



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
E.L.C. NO.109 OF 2013

ELIZABETH WARUGURU..... PLAINTIFF

VERSUS

MOSES KANYINGI.....DEFENDANT

R U L I N G

On the 2/7/2014, the defendant moved this court for an order that the execution of orders granted on 2/7/2014 be stayed and that the order made on the said day dismissing the application dated 26/6/2014 be set aside.

The application was based on grounds that;

1. *The defendant/applicant's advocate arrived in court late after the matter had already been mentioned in court and dismissed.*
2. *The defendant/applicant's advocate was aware of the application fixed on 2nd July 2014 and was ready to proceed with the same, when the advocate attended court for hearing he noticed that this application had been mentioned and dismissed for non-attendance.*
3. *The matter was due for interparties hearing and the plaintiff was present.*
4. *The counsel for the defendant/applicant's advocate failure to be present in court on 2nd July 2014 was unintentional.*
5. *The defendant/applicant has a strong case and stands to suffer grave injustice in the event of losing an opportunity to argue his case and that unless the orders for stay are granted the first defendant/applicant will suffer irreparable harm and that the review of the orders will not cause any prejudice to the plaintiff/respondent.*

In the supporting affidavit the applicant's lawyer Patrick Wahinya Macharia depones that;

1. *That the application was fixed for interparties hearing on 2nd July 2014.*
2. *That he arrived a little bit late in court and found the application had been dismissed for non attendance.*
3. *That his client had been committed to jail for contempt of court and if this matter is not*

reinstated he would suffer irreparable harm because he would have to serve his full sentence on orders obtained irregularly.

4. *That he had been in consultation with the plaintiff/respondent advocate Mr. Waruingi.*
5. *That Mr. Waruingi on the previous day had called him using mobile No.07000229 and informed him that due to the fact that this is a family dispute his client had agreed to sign consent on the matter.*
6. *That he was not aware that it was a mischief to delay justice and dismiss the application.*
7. *That it is only fair and just that the orders made on 2nd July 2014 be set aside and stay of the execution of the same be ordered and application dated 26th June 2014 proceed for inter parties hearing on merit.*

In reply to the application vide replying affidavit sworn on 9/7/2014, the plaintiff's lawyer deposes that;

1. *That the applicant and his advocate were absent from court on 2/7/2014 when they were aware of the date and have not given any sufficient reason to warrant setting aside orders of 2.7.2014.*
2. *That this is the 3rd consecutive time the applicant and his advocate had failed to attend court after the applicant had disobeyed court orders with impunity.*
3. *That the applicant was properly sentenced for contempt and the court was provided with adequate evidence of the same.*
4. *That there has been no consultation with Mr. Wahinya Advocate as alleged. It is only on the 30/6/2014 when waruinge was serving a replying affidavit dated 30/6/2014 that the later called the former after the former's secretary informed him she had been instructed not to receive any documents. Mr. Wahinya told him that he would receive the same personally. He later received and stamped the same and sent his clerk to bring to deliver to Waruinge's office.*
5. *That it is not true I communicated with Mr. Wahinya on 1/7/2014 using mobile 0700022916 or at all or as alleged in paragraph 7 of his affidavit.*
6. *That the counsel for the applicant is only looking for an excuse or reason for not attending court since there is no credible ground upon which the orders sought may be granted hence the application is otherwise without merit and should be dismissed with costs.*

When the application came before me for hearing on 10/7/2014, **Mr. Warutere** for the defendant/applicant argued that the applicant's counsel arrived late in court as there was communication that the matter be settled outside court. The court should determine this matter in the interest of justice and considering Article 156 of the Constitution to the applicant's favour.

Mr. Waruinge on his part relied on the replying affidavit and stated that no reason had been given by the applicant to warrant the court to exercise discretion to his favour. He denied that there was an intention by the parties to settle the matter out of court.

I have read the application, grounds therein and the supporting affidavit and listened to the applicant's counsel and the only reason given by the applicant's counsel for failing to come to court on the scheduled date is that there were consultations between the plaintiff and the defendant.

This court finds that this is not a good ground to exercise its discretion to set aside the orders made on 2/7/2014 because even if consultations were on going, the applicant should have appeared in court and informed the court that, there were consultations on going. Moreover, the respondent has denied that there were consultation. Despite this denial, the applicant has not exhibited any communication between

him and the respondent. The court is left with no alternative but find that the issue of consultation is raised to give the applicant a reason for failure to attend court. The applicant, appears like a litigant who's intentions are to obstruct justice by failing to attend court and therefore the court cannot exercise discretion in his favour on the reasons given. The applicant came to court under certificate of urgency, obtained temporary orders, was released from jail, served to respondent with the application but failed to attend court on grounds of consultations.

This court agrees with **Mr. Waruinge** that the counsel for the applicant is only looking for an excuse or reason for not attend court.

Article 159 of the Constitution of Kenya should not be misinterpreted to excuse failure to attend court as the same was meant to guide the judge not to put undue regard on procedural technicalities. No such technicality has been considered as the applicant's counsel had a duty to explain to court why he never appeared on the scheduled date despite taking the date. The Article referred to by the applicant's counsel also provides expeditious justice. However this court is inclined to allow the application on the basis that the applicant is an elderly man and likely to suffer in jail without being heard And that failure to attend court was mistake of counsel that cannot be visited on him. Moreover the parties are husband and wife who still live together. The upshot of the above is that the application is allowed. The application dated 26/6 2014 to be heard on 1/10/2014

Dated, signed and delivered on 24th day of September 2014.

A. OMBWAYO

JUDGE