



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 1353 OF 1998

JOSEPH KAARA HENRY MWETHAGA..... PLAINTIFF

- **VERSUS** -

CHRIS M. GATURUT/A CRIMA ENTERPRISES.....1ST
DEFENDANT

THABITI FINANCE COMPANY LIMITED(IN LIQUIDATION)2ND
DEFENDANT

MUGUNANDU FARM LIMITED3RD DEFENDANT

JOEL GATIMU KIBUCHI4TH DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 27th February 2012. The plaintiff prays that the order of court of 27th February 2012 be set aside. That order dismissed the suit for want of prosecution. The plaintiff also prays that the earlier order of court dated 3rd April 2000 be restored. This latter date seems to be erroneous. The application is expressed to be brought under order 12 rules 6 and 7, order 45 rule 1 of the Civil Procedure Rules 2010 and sections 1A, 1B and 3A of the Civil Procedure Act. There are annexed to the application two affidavits by Charles Kihara and Joseph Mwethaga sworn on 27th February 2012.

2. The gist of the application is that the plaintiff's counsel was on the material day held up until 9.35 a.m in another matter HCCC No EL No 359 of 2004 before the High Court. The plaintiff alleges he was in court when the matter was called out but did not rise to inform the court of the absence of his counsel. The suit itself is partly heard, and the plaintiff says he is keen to prosecute it and that it is only fair and just that the order of dismissal be set aside.

3. The motion is opposed. There are grounds of opposition dated 16th March 2012. It is submitted that this is an old suit and litigation should come to a close. The plaintiff is accused of indolence and of coming to court with unclean hands. It was also submitted that the application is not merited, is an abuse

of court process and an afterthought.

4. I have heard the rival arguments. On 19th January 2012, the plaintiff's counsel took a hearing date at the court registry for 27th February 2012. On the latter date, the defendant's counsel appeared in court. When the matter was called out, the plaintiff or his counsels were absent. The defendant did not admit to any part of the claim. The plaintiff's suit was thus dismissed by court under the provisions of order 12 rule 3 of the Civil Procedure Rules 2010. It is not true that the plaintiff was present at that time. At paragraph 10 of the affidavit of Joseph Mwethaga, the plaintiff, it is deposed as follows;

“That I am informed by my Advocate, Mr. C.N. Kihara, which information I verily believe to be true, that he had allocated his court Clerk Mr. Sagala to get a lawyer to hold his brief but the said Mr. Sagala entered in court when the matter was being called out and could therefore not get an advocate in time to hold brief. The said Mr. Sagala is known to me and I came from Mr. C.N. Kihara's office with him and I confirm we reached court with him when the matter was being called out due to a traffic jam from Nairobi City Centre”.

5. To be fair to the plaintiff, he did later try to find out the status of the matter from the court clerk. It had been dismissed. At 9.35 a.m, the court record shows that his counsel, Mr. C.N. Kihara, mentioned the matter to try and explain his absence. Accordingly, the defendant was entitled to apply, and the court was within its parameters, in dismissing the suit. See Mukisa Biscuit Manufacturing Company Vs Westend Distributors [1969] E.A 696.

6. The plaintiff has now 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.

7. I am of the view that the mistakes of counsel and the plaintiff in this case must be considered alongside the history of the matter. The suit was filed way back in 1998. The trial commenced before the Hon. Justice Azangalala on 14th February 2006 when the plaintiff opened his testimony. It proceeded for further hearing on 5th June 2007 and 13th June 2007.

8. On 5th May 2000, the Honourable Justice Githinji, had in a considered ruling had granted an order prohibiting any dealings with the suit property Mutira/Kaguyu/839 until the determination of the suit. That is why I stated earlier that the applicants reference to an order of the Hon. Justice Githinji dated 3rd April 2000 is erroneous. True, the parties had appeared for arguments on that date but the substantive interim order of injunction was granted on 5th May 2000. I would thus agree that the plaintiff has not been indolent and not entirely to blame for the delays in concluding the trial. I am also unable to say that the present application is dilatory or that the plaintiff and his counsel acted deliberately to obstruct justice by failing to attend court promptly on the material day. I accept their explanation as reasonable.

9. This court is now enjoined by articles 50 and 159 of the constitution as well as 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 require that the plaintiff be reinstated to the seat of justice and that this matter be heard on its merits. I would also reinstate the order of injunction made on 5th May 2000 pending the final determination of the suit. I think the prejudice suffered by the defendants can be compensated in costs.

10. In the result, I order as follows;

a) **THAT** the order of court of 27th February 2012 dismissing the suit be and is hereby set aside.

b) **THAT** the order of court of 5th May 2000 granting an injunction be and is hereby reinstated.

c) **THAT** the plaintiff shall pay the 2nd, 3rd and 4th defendants thrown away costs of Kshs 5,000 each before the next hearing date to be taken at the registry on a priority basis.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 4th day of May 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Muchiri for C.N. Kihara for the Plaintiff.

Mr. Njue and Mr. Ohenga for the Defendants.