

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 606 of 2005

JOHN KARIUKI MAINA.....PLAINTIFF

VERSUS

1. BISHOP MULANDI

2. MARY WANJIKU DEFENDANTS

R U L I N G

1. The Plaintiff's suit herein was dismissed on 9th March 2011 for non-attendance when the case came up for hearing.

2. The Plaintiff then applied by **notice of motion dated 23rd March 2011** for reinstatement of his case. In the supporting affidavit annexed to the application the Plaintiff has deponed that when he took the hearing date (9th March 2011) *ex parte* he thought he had noted the hearing date on his copy of the notice to fix hearing date; that it turned out that he had not so noted the date and he could not remember where he had noted the hearing date; that he could not remember the hearing date; that after a couple of weeks he went back to the registry but that the court file could not be located so that the hearing date could be checked for him; and that on 18th March 2011 when he went back to the registry with a view of taking a fresh hearing date, he learnt that the case had been dismissed on 9th March 2011 for non-attendance. He then filed the present application on 23rd March 2011.

3. The Defendants have opposed the application by replying affidavit sworn by their counsel and filed on 18th April 2011. The grounds of opposition are mainly technicalities. But the Defendants have also argued that the Plaintiff's explanation for not attending court on 9th March 2011 is not credible. They have also pointed out that the case is very old.

4. In a supplementary affidavit filed on 16th May 2011 in response to the application, the Plaintiff has demonstrated his keenness to prosecute the case. He has also argued that it is in fact the Defendants, through their counsel, who have caused delay in prosecution of this case.

5. In considering this ruling I have perused the court record. I have noted that this case was in effect transferred from the lower court at Thika; that before the transfer the Plaintiff has commenced prosecution of the case; that after transfer hearing of the case commenced before Khamoni, J on 8th October 2008 when the Plaintiff testified in part but ran into difficulties on account of lacking some documents that he had produced before the lower court and which had not been returned to him; and that it was indeed the Plaintiff who had fixed the case for hearing on 9th March 2011.

6. I accept the Plaintiff's explanation that he could not remember the hearing date after not being able to locate the note of the same he had made; that he tried to get from the court registry the hearing date but the court file could not be traced; and that he made the present application without undue delay.

7. In the circumstances the dictates of justice demand that the Plaintiff be permitted to prosecute his case. I will allow his application and set aside the order of dismissal of 9th March 2011. The case is reinstated to hearing.

8. The Defendants will have the costs of this application. It is ordered.

DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2013