



COPY

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
HIGH COURT CIVIL CASE NO 345 OF 2009

WANGULU ENTERPRISES PLAINTIFF

- VERSUS -

- 1. ABDALLA SAID KUGOTWA1ST DEFENDANT**
- 2. THADDEUS KIMINZA MUTISO 2ND DEFENDANT**
- 3. JANE NEJRU MUTISO 3RD DEFENDANT**
- 4. MWICIGI KANIU4TH DEFENDANT**
- 5. JANE GATHONI MWICIGI5TH DEFENDANT**
- 6. THE DISTRICT LAND REGISTRAR,KWALE 6TH DEFENDANT**
- 7. THE ATTORNEY GENERAL7TH DEFENDANT**

RULING

[1] The applicant in this case brings this application under Section 1A, 1B and 3A of the Civil Procedure Act and Order 12 Rule 7 and Order 51 and Rule 3 of the Civil Procedure Rules. The applicant applied that the application be certified as urgent. He also applied for the Court to revive this suit and that the orders made on 6th June, 2013 be set aside among other orders.

The application was dated 5th June 2013 and was supported by Eunice W. Kibe who is an advocate practicing in Mombasa in the firm of E.W. Njeru & Company Advocates and who had the conduct of the case.

She depones in her affidavit sworn on 18th June 2013 that this case was fixed for hearing on 6th June 2013 and she was represented. That she was taken ill on 4th June 2013 and that she was unable to attend court and that she did not go to her office between 4th and 8th June. as she says that it was only on 17th June 2013 that she discovered the file was dismissed.

She alleges that on 5th June 2013, she had given specific instructions to her clerks to give the file to

an advocate to hold her brief. That these instructions were not carried out and no one appeared in Court. She argued that the case was dismissed for no fault of her clients but her own.

[2] This matter came under Certificate of urgency and was argued by Mrs Kibe on 18th June, 2013 *exparte*. She repeated the contents of her affidavit and stated that she had asked her clerk to hand over the file to Mr. Maggia advocate and it was not done. She told the Court that she was in a very awkward situation. She said she had been persuing this matter diligently and on behalf of the plaintiff though by oversight she did not inform the plaintiffs. She prayed for a stay pending the hearing of the application.

The Court ruled that this matter was dismissed under Order 12 rule 3(1) for non attendance of the plaintiff and their advocates. the Court further said that this was a final order of the Court. That then there was no suit capable of being reinstated. That the suit must first be reinstated before any orders of stay can be granted. The Court stated that it was *functus* official as at then. The Court said that it could only entertain an application to set aside the orders of 6th June 2013 and there was no such application in Court.

The Court stated that there was nothing to stay by then and ordered the application to be served and be heard on priority basis.

[3] On 18th June, 2013 the applicant filed a notice of withdrawal of the application dated 17th June 2013 and filed yet another Notice of Motion dated 18th June 2013 under Certificate of urgency.

This application prayed that the Order of 6th June 2013 be set aside and the suit filed on 5th October 2009 be reinstated and that there be a stay of execution pending the determination of the application.

The Court certified the application urgent and ordered it to be served on the respondents and that an urgent hearing date be given by the Court. The same came up for hearing on 1st July 2013. Mrs Kibe swore an affidavit dated 18th June 2013 and stated that she was represented when the matter was fixed for hearing on 6th June 2013. That on 4th June 2013 that she was taken ill. She produced three documents a sick off dated 4th June 2013 by Dr. J.M. Chamia unstamped, a document headed Dr. J.M. Chamia Consultant Gynecologists unsigned and which has also a letter head of Fiaz Pharmacy Ltd Retail and wholesale Veterinary Chemists dated 4th June 2013 and a stamped receipt by Dr. J.M. Chamia for Kshs. 1500 dated 4th June 2013. She says she went to her office on 9th June 2013. That on 17th June 2013, she learnt that the case was dismissed. In paragraph 9 of her affidavit she admits the case was dismissed through her own fault. She requested the Court to reinstated the suit in the interest of justice.

[4] This application was seriously opposed by the respondents. Miss Mwanakitina for 1st defendant stated that the reasons advanced by Mrs.Kibe were not convincing. That she could have called her clerk in the morning or talked to somebody else to hold her brief. That Mrs Kibe could have called her as a matter of courtesy to say she was unwell and could not proceed with the case. The advocate argued the date was taken by consent. Mr. Mwakileti for the 2nd defendant opposed the application and relied on the affidavit of the 2nd defendant sworn on 22nd June 2013. He argued that the plaintiff had not given sufficient reasons to enable the Court exercise it discretion in the plaintiffs favour. He argued that the documents relied on by Mrs Kibe to show her sickness were not signed by the doctor. He argued that they do not show what counsel was suffering from. He further argued that sick off days were quite curious for a person who is self employed and was her own boss. Mr. Mwakileti in addition argued that he knows the plaintiffs advocate firm. That there are two other advocates, a Mr. Mureithi and Mr. Michael Kibe besides the plaintiff and none of them was in Court. That as a matter of courtesy she should have called any of her colleagues appearing for the defendants to say she was sick. She did not do so. Mr. Wakileti Learned Counsel for the 2nd defendant said that he had talked to Mr.Ngare State Counsel, who was appearing in this matter as well and who said he called the firm of E.W.Njeru Advocates about this case and no one was interested in this matter at all. Miss. Lutta Learned State Counsel said this matter was an abuse of the process of the Court. She adopted the submissions of Miss. Mwanakitina and Mr. Mwakileti. She confirmed that her colleague Mr.Ngare had called the firm of E.W. Njeru & Co. Advocates in the morning of 6th June 2013 informing them of the case that was coming for hearing and no one told Mr.Ngare that Mrs. Kibe was unwell. She emphasised that Mrs Kibe's application paragraph 8 had said

the plaintiffs were not informed. She argued that even if that were so, the plaintiffs should have called their advocate to find out when the case was fixed for hearing. She argued that the plaintiffs were not interested in their case. She said that this was a 2009 matter and was rightly dismissed.

[5] In reply Mrs Kibe said that the respondents advocates if in doubt of her medical document should have called the doctor to confirm whether the documents were genuine. She said that it is true that the firm had two other lawyers and that Mr. Muriithi was in Malindi with petitions and that Mr.Kibe was out of town. She said she regretted what happened.

[6] I have carefully listened to the arguments by the applicants and the respondents. There was no denying that Mrs Kibe the advocate for the applicant was represented by Mrs Kayatta on 13th March, 2013 when the hearing date was fixed for 6th June 2013. This fact is admitted by the plaintiff advocate on her affidavit. The plaintiff's advocate though aware of this date did not attempt to show the Court that she diarised the date. There was no letter that advocates usually write to their clients to inform them of the hearing date exhibited to show that the firm of E.W. Njeru was diligent enough to inform their clients of such a date. Mrs. E.W. Kibe the Counsel who says that she had the conduct of this case from inception is silent on these issues. Indeed, there was no information on Mrs Kibe's affidavit to show that the plaintiffs had earlier been informed of the hearing date of 13th March 2013 and if they were, why they never followed up with her firm to find out what happened on that date. Mrs Kibe Learned Counsel does not explain why her clients who should have been in Court on 13th March, 2013 and 6th June 2013 were not in Court. Instead, the Learned Counsel concentrated on her own illness of 4th June 2013. While Mrs Kibe may have been unwell as she alleges, there is no explanation why, she did not take a phone on 4th June 2013 and call her colleague advocates acting for the defendants to explain her predicament that she had been given three days sick off and which date included the 6th June 2013, the date of the hearing.

There is no explanation why her clerk would have refused to carry out her instructions on the 6th June 2013 to take her file and ask any other Counsel to hold her brief. There is no such affidavit from her alleged clerk at all. Mrs. Kibe admitted that in her office there are two other lawyers, a Mr. Muriithi and Mr. Kibe. We are told Mr.Muriithi was at Malindi dealing with petitions. No petition case numbers were cited. In any case, it has not been explained why the said Mr. Muriithi could not call his colleagues in Mombasa to hold his partners brief in this case. I do not think it is a good thing to say to court that Mr. Kibe advocate was out of town and could not attend the court particularly when his partner Mrs Kibe had a sick off two days earlier before the hearing and he knew or ought to have known that she would not be available to conduct the hearing. Even if he was out of town he could at least have communicated with the advocates for the defendants who he knew or ought to have known that they would be in Court and unaware of his partner's predicament. This case was not dismissed by Court until 12.30 p.m. Mrs Kibe who was presumably at home with her sick off, should that morning have contacted her office or Mr. Maggia advocate to whom she had sent her clerk to hold brief on 6th June, 2013 to find out what happened and she would have salvaged the situation. There is absolutely no excuse why the plaintiffs were not in court, their advocates sickness notwithstanding. There is no plausible reason given why they were not aware of the hearing date. In any case, that lack of information can only be visited by them on their Counsel not the defendants who were in Court and ready to proceed.

[7] I completely agree with submissions by Miss. Mwanakitina Learned Counsel for the 1st defendant, Mr. Mwakileti Learned Counsel for the 2nd defendant, Mr. Ngare and Miss. Lutta Learned State Counsels that there is absolutely no merit in this application. That it is an abuse of the process of the Court. I do not believe the excuses propounded by Mrs Kibe in her affidavits and her submissions to Court. Her allegations against her own clerk does not add up. Her inability to inform her clients of the hearing date does not persuade the Court to exercise its discretion in their favour at all. They too, should have been diligent and inquired from her when the case was fixed for hearing. After all it is their case. Their remedy for their Counsel's failure and their own if at all, have no place in this application, the same lies elsewhere. This application is dismissed with costs to the respondents.

Dated and delivered in open Court at Mombasa this 23rd day of August, 2013.

S.N. MUKUNYA

JUDGE

In the presence of:

Anjarwalla Advocate for the plaintiff'

Abubakar Advocate for the 1st defendant

Asige Advocate for the 2nd,3rd and 4th defendants