

REPUBLIC OF KENYA

High Court at Bungoma

Civil Case 128 of 2001

NAMBAYI MULTI PURPOSE CO. LTD..... PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATIONDEFENDANT

RULING

The application dated 28th January 2010 seeks to reinstate suit dismissed for want of prosecution. The application is supported by the annexed affidavit of one Jestimore Kibunguchi sworn on the 28th January 2010. The application is opposed and the 1st respondent has filed a replying affidavit sworn by Augustine Psinen on 28th June 2010.

The applicant's suit was dismissed on 26th June 2009 as per the supporting affidavit for non-attendance by their advocate on record then. In their affidavit in support at paragraph 5, it is stated that the said advocate whose name is not disclosed was engaged in studies during the time the matter came up for hearing. Annexed to the supporting aff. is a form with heading as "Moi university program". The advocate went to the registry to fix hearing date only to discover the adverse orders in the file. The applicant through Mr. Kibunguchi swears that they are aware the said advocate has completed his studies. The said advocate never swore an affidavit to annex documents to verify this contention. From the pleadings before the court, no student ID is attached or exam timetable. It is difficult therefore for this court to confirm whether the said advocate was undertaking an exam or not on the 26th June 2009 since no examination timetable has been annexed. The applicant has not explained why on their part they did not attend court on the date set for hearing of the main suit.

The second difficulty I am in having perused the court record, either part of the court record is missing or the applicant has quoted in their affidavit wrong date when this matter was dismissed. The record for 2009 as per the file which is close to the prayers herein is for 14th August 2009 when the matter was listed before the Deputy registrar for dismissal.

On the said date, there was no appearance for the plaintiff and thus the suit was dismissed for want of prosecution as the record bears it out. On the same day parties appeared later and some proceedings were recorded fixing the matter for directions for another date. The next date is listed as 11th January 2010 when date for directions was fixed in the registry. Proceeding on the assumption that proceedings took place on 26th June 2009, then no explanation has been preferred why applicants were absent on that date at all. And if no proceedings took place on the 26th June 2009 then there is nothing for this court to set aside. On the body of the notice of motion, the applicant has sought a blanket prayer for setting aside the order dismissing this suit without quoting dates in reference. Such blanket prayer makes explaining for counsel of their client's absence quite an uphill task.

Mr. Onkangi submitted that mistake of counsel should not be visited on their client. No mistake of the advocate has been established before me. The advocate alleged to have committed the mistake has not sworn an affidavit as indicated in the earlier paragraphs to show that he was committed on the date the matter came up for hearing and subsequently dismissed. Annexing a university program only is not an explanation of the activities of the advocate on the said date.

In the case on Muchiri Karanja vs. Zipporah Wangui – HCCC No. 176 of 1998 at Nakuru, Justice Alnashir Visram held that nothing would have been easier than to have the advocate who made the

alleged mistake swear an affidavit to establish the same. He proceeded to dismiss the defendant's application. A similar holding/view was taken in an earlier suit from the authority supplied by the respondent, the case of Njagi Kanyunguti alias Karingi Kanyunguti & 4 others vs. David Njeru Njogu CA at Nbi Civil Appeal no. 181 of 1994.

In this case, the court at page 5 stated that the court is “***enjoined to consider all the circumstances of the case both before and after the judgment being challenged before coming to a decision whether or not to vacate the judgment***”. In that case, the court of appeal upheld the law that this or any other court can only exercise its judicial discretion in favour of setting aside an *ex parte* judgment in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or errors and not to assist a person who has deliberately sought to obstruct or delay the cause of justice. Other than the absence of counsel to attend court on the date of the hearing, the respondent counsel submitted that no explanation was given why no steps were taken to prosecute this suit between October 2006 to 2008. Considering the analysis given I do find that the present application to set aside the dismissal for non-attendance is unmerited. The applicant has not demonstrated to this court that the acts of his advocate amounted to excusable mistake. The application dated 28th January 2010 is therefore dismissed with costs to the respondent.

RULING DATED, SIGNED, READ AND DELIVERED in open court this 19th day of MARCH 2013.

A. OMOLLO

JUDGE.