



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 683 OF 2009

MOSES MWANGI KAMAU.....PLAINTIFF

- VERSUS -

LUTHERAN CHURCH OF KENYA REGISTERED TRUSTEES.....DEFENDANT

RULING

1. The application dated 28th April 2015 seeks the reinstatement of the plaintiff's suit. The said suit had been dismissed because the plaintiff had failed to take steps to prosecute the suit for over a year.
2. According to the plaintiff, the suit was dismissed on 23rd May 2014, but the plaintiff did not have any notice either prior to the dismissal or after the said dismissal.
3. The advocates for the plaintiff later perused the court file, and it is then that they found out about the dismissal of the suit.
4. It is the plaintiff's position that he was not at fault. Indeed, he emphasizes that he had always been keen to prosecute his case.
5. As he believes that he has a genuine claim against the defendant, the plaintiff said that the failure to reinstate the suit would cause him undue prejudice.
6. He attributed his failure to attend court on the date when he was supposed to have shown cause why the case should not have been dismissed, to the fact that no notice was ever served upon him.
7. Therefore, the plaintiff points out that the failure to attend court on the material date cannot be deemed to be an indication of his lack of interest in the case.
8. The plaintiff cited Order 10 Rule 11 of the Civil Procedure Rules which provides as follows;

“Where judgement has been entered under this Order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just”.
9. Based on that Rule, the plaintiff placed reliance upon the case of **TRUST BANK Vs PORTWAY STORES (1993) LIMITED & 4 OTHERS, Hccc No. 413 of 1997**, in which Ringera J. (as he then was) rendered himself thus;

“I may state straight away that the principles applicable to setting aside of default judgements which are regular on their face - as is the judgement in this case – are not in doubt. The court has an unfettered discretion. Such discretion is exercised in order to do justice as between the parties”.

10. The learned Judge pointed out that the rationale for giving an unfettered discretion to the Court in such instances is that to deny a person a hearing should be the very last resort of a Court of Justice.

11. The plaintiff also cited the case of **THOMAS RATEMO ONGERI & 2 OTHERS Vs. ZACHARIAH ISABOKE NYAATA & ANOTHER ELC No. 95 of 2004** (Kisii). In that case the court set aside the Decree against the plaintiffs because, inter alia;

“The defendants have not indicated that they would suffer any serious prejudice or miscarriage of justice if the plaintiff’s application is allowed”.

12. That Order was made pursuant to Order 10 Rule 11 of the Civil Procedure Rules.

13. In the case before me, as was pointed out by the defendant, the provisions of Order 10 Rule 11 were not applicable. I so hold because the plaintiff’s case was not dismissed for the reason that the plaintiff failed to either Enter Appearance or to file some pleading or to serve any pleading.

14. The provisions of Order 10 of the Civil Procedure Rules address scenarios in which a judgement is entered in default of Appearance; or in default of Defence; or in default of service of the Memorandum of Appearance or of the Defence.

15. In the case of **IBRAHIM ATHMAN SAID Vs IBRAHIM ABDILLE ABDULLAH & ANOTHER ELC No. 663 of 2009**, the plaintiff invoked Order 12 Rule 7 of the Civil Procedure Rules, just like the plaintiff has done. J.M. Mutungi J. expressed himself thus;

“As I have held that there is no evidence that the plaintiff’s Advocate was served with the Notice to show cause, it is my view that the order of dismissal of the suit made on 3rd February 2012 cannot stand as the essence of requiring a notice to be given is so that a party may be able to appear and if he is able, to demonstrate and show cause to the court why the suit should not be dismissed. The plaintiff was not afforded that opportunity and in my view, an order ought to be made only after the opportunity to show cause. It if it is shown that an affected party did not get the opportunity to show cause, such an order will be set aside at the instance of the effected party”.

16. That case appears to be on all fours with the case before me. I say so because a perusal of the Court file revealed that all 3 copies of the *“Notice To Show Cause”* notices were still on the file.

17. By their very title, the said notices were intended to give Notice to the plaintiff to show cause why his case should not be dismissed.

18. Unless the plaintiff was made aware that he was being required to show cause, he could not have had reason to come to court to show cause.

19. Therefore, by issuing a *“Notice To Show Cause”*, then keeping it away from the person expected to show cause, is being defeatist.

20. In **ASSOCIATED WAREHOUSE CO. LIMITED & OTHERS Vs TRUST BANK LIMITED, Hccc No. 1266 of 1999**, Azangalala J. (as he then was) held as follows;

“Rule 2 (1) of Order 16 (repealed Civil Procedure Rules) presupposes service before dismissal. It is also clear that under this rule that even where cause is not shown, dismissal is not mandatory, as the rule is permissive. In this case the plaintiffs were not given a chance to

show cause why their suit should not be dismissed”.

21. In similar vein, Order 17 Rule 2 of the (repealed) Civil Procedure Rules presupposed service before dismissal.

22. As the plaintiff was not served with the Notice, he was deprived of the opportunity to show cause. He was therefore condemned without being accorded the opportunity to be heard. Such condemnation is inconsistent with fairness and justice. The court cannot, therefore, countenance it.

23. In the result, the dismissal of the suit is revoked, and the suit is reinstated.

24. However, the plaintiff cannot be awarded the costs of the application as the defendant was not responsible for what had befallen the plaintiff. Accordingly, the costs will be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of December 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kabue for Miss Wairimu for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk