



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO.129 OF 2007

MATHIAS NASUBO OGAMA PLAINTIFF

- VERSUS

REBMAN AMBALO MALALA..... DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 15th February 2012. The plaintiff prays that the order of court of 15th February 2012 dismissing the suit be set aside and that the suit be heard on its merits. The application is expressed to be brought under order 12 rule 7 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act. There is an affidavit in support sworn on even date by William Ikapel.
2. On 15th February 2012, the matter came up for hearing. The hearing date had been taken by consent of the parties. On that day, the matter was called out. Only the defendant appeared who was not admitting to any part of the plaintiff's claim. The court dismissed the suit under the provisions of order 12 rule 3 of the Civil Procedure Rules 2010.
3. The plaintiff's counsel says that he was caught up in a traffic snarl up at Kenyatta Avenue in the City Centre. He was using public transport and only arrived in court at 9.10 a.m when the matter had already been dismissed. He later rose and addressed the court to explain his absence and that of his client plaintiff. The plaintiff says he is keen to prosecute the suit and should be reinstated to the seat of justice.
4. The motion is contested. There is filed a replying affidavit of Anthony Lubulellah sworn on 23rd February 2012. It is deponed that the hearing date was taken by consent of both parties. The defence counsel states that he left his offices along City Hall way at 8.40 a.m on 15th February 2012, drove through Kenyatta Avenue, and arrived in court well before 9.00 am. He thus contests the averment by the plaintiff that there was a traffic jam along that route. The case was called out at 9.25 a.m when it was dismissed. The deponent states that he only left court at 9.30 a.m and by that time, the plaintiff's counsel had not arrived in court. It is also contended that no explanation has been offered about the plaintiff's absence. The defendant also submitted that the principal decree herein has been met and that the remainder of the suit is caught up by estoppel by virtue of an agreement dated 19th May 2005 annexed to the defendant's affidavit sworn on 9th December 2009. It is thus the defendant's case that even on the merits, there is no suit to be reinstated.

5. I have heard the rival arguments. The plaintiff has brought this motion under order 12 rule 7. Order 12 rule 3 allows a court to dismiss a suit for non-attendance. Rule 7 then allows the aggrieved party to set aside that order and reinstate the suit. The decision of Maina Vs Mugiria [1983] KLR 78 reaffirms this court's wide and unfettered discretion to set aside an *ex parte* judgment and to do substantial justice to the parties. The case cited with approval the decision in Shah Vs Mbogo [1967] E A 116. The latter decision holds that the discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a party who has deliberately sought to obstruct or delay the course of justice. The court also has inherent power to dismiss a suit. See Mukisa Biscuit Manufacturing Company Vs WestEnd Distributors [1969] E.A 696. The court, in exercising its discretion in such a matter must do so in a judicious manner. As justice is a two way street, the court must also have regard to the rights and interests of the defendant.

6. This suit was filed on 9th March 2007. That is nearly five years ago. It is an amended claim by a retiring partner in a firm for Kshs 78,157,630.50. Certain parts of that claim were admitted in the initial defence at paragraph 13, 14 and 15. By a consent filed in court on 15th July 2009, an admitted sum of Kshs 538,344 was ordered to be paid. At paragraph 20 of the amended defence, there is a defence of estoppel based on the agreement dated 19th May 2005. On 10th June 2010, the court entered further judgment in favour of the plaintiff for Kshs 1,279,175.20 admitted in the amended defence. Subsequently, the parties filed witness statements and bundles of documents to prepare the suit for trial. I have set out that history of the claim because it is relevant to the application before the court.

7. From that history, I would not say that the plaintiff has been indolent or not shown a keen interest in prosecuting the suit. The matter thus largely turns on the plaintiff's absence or that of his counsel for the hearing on 15th February 2012. I have formed the clear impression that the plaintiff's counsel is less than candid. He was not in court at 9.10 a.m. Neither was his client, the plaintiff. He, the lawyer, must have come to court well after 9.25 a.m and certainly, when Mr. Lubulellah had left court. True, the plaintiff's counsel later rose to address the court and explain his predicament. In the affidavit in support, the plaintiff's counsel makes no mention of the plaintiff's whereabouts on the material day. Traffic snarlups in a city like Nairobi are a common feature. They do not provide a very good reason for lateness in court save in exceptional circumstances. It is even contested by the defendant whether there was such a traffic snarl up on the material day. But I have also taken into consideration that the plaintiff's counsel was using public means. In sum, the plaintiff's counsel by poor planning of his journey was the author of his own misfortune.

8. Considering the nature of the claim, it might not however be just to visit those sins of counsel on the plaintiff. I do not wish to comment on the defence of estoppel set up by the agreement dated 19th May 2005. That would be properly the province of the trial court on tested evidence. I am also unable to say that the absence of the plaintiff or his counsel when the matter was called out was entirely deliberate or meant to obstruct justice. But as I stated, I must also be faithful to the interests of the defendant to a fair trial. I think that the defendant in this case would suffer prejudice. But it is the kind of prejudice that can be compensated in costs or suitable getting up fees.

9. This court is now enjoined by articles 50 and 159 of the constitution as read together with sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. I think the ends of justice in this case would be better met by hearing all the parties on the merits. I thus order as follows;

a) **THAT** the order of court dated 15th February 2012 dismissing the plaintiff's suit be and is hereby set aside. The plaintiff's suit is reinstated for hearing.

b) **THAT** the plaintiff shall pay the defendant's costs assessed at Kshs 30,000 (Thirty thousand only) to be paid before the next hearing date.

c) **THAT** the plaintiff shall fix the suit for hearing within a period of 90 (ninety) days in default of which the suit shall stand dismissed.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 8th day of May 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mrs. Keya for Mr. Ikapel for the Plaintiff.

Ms Onyango for Lubulellah for the Defendant.