



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 476 OF 2009

FRANCIS NGIRA BATWARE.....PLAINTIFF

• **VERSUS –**

ASHIMOSI SHATANBASI

T/A ASHIMOSI SHATANBASI & ASSOCIATE ADVOCATES.....1ST DEFENDANT

MUGANGA WASULWA

T/A KEYSIAN AUCTIONEERS2ND DEFENDANT

ADAN MAALIM3RD DEFENDANT

RULING

1. The application before me seeks the reinstatement of the application dated 23rd May 2013, which had been dismissed on 7th November 2013.
2. According to the plaintiff, the advocates who had been representing him in this case suddenly advised him that they would no longer be able to continue acting for him.
3. The said communication was received by the plaintiff on 6th November 2013.
4. By the time when the plaintiff was being abandoned by his lawyers, he had filed the application dated 23rd May 2013, and the said application had been set down for hearing on 7th November 2013.
5. In effect, the plaintiff's previous advocates abandoned him on the eve of the hearing of his application.
6. The plaintiff had no alternative but to engage another firm of advocates, to replace the lawyers who had abandoned him.
7. Mr. Charles Njenga, an advocate who practices as a partner in the law firm of Muchoki Kangata Njenga & Company Advocates, has sworn an affidavit in support of the plaintiff's application.
8. He deponed that the plaintiff instructed him at about 8.30 a.m on the 7th of November 2013. He was instructed to take over the conduct of the plaintiff's case from the law firm of M. Mutinda & Associates.
9. On account of the fact that the plaintiff's application dated 23rd May 2013 was scheduled for hearing on the same day, (the 7th of November 2013), the learned advocate said that he did not have time to file a Notice of Change of Advocates before the plaintiff's application came up for hearing.

10. It was in those circumstances that Mr. Njenga advocate instructed another lawyer to hold his brief, and to seek time to enable his law firm put themselves properly on record.
11. However, the plea for more time was rejected by the court. Thereafter, the court proceeded to dismiss the plaintiff's application. The reason for the dismissal of the application was that the party who had filed it, was not in court to prosecute his own application, on the date when it was scheduled for hearing.
12. In the light of the explanation advanced by the plaintiff, he is of the view that his failure to attend court on 7th November 2013 was neither deliberate nor negligent, on the part of the plaintiff.
13. The said failure was blamed on the mistake of the plaintiff's previous lawyers. And the plaintiff requested this court not to punish him for the mistake of his lawyers.
14. The plaintiff pointed out that his claim against the defendants was substantial, and that if he was shut out from prosecuting it, he would suffer an injustice.
15. It was the plaintiff's further contention that the reinstatement of the application dated 23rd May 2013 would not prejudice the defendant. His reason for that submission was that after the application was reinstated, the parties would be accorded an opportunity to be heard.
16. In answer to the application the 1st defendant's advocate, Mr. Ashimosi, submitted that the plaintiff was wrong to have sought the reinstatement of the application dated 23rd May 2013.
17. In his considered opinion, the only recourse available to the plaintiff was an appeal, because the application which the plaintiff seeks to have reinstated, was dismissed in the presence of the advocates for both parties.
18. Mr. Ashimosi stated that the provisions of Order 51 rule 15 of the Civil Procedure Rules envisaged the setting aside of orders which had been made ex-parte.
19. Therefore, as far as the 1st defendant was concerned, when an order of dismissal was made in the presence of both parties, it cannot be set aside. A party who was aggrieved by such an order of dismissal could only appeal against the order, so submitted the 1st defendant.
20. In any event, the firm of M. Mutinda & Associates advocates were said to have been duty bound to attend court on 7th November 2013, as they were still the advocates on record for the plaintiff.
21. Finally, the 1st defendant submitted that the re-opening of the case would greatly prejudice him as the case against him had been dismissed in accordance with the law.
22. In determining the application before me, I have first perused the record of the proceedings which took place on 7th November 2013.
23. The record shows that Ms Ouma advocate held brief for Mr. Nganga advocate, for the plaintiff. Ms Ouma informed the court that the firm of Kangatta wished to come on record for the plaintiff. In order to enable that firm of advocates have time and opportunity to come on record, Ms Ouma sought an adjournment.
24. Mr. Ashimosi advocate responded to the request for an adjournment as follows;

“There is really no appearance for the plaintiff. I pray for the motion dated 23rd May 2013 to be dismissed”.

25. The learned Judge took note of the fact that the advocates who were on record for the plaintiff were still Messrs M. Mutinda & Associates. Therefore, the court went on to make the following conclusion;

“Accordingly, the notice of motion by the plaintiff dated 23rd May 2013, for review, is dismissed for non-attendance and for want of prosecution”.

26. In the light of the foregoing, the defendant cannot now be heard to say that on 7th November 2013, both the parties were present in court.
27. It was the defendant who told the court, on 7th November 2013, that there was no appearance for the plaintiff. The court accepted that contention.
28. I therefore find that the order made on 7th November 2013 falls within the ambit of Order 51 rule 15 of the Civil Procedure Rules, which empowers the court to set aside orders that had been made ex-parte. The plaintiff was not obliged to appeal against the order which dismissed his application

dated 23rd May 2013.

29. Secondly, I find that the reinstatement of the application dated 23rd May 2013 would not be prejudicial to the defendant, as both parties would be accorded an opportunity to be heard. In respect to the date when the plaintiff's former lawyers failed to attend court, the defendant can be compensated by an award of costs.
30. I hold the considered view that the plaintiff could not have compelled their previous lawyers to continue acting for them.
31. And considering that the said lawyers communicated their decision to cease acting for the plaintiff only on 6th November 2013, the plaintiff were unable to procure another advocate earlier than the morning of 7th November 2013.
32. If there was any error, it would have to be placed at the doorstep of the plaintiff's previous lawyers. It would be unfair to punish the plaintiff for the mistake of their lawyers.
33. And even though the said lawyers may have made a mistake by telling the plaintiff, very late, about their decision to discontinue their representation for the plaintiff, this court notes that the plaintiff acted very promptly by procuring another law firm to represent them.
34. The conduct of the plaintiff demonstrated a keen desire to prosecute their case. Therefore, it cannot be said that the plaintiff intended to simply delay the case.
35. In the final analysis, justice demands that the plaintiff be accorded an opportunity to canvass his application dated 23rd May 2013. Therefore the said application is reinstated.
36. The plaintiff will pay to the 1st Defendant, the costs of the current application, together with costs for 7th November 2013.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of July 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Shah for Njenga for the Plaintiff.

Ndirangu for Ashimosi for the 1st Defendant.

..... for the 2nd Defendant.

..... for the 3rd Defendant.

Mr. C. Odhiambo, Court clerk.