



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 11 OF 2017

IN THE MATTER OF :

AN APPLICATION BY JITESH SHAH,OSHWAL EDUCATION & RELIEF

BOARD AND OSHWA UNIVERSITY TRUST FOR LEAVE TO APPLY

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,

PROHIBITION AND MANDAMUS

AND IN THE MATTER OF:

THE ADVOCATES ACT CHAPTER 16 OF THE LAWS OF KENYA

AND IN THE MATTER OF:

ADVOCATES REMUNERATION ORDER 2009 AS AMENDED BY THE ADVOCATES

(REMUNERATION) (AMENDMENT) ORDER 2014

IN THE MATTER OF:

THE FAIR ADMINISTRATIVE ACTION ACT,2015

JITESH SHAH.....1ST APPLICANT

OSHWAL EDUCATION & RELIEF BOARD.....2ND APPLICANT

OSHWAL UNIVERSITY TRUST.....3RD APPLICANT

VERSUS

THE HON.DEPUTY

REGISTRAR ENVIRONMENT &

LAND COURT NAIROBI.....RESPONDENT

AND

KOKI MBULU & CO.ADVOCATES.....INTERESTED PARTY

RULING.

1. The ex-parte applicants filed a Notice of Motion dated 25th January 2018 in which they seek an order that this court's order of 18th

January 2018 dismissing the applicant's chamber summons dated 6th January 2017 be set aside. The applicants contend that when a date for the chamber summons which was dismissed was given by the court, the applicant's advocate misdiarised the date as 19th January 2018 as opposed to 18th January 2018. When the advocates came for the hearing of the chamber summons on 19th January 2018, the application was not listed in the days cause list. The advocate went to the registry where upon perusal of the court file learnt that the application came up in court the previous day and had been dismissed for non-attendance.

2. The applicants contend that the non-attendance was not deliberate . It was due to the wrong entry in the diary. The applicants therefore plead with the court to set aside the dismissal order so that the applicants can be heard on their chamber summons for leave to bring up an application for judicial review.

3. The applicants' application is only opposed by the interested party based on grounds of opposition dated 8th March 2018 and filed in Court on 12th March 2018. The interested party contends that the applicants application is irredeemably defective.

4. During the hearing of the application, Mr Wafula submitted that failure to attend court was not deliberate. The failure to attend court was due to a wrong entry in their court attendance diary. He submitted that this is an excusable mistake which will not prejudice any party if the court were to grant the prayers.

5. M/s Koki Mbulu for the interested party argued that the affidavit in support of the applicants application was sworn by an advocate which is wrong. She further argued that the application should have been brought under order 51 of the Civil Procedure Rules and that Article 159 of the Constitution which has been cited by the applicants is irrelevant.

6. In response to M/s Koki Mbulu's submissions, Mr Wafula submitted that the issues which he deposed to were non contentious and as such, he was at liberty to swear an affidavit.

7. I have considered the applicants application as well as the opposition to the same by the interested party. The issue of whether to set aside an order of the court or not is an exercise of discretion by the court. This exercise of discretion is intended to avoid injustice to a party who has found himself in problems for an excusable mistake. In the instant case, the applicants have demonstrated that non attendance of their counsel on 18th January 2018 was due to wrong entry in the diary. The applicant's counsel has exhibited a copy from their diary for both 18th and 19th January 2018. It is clear that he misdiarised the date for hearing as 19th January 2018 instead of 18th January 2018.

8. The law is clear that an advocate can swear an affidavit in a case where there are no issues which are contentious. In this case, it is the advocate who was in court and it is the advocate who made a wrong entry in the diary. It was therefore perfectly in order for the counsel to swear an affidavit to explain the non-attendance in court on 18th January 2018.

9. Order 51 Rule 10(2) is clear that no application shall be defeated on a technicality or for want of from that does not affect the substance of the application. This is what Article 159 enjoins the court to do by administering justice without undue regard to procedural technicalities. I therefore find that the applicant's application is meritorious. I allow it as prayed in its entirety.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **28th** day of **June 2018**.

E.O.OBAGA

JUDGE

In the presence of :-

Mr Kimani for 1st and 3rd applicants

Mr Otieno Mudanyi for M/s Njeri Mucheru for 2nd respondent

Court Clerk: Hilda

E.O.OBAGA

JUDGE