



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 246 OF 2018**

**JOHNSON MWANGI MARIU.....APPELLANT**

**-VERSUS-**

**LINDA WAGAH.....RESPONDENT**

**(Being an appeal from the ruling of the Chief Magistrate's Court Nairobi delivered on 14<sup>th</sup> May, 2018 in CMCC No. 7273 of 2013)**

**JUDGEMENT**

1. The background of this matter is that by notice of motion dated 11/5/2018 and filed on 14/5/2018 the appellant sought to review orders of 10/5/2018 and stay of orders of 6/6/2017 pending determination of application dated 10/5/2018.
2. The orders of 6/6/2017 arose from notice of motion dated 4/5/2017 which was for striking out the suit and/or declare suit abated for want of issuance of summons and service thereof as stipulated by rules.
3. The appellant despite service had not defended thus suit was struck out.
4. From 6/6/2017 when suit was struck out with costs, the appellant never acted thus execution for costs was levied thus prompting the filing of application dated 10/5/2018 almost a delay of one year.
5. This application dated 10/5/2018 sought stay of orders of 6/6/2017 and setting aside of same orders which struck out suit.
6. Instead of fixing the application dated 10/5/2018 for *interpartes* hearing, the appellant filed a replying affidavit of the said application dated 11/5/2018.
7. Exparte orders were not granted and instead of fixing same for *interpartes* hearing the appellant lodged the instant appeal to challenge failure to grant interim orders.
8. The appellant now complains in appeal that:
  - **Court failed to appreciate gravity of matter leading to denial of interim orders.**
  - **Court failed to consider evidence and totality of circumstances leading to dismissal of the suit.**
  - **Court failed to consider principle that mistake of advocate should not be visited upon an innocent litigant.**

9. The court observes that the record is very deficient in form and content and could have attracted striking out orders. Proceedings and rulings are not incorporated herein.
10. The appellant submission is extremely narrow in form and content and fails to make material disclosure just like the record of appeal. Why has appellant refused to lay the background of the matter" Why is he arguing on sidelines of the real issues"
11. The instant appeal shows an appellant who is not candid and not going to the substance but technicalities.
12. The application dated 10/5/2018 should have been fixed for *interpartes hearing* rather than filing a replica of the same on 11/5/2018 and seek to argue same *ex parte*.
13. The grounds raised in appeal raises issues which could have only been canvassed and determined *interpartes* via application dated 10/5/2018 not application dated 11/5/2018.
14. The filing of application dated 11/5/2018 while application dated 10/5/2018 was pending violated section 6 of the Civil Procedure Rules on res *subjudice rule*.
15. This was a clear case of abuse of the court process which court does not take kindly. The provisions of Article 159(2) of the Constitution of Kenya were not intended to aid abuse of the court process but to render a smooth administration of justice in the content of substantial justice devoid of technicalities.
16. Cutting corners and ambush mode of trial would not advance substantial justice but subvert the same.
17. If appellant fixed *interpartes* hearing of application dated 10/5/2018, the issue of substantial justice would have been addressed.
18. The court finds that the appeal is a total waste of time and devoid of merit. The appellant ought to proceed to the lower court and fix application dated 10/5/2018 for *interpartes* hearing in a competent court.
19. Thus the court makes the following orders –

**1. Appeal is dismissed.**

**2. No orders as to costs.**

**3. Matter referred back to lower court for hearing of application dated 10/5/2018 interpartes.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2019.**

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**C. KARIUKI**

**JUDGE**



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