



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 1264 of 2004

JOHN KINGARU GICHIRI.....1ST PLAINTIFF/APPLICANT

MARGARET NJAMBI KINGARU.....2ND PLAINTIFF/APPLICANT

VERSUS

FURCON LIMITED.....DEFENDANT/RESPONDENT

RULING

The applicants herein have brought this Notice of Motion dated 15/8/2012 brought under Sections 1A and 1B of the Civil Procedure Act and Order 51 Rules 1, 3 and 15 of the Civil Procedure Rules (2010) and the Inherent Power of the Court.

The applicant's prayers to court are to set aside the order 8th February, 2012 which dismissed the plaintiff's suit for non-prosecution.

The plaintiff also prayed that the plaint dated 19/10/2005 be reinstated for interpartes hearing.

The application is supported by the grounds set out on the face of the applicant and upon the supporting affidavit of John Kingaru Gichuki and annexures therein. The applicants counsel, Harison Kinyanjui also filed his verifying affidavit.

I have perused the court's record and considered the provisions of Section 1A & B of the Civil Procedure Act.

Section 1A of the Civil Procedure Act starts that: -

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes...”

Further Section 1B states that for the purpose of furthering the overriding objectives, the court shall handle all matters presented before court for the purpose of attaining among other this aim.

“The just determination of the proceedings indeed the plaint herein was filed on 19/10/2005 on behalf of the Plaintiff/applicant after the matter was filed, it has never proceeded for further hearing.”

On 8/2/2012, the suit was dismissed for want of prosecution. Applicant stated that he was out of the country from September, 2005 and thus was unable to prosecute the case effectively. He annexed a copy of his passport *JKGI* to confirm that averment.

His counsel Mr. Kinyanjui also averred that on 8/2/2012, he failed to appear in court to oppose application for dismissal for want of prosecution as he was engaged in another matter. Mr. Kinyanjui attached a copy of his Diary for the material day as *JHKL*.

I have considered the grounds and reasons advanced by the applicant in support of this application herein. I have also considered the relevant law.

The applicant has sworn reasonable explanation as to only he failed to prosecute the case. The overriding objectives of the Civil Procedure Act to have the matter determined in a just manner. The other objective is to have the matters heard expeditiously. In the instance case, we cannot find and hold that this matter has been handled expeditiously. There is indeed delay in disposal of the matter.

Mr. Kinyanjui explained to court that he failed to appear in court on 8/2/2012 to oppose the application for dismissal as he had other cases. That was therefore the mistake of the defence counsel.

As was held in the case of *CMC Holdings Ltd Vs. Nzioki Civil Appeal No. 329 of 2001*.

“In Law the discretion on whether or not to set aside an ex parte order was

meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things on excusable mistake or error.”

Failure by the applicant counsel to be in court on 8/2/2012 was an excusable mistake on the part of the Applicant as it was not of his own making and therefore the applicant should not be made to suffer.

The court will allow the applicant's application dated 15/8/2012 in its entirety.

However the plaintiff is ordered to ensure that the matter is set down for hearing expeditiously within the next 45 days. Failure to do so, this court will not hesitate to vacate this orders.

Costs in the cause.

Dated, signed and delivered this 20th day of November, 2012.

**L.N. GACHERU
JUDGE**

In the Presence of:

.....For the Applicants

.....for the defendant

.....court clerk