

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL 84 OF 2007

JOASH ONDEKU ARUBA.....APPELLANT

~VRS~

BETTY WANAMBIRO.....1ST RESPONDENT

JOSEPHINE WAITHERA NDUNG’U.....2ND RESPONDENT

(Being appeal from the Judgment of the Resident Magistrate Hon. Mr. G. Sogomo sitting in Bungoma Court in Civil Case No. 497 of 2003)

JUDGMENT

On 12/3/2003 the Appellant filed a suit against the Respondents claiming general and special damages for injuries he suffered in an accident in which motor vehicle registration number KAN 412 W belonging to the 1st Respondent and vehicle KAM 824 W belonging to the 2nd Respondent collided on 6/11/2002 along Bungoma-Mumias road. He blamed the accident on the negligence of the drivers of the two vehicles. His case was that he was travelling as a fare-paying passenger in KAN 412 W when the accident happened. The Respondents filed defences denying that they owned the respective vehicles. They denied the fact of accident, that the Appellant was in any of the vehicles as a fare-paying passenger, or at all, or that they were negligent in any way.

On 2/7/2007 the suit came for hearing. The hearing date had been taken by M/s Elizabeth change & Co. Advocates for the Appellant and served. The record shows that on that day the parties and their advocates were absent. The court dismissed the suit with costs for non-attendance. On 17/9/2007 the Appellant applied under the then Order 9 B rule 8 of the Civil Procedure Rules to have the order dismissing the suit with costs set aside and or reviewed and the suit reinstated for hearing. He swore a supporting affidavit to say that on the day for hearing he was present as was M/s Nanzushi advocate who held brief for her advocate Mrs. Elizabeth Chunge who was not present. The suit was nonetheless dismissed. He indicated his desire to have the case heard and determined on merits. Mrs Chunge swore an affidavit to say that she had travelled to Nairobi but had asked her clerk to get M/s Nanzushi to hold her brief in the matter and to seek adjournment. She was later to learn that although her client and M/s Nanzushi were in court the suit had nonetheless been dismissed with costs for non-attendance.

The application was not opposed. The trial magistrate, however, dismissed it. He was offended by the fact that neither the Appellant nor M/s Nanzushi was present on the hearing date and yet the affidavits were saying that they were present. He found that the affidavits supporting the application were not truthful and could therefore not form the basis for the exercise of the discretion to reinstate the suit. This decision is what the Appellant has appealed against. The parties agreed to file written submissions but only the Appellant’s advocate complied. I have considered the submissions and the grounds in the Memorandum of Appeal.

Whether or not a court should reinstate a dismissed suit for non-attendance entails the exercise of discretion. The reasons for not attending on the hearing date have to be given. The court has to consider whether the application has been brought timeously, whether the other side will suffer any prejudice if the suit is reinstated, and whether such prejudice may not be sufficiently compensated by the payment of costs. It should always be remembered that to deny a party the right of having his case heard and determined on merits is the last thing a court of law should do (**Sodha v. Hemraj [1952] 7 ULR**

11). Secondly this court will not interfere with the exercise of discretion of the trial court unless it is satisfied that the court in exercising its discretion misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the court was clearly wrong in the exercise of its discretion and that as a result there has been injustice (**Mbogo and Another v. Shah [1968] EA 93**).

The trial court was unduly influenced by the fact that the Appellant was saying he was present with M/s Nanzushi when, according to the court record, he was not. Quite unfortunately, the affidavit of the Appellant did not receive any response. No other affidavit was filed to counter it. The court should have remained out of the fray, in which case there was no basis to dismiss this undefended application. There was no delay in bringing the application and there was no prejudice to the Respondents in allowing it. More important, the court should have been on the side of having the case dealt with on merits. It is for the reasons that I find that the trial court did not consider all the facts when it exercised its discretion to dismiss the application.

The result is that I allow the appeal. The order of the lower court is set aside and in its place there shall be an order allowing the application to reinstate the suit. Costs will abide the hearing and determination of the suit.

Dated, signed and delivered at Bungoma this 19th day of September, 2012.

A. O. MUCHELULE

JUDGE