



PAUL NZOMO MWITIKI.....PLAINTIFF

VERSUS

1. NDAMBUKI KISONGWE

2. MARGARET KAVEKE KYENGO.....DEFENDANTS

RULING

1. By a **Chamber Summons** Application dated **06/10/2009** (“*Application*”), the plaintiff, **Paul Nzomo Mwitiki** (“*Applicant*”) has approached the Court under **Order IXB, Rule 4(1)** and **8** of the (**Old**) **Civil Procedure Rules** for orders that the Court’s order issued on **24/09/2009** dismissing the Applicant’s suit be set aside and that the Court does order the reinstatement of the suit.
2. The Application is supported by the affidavit of **Nicholas Odera Sumba**, the advocate who has the conduct of this matter on behalf of the Applicant.
3. There is evidence on record that the Respondents’ counsel, **Nzei & Co. Advocates**, were served with the Application more than **two years** ago. They did not file any Replying Affidavit or Grounds of Opposition. This, despite the fact that the Application was first slated for hearing on **16/04/2011** and they were served with a hearing notice on **31/01/2011**. Due to some confusion about what was listed for hearing, the Application did not take off on **16/04/2011**. The Respondents’ counsel was, again, served with a hearing notice on **02/11/2011**. This was for **07/12/2011**. The Respondents’ counsel still did not file any replying documents.
4. When the matter was called before me on **07/12/2011**, **Mrs. Nzei** first sought an adjournment to have an opportunity to file replying papers. She explained that she has not been in touch with her clients for more than **two years**, and that although she has written to them, she has not yet received instructions. In the alternative, she prayed that the Grounds of Opposition she had just filed that morning of **07/12/2011** be admitted to the record and that the Application be heard *inter partes*.
5. **Mr. Sumba**, for the Applicant, objected to both the application for adjournment and admission of the Grounds of Opposition into the record. On the former, he submitted that the Respondents were served more than two years ago; and that it was simply not believable that the counsel had not been able to get in touch with them for more than two years. On the latter issue, **Mr. Sumba** submitted that the Grounds of Opposition should not be considered since they were filed in violation of the **Civil Procedure Rules**.
6. In a short ruling given in Court, I declined to adjourn the hearing of the Application and noted that the Respondents’ counsel had been served more than two years ago holding that no good reason had been given for not filing replying papers on time. On the same grounds, I struck out the Grounds of Opposition filed on **07/12/2011** for being in clear violation of **Order 50, Rule 14**, and, on account of the conduct of the Respondents’ counsel in the matter, refused to exercise discretion to enlarge time or allow the Respondents’ counsel to have audience before the Court. The Application, therefore, proceeded *ex parte*.
7. In his submissions, **Mr. Sumba** reiterated the contents of his affidavit. In particular, he emphasized that the Applicant has always been ready to proceed with the matter and had been the one that had been

pressing relentlessly for a hearing date. However, on the day the matter was dismissed for non-attendance, Mr. Sumba submitted, he fell gravely ill and had to be taken to a doctor. Mr. Sumba's affidavit annexed medical documents including treatment notes from **Dr. Ikiara of Alliance Health Services** to substantiate that claim. Owing to this medical condition, Mr. Sumba was unable to come to Court or instruct another counsel to hold his brief.

8. The affidavit of **Mr. Sumba** also avers that he and the Applicant had agreed to travel to **Machakos** (from Nairobi) together but when the Applicant tried to reach him on the phone on the day of the hearing he could not. Thinking that the hearing date must have changed, the Applicant did not come to Court either.

9. The legal provision applicable to the Application at hand is **Order IXB, Rule 8** of the **(Old) Civil Procedure Rules**. It provides as follows:

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such terms as are just.

10. There are four general principles which have emerged in our case law on the principles governing the exercise of unfettered discretion donated to the Court by **Order IXB, Rule 8** of the **(Old) Civil Procedure Rules**. These are as follows:

a. First, the discretion is unfettered. It must, of course, be exercised judiciously. The main concern, though, is not to adhere to technicalities but to do justice to the parties. See *Patel v E.A. Cargo Handling Services Ltd* [1974] EA 76.

b. Second, the discretion should not be used to aid an applicant who has deliberately sought to obstruct the case or delay it or one who seeks the Court's indulgence in bad faith. See *Shah v Mbogoh* [1967] EA 116.

c. Third, the discretion of the Court is properly used to avoid injustice or hardship caused by accident; inadvertence; excusable mistake or error. Where possible, but within reason and appreciation of the fact that an attorney is the client's agent, the mistakes of the attorney should not be visited on the client. See *Lee Muthoga v Habib Zurich Finance (K) Ltd* and *ICEA v Wellington Omodho* (Milimani HCCC No. 1650 of 2001).

d. Fourth, in land cases, where possible and in light of the other three principles, the Court should err on the side of having the case heard on its merits.

11. I have considered the instant Application in light of these four principles. The evidence shows that the Applicant's counsel has been diligent in trying to set the case for hearing and that the Applicants have been anxious to conclude it. Indeed, it is the Respondents who have asked for adjournments on some occasions. The Court believes **Mr. Sumba's** story that he fell ill on the day of the hearing. In an ideal situation, Mr. Sumba's office would be a little better organized and would have arranged for another advocate to hold his brief in Machakos when they realized he was unwell. However, that would be a very high standard to insist on. In any event, even accepting error – a benign one – on the part of **Mr. Sumba**, my view is that it should not be visited on the Applicant in the present circumstances. First, the Applicant evinces no pattern of delaying or seeking to obstruct the hearing of the matter. On the contrary, the Applicant has been very diligent in having the matter heard. Second, this is a matter involving land and there is a judicial policy preference on hearing it on its merits so that all the issues can be ventilated fully. Third, the Respondents would suffer no prejudice if the suit is reinstated.

12. The upshot is that I am of the view that the issues raised herein ought to go to full trial. Consequently, I will allow the Application dated **06/10/2009** and make the following orders:

a. **That** the Court's orders issued on **24/09/2009** dismissing the Plaintiff's suit are hereby set aside and the suit is reinstated;

b. **That** the costs of this Application will be in the cause.

DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.

J.M. NGUGI
JUDGE