He cites the delay in serving the instant application from 3/7/2019 to 17/7/2019 as an example of how the applicant has sought to delay the matter.

5. Both parties filed their submissions on **23/9/2019**.

6. Three main points affect the application by the applicant. One is that an application must be premised on sound evidence. It needs not be gain said that statements made in the affidavit require to be supported by evidence and usually that evidence is brought to court by way of annexures to the affidavit. Paragraphs 3, 4 and 5 cited above in the affidavit of Steve Biko Osur are not supported by any annexure, though some annexure is alluded to at paragraph 5. I find that there is no evidence to support the statements in those paragraphs in the supporting affidavit. They alone should not be taken to be proof of the facts stated.

7. The second point is that on 13/5/2019 when the matter was dismissed the court was not meant to sit over a mention of the case but a hearing of submissions in respect of the application dated 5/3/2019. The order issued on 8/4/2019 clearly states thus:

“Highlighting of submissions on 13/5/2019”

8. It is not therefore correct for applicant to allege that the application was dismissed on a mention date, for the reasons that 13/5/2019 was not a mention date, and, secondly the application was not dismissed on that date but was struck out.

9. Thirdly, it is evident from the record that no submissions had been filed by the applicant by 13/5/2019. When the court orders an application to be disposed of by way of submissions to be highlighted and no submissions are filed and, further, counsel fails to appear before court on the day of highlighting submissions, that application may be correctly be dismissed for want of prosecution or struck out. Had there been any submissions filed before 13/5/2019 on the record this court would have deciphered an intention on the part of the applicant to prosecute her application, and may have believed the statement that failure to attend court was caused by misdiarization. However no submissions were filed in this case in respect of the application dated 5/3/2019 and when counsel failed to attend court the application was struck out.

10. The above three interconnected points are sufficient to dispose of the applicant’s application dated 3/6/2019. Failure to annex the exhibits to the affidavit to support the factual statements leaves the court with no evidence upon which to grant the orders sought; that evidence would have convinced the court that failure to attend court or to even file submissions on the part of the applicant’s counsel was inadvertent.

11. I find that the application dated 3/6/2019 has no merit and the same is dismissed with costs.

Dated, signed and delivered at Kitale on this 24th day of October, 2019.

MWANGI NJOROGE

JUDGE

24/10/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for respondent/plaintiff

N/A for the applicant

COURT

Ruling read in open court at 3.15 p.m.

MWANGI NJOROGE

JUDGE

24/10/2019