



NO.56

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO.18 OF 1997

BETWEEN

ONUONGA

OSEKO.....APPELLANT

AND

HUDSON

NYANSIMORARESPONDENT

**(Being an appeal from the judgment of the SRM Hon. Mr. K. Ngomo delivered on 16th March 1997
in Kisii**

Chief Magistrate's Court Civil Case Number 136 of 1994)

RULING

1. The application before court is the Notice of Motion dated 18th December 2008, brought under **section 3A** of the **Civil Procedure Act** and **Order IXB** of the **Civil Procedure Rules** seeking orders that the order made by this Honourable court on 16th November 2004 be set aside. The application which is filed in person is badly drawn as the grounds in support thereof are not clear in what they are intended to convey to the court.

2. The application is supported by the affidavit sworn by the applicant on the 17th December 2008. What the applicant is saying is that he did not deliberately fail to attend court on 16th November 2004 when the order of dismissal was made against him.

3. The application is opposed vide the Grounds of Opposition dated 6th January 2009 and filed in court on the same day. The following are the grounds:-

- 1) *That this application is fatally defective and an abuse of the due process of the court.*
- 2) *That the application (sic) is guilty of laches and has brought the application after a long period of 4 years since the bill was dismissed.*
- 3) *That this court lacks jurisdiction to entertain the instant application.*
- 4) *That the application together with the affidavit offends (sic) the mandatory provisions of the law and therefore ought to be struck out.*

4. Briefly the facts leading to the instant application are that the appellant through the firm of G.J. Mainye & Co. Advocates filed the Memorandum of Appeal dated 21st March 1997 on the 24th March 1997. The matter has been in and out of court many times since then; culminating in the order of 16th November 2004 by which the Bill of Costs filed by the applicant herein was dismissed. Undeterred by the said order of 16th November 2004, the applicant filed another Bill of Costs dated 17th December 2008. The same was fixed for taxation on 12th January 2009 before the Deputy Registrar. On 12th January 2009, the Deputy Registrar ruled that he had no jurisdiction to deal with the application. This is the reason why this matter is before me although by an order dated 6th October, 2010, this court had ordered that the application be heard by the Deputy Registrar.

5. The application was canvassed before me on 2nd February 2011. Both Mr. Moracha for the applicant and Mr. Nyambati for the Respondent reiterated the averments in their respective pleadings to support their position in the matter. Counsel for the Respondent submitted that there was no good cause shown by the applicant to warrant the exercise of discretion by this court in favour of the applicant. That there was clear evidence on record showing that the applicant and his counsel were both aware of the hearing date for the taxation which came up on 16th November 2004 and that no reasonable explanation has been given for their absence from court on the material day.

6. Finally, counsel for the Respondent submitted that under **Order 12 Rule 6 (2)** of the **Civil Procedure Rules (2010)** this application is flawed. The relevant provisions of **Order 12** are **rules 3 and 6 (2)** thereof. **Rule 3** deals with dismissal of a suit where on the day fixed for hearing, only the defendant attends court. Under **rule 6 (2)**, where a suit has been dismissed under **rule 3**, no fresh suit may be brought in respect of the same cause of action. Counsel urged the court to dismiss the application. Though this is the current position, this application is governed by the old rules.

7. I have now considered the application as filed and the submissions made by both counsel. The main ground on which the applicant has hinged his application is that failure to attend court was a mistake committed by his former advocate and that in the circumstances, that mistake by counsel should not be visited upon the applicant.

8. After considering all the circumstances of this case, I am of the humble view that this application lacks merit. In the first place, the applicant is guilty of inordinate and unexplained delay in bringing this application. In his own affidavit in support of the application, the applicant admits that he was present in court on 12th October 2004 when the Bill of Costs was fixed for taxation on 16th November 2004. The applicant's allegation that he misheard the date is, in my view, an afterthought. Secondly, while applicant's counsel alleges that the failure to attend court on 16th November 2004 was that of the applicant's counsel, the applicant blames himself for it. There is contradiction and such contradiction, to my mind shows that the applicant is not being truthful in explaining his predicament and in asking the

court to grant the orders sought.

9. In the premises and for the reasons above given, the applicant's application dated 18th December, 2008 and filed in court on the same day be and is hereby dismissed with costs to the Respondent.

10. It is so ordered.

Dated and delivered at Kisii this 24th day of March, 2011.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Mbeche (absent) for Applicant/Respondent

Mr. Nyambati (present) for Respondent/Appellant

Mr. Bibu - Court Clerk