REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 248 OF 1997

SIMEON MURUCHI THIGA

T/A NEWSPAPERS SERVICES ……..…….. PLAINTIFF

VERSUS

PHOENIX OF E.A. ASSURANCE CO. LTD. ……..…… DEFENDANT

RULING

The plaintiff's application dated 31st January, 2012 seeks to set aside the order made on 30th January, 2012 dismissing the plaintiff's suit for want of prosecution and reinstatement of the suit for hearing. The application was supported by an affidavit sworn by the plaintiff as well as an affidavit sworn by the plaintiff's advocate, **Jeremy Njenga**. The plaintiff stated that on 30th January, 2012 when the suit came up for hearing he was in court. He had earlier met with his advocate and they had agreed that they would get in touch on the morning of the hearing date. The plaintiff had not however gone through the advocate's office but came straight to court. He switched off his mobile phone, sat in court but all along he did not hear his name being called out, he only heard case numbers. He also did not see his advocate until about 10 a.m. when he walked out of the court room and switched on his mobile phone when they were able to communicate. By that time he had been informed by the court clerk that the suit had been dismissed for want of prosecution since no one responded when the matter was called out. His advocate told him that he genuinely believed that the matter had not been listed for hearing

The plaintiff stated that he has waited patiently for many years to have his matter heard and urged the court to set aside the dismissal order that had been made.

On his part, Mr. Njenga stated that he was all along aware that the matter was scheduled to be heard on 30th January, 2012. He had already filed the plaintiff's witness statements as well as all the documents that he was going to produce and was ready for the hearing. On 26th January, 2012 he met with the plaintiff for pre-trial briefing and they agreed that they would communicate on the morning of the hearing for purposes of confirming the court before which the matter would be listed. Counsel added that on Saturday 28th January, 2012 he tried to access the internet with a view of confirming whether the matter was listed but he was not successful. When he checked the internet again on 30th January, 2012 he realized that the matter was not listed. At about 8.30 a.m. he instructed a pupil in his firm to accompany

his clerk to court to find out why the matter was not listed and advise him accordingly. Mr. Njenga came to court at about 9.15 a.m. and proceeded to another court where he had another matter. However, at around 9.50 a.m. while still waiting before the court of Mugo, J. he was informed by his clerk that the matter was indeed listed for hearing before this court. When he reached this court room he found that the suit had been dismissed for want of prosecution. Counsel said that he had earlier tried to get in touch with the plaintiff but his phone was switched off.

Mr. Njenga urged the court to grant the plaintiff's application because his failure to attend court was inadvertent.

The defendant opposed the plaintiff's application. **Benson Kuria**, an advocate practicing in the firm of **Mohammed Madhani & Company Advocates** who are on record for the defendant, swore a replying affidavit. He stated that the matter was listed before this court and when he arrived in the court room he found that the matter had been called out and placed aside since none of the parties or their advocates was present. At about 10.15 a.m. the matter was called out again and at that time neither the plaintiff nor his advocate were present. The defendant's witness told the court that the defendant was not admitting any part of the plaintiff's claim and consequently the court dismissed the plaintiff's suit for want of prosecution. Mr. Kuria stated that the plaintiff's allegation that he was in court room all along is not true as he ought to have responded when the case was called out the second time.

I have considered the affidavits on record and the brief submissions that were made by both **Ms. Wambua** for the plaintiff and **Mr. Rimui** for the defendant. This case was listed for hearing before this court on 30th January 2012, the date having been fixed by consent on 11th November, 2011. The matter was the first one in the cause list and was called out at 9.00 a.m. None of the parties or their respective advocates was in attendance. The record shows that the matter was called out again at about 9.30 a.m. and both the plaintiff and his advocate were absent. Mr. Kuria for the defendant and one defence witness were in attendance. The court proceeded to dismiss the suit for want of prosecution as the defendant was not admitting any part of the plaintiff's claim. If at all the plaintiff was present in court all the time he did not respond when the suit was called out. The plaintiff and his advocate can only blame themselves but not the defendant nor the court.

But having said that, I realize that this is an old case which has come up for hearing on a number of occasions. The plaintiff had filed his witness statement as well as all the documents that he intended to rely upon in his case. There was inadvertent mistake on the part of both his advocate and himself in not attending court in time or failing to respond when the case was called out. That is an excusable mistake. As much as possible, cases ought to be determined on their merits and I think it would be unjust for this court to fail to reinstate the suit. The plaintiff has a substantial claim and whether it has merits or not, that can only be determined if the plaintiff is given an opportunity to prosecute his suit. The defendant will not be prejudiced by grant of the orders sought in a manner that cannot be compensated by an award of costs. Consequently, I allow the plaintiff's application and set aside the dismissal order made on 30th January, 2012 and reinstate the suit. The plaintiff shall however pay the costs of the application assessed at Kshs.10,000/= before the suit is given another hearing date.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MAY, 2012.

D. MUSINGA

JUDGE

<u>In the presence of:</u>

Muriithi – Court Clerk

Mr. Kenyariri for Mr. Rimui for the Defendant

Mr. Muindi for Miss Wambua for the Plaintiff