



IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE NO. 1463 OF 1996

DANSON METHU KIBEBE..... PLAINTIFF

VERSUS

RICHARD RUGENDO & OTHERSDEFENDANTS

Coram: Mwera J

Muia for plaintiff

Kuyo for defendants

Ag. For 3rd defendant NA

Njoroge, court clerk

RULING

The chamber summons dated 3.1.11 was said to have been brought under Order 12 rule 7 of Civil procedure Rules and section 3A of Civil Procedure Act. By it the plaintiff prayed that the court's order of 12.5.10 dismissing the suit herein be set aside so that it goes for trial. The only reason given was that the plaintiff's advocates were inadvertently not aware that the suit had been set down for hearing on the material date.

Mr. V. Muia Advocate deponed in a supporting affidavit that he was acting in the cause for the plaintiff. That on 13.5.09 the case was before Waweru J and the suit was stood over generally. The parties were to take fresh dates but after paying a court adjournment fee. Then later the 1st and 2nd defendants served the plaintiff's lawyer with a party and party bill of costs. It transpired that the case had been fixed for hearing on 12/5/10. Mr. Muia was not aware of this date, neither was his client. The date had been fixed without his knowledge. Therefore he had not put it in his diary. Later he learnt that their court clerk had taken the date at the registry and had not placed it in the diary or informed Mr. Muia. So there was no attendance – all due to an honest omission. There was no affidavit from Mr. Muia's court clerk who was said to have taken the date from the registry.

In the replying affidavit of Mr. Kibet for the 1st and 2nd defendants it was deponed that when he took over the conduct of this case it was fixed for hearing on 25th and 26th March 2009. It did not take off. On 25/3/10 the defendants were served with the hearing notice for 12.5.10. When the matter was called out there was no attendance on the part of the plaintiff and the suit was accordingly dismissed. It

appeared that the plaintiff was no longer interested in prosecuting his case. Keeping it around is oppressive and prejudicial to the defendants. There was no basis to reinstate it. In a further affidavit by Mr. Muia he appeared to repeat what he said about his court clerk taking the date of 12.5.10 and not informing him.

In submission it was said that failure to attend court was not deliberate. It was all the mistake of his clerk. With the previous fixtures for trial, the plaintiff had maintained interest in the matter and this court should set aside the order and allow trial to do justice in the matter. No prejudice will befall the defendants.

On their part the 1st and 2nd defendants asserted that granting orders as sought here is a matter of discretion but to be dispensed on compelling grounds e.g. excusable mistake. The act of Mr. Muia's clerk to take a hearing date and not bring it to his attention or reflect in his diary, was an act of negligence. This meant one not exercising due diligence and not making an excusable mistake or error.

Having considered all the foregoing this court is minded to dismiss this application. Mr. Muia claimed that his clerk fixed the date of 12/5/10 in the registry but failed to inform him or reflect it in his diary. And that this application need be allowed and not have Mr. Muia's client suffer prejudice because of the clerk's error or omission. Fair enough. But the court to exercise its discretion in such circumstances ought to be satisfied with the evidence/material placed before it that surely one deserves the discretion to be exercised in his favour. Here Mr. Muia does not disclose the name of his court clerk who took the hearing date. Further, that clerk does not swear and file an affidavit explaining the state of things. So can the court believe that actually there was an error, omission or mistake that should be excused? Hardly from the lack of necessary material to resolve such a question. So the court was left with the view that Mr. Muia's clerk was only negligent i.e. lack of diligence on one's performance of duty; not being mindful that one's duty must be taken seriously since failure in performing well may result in prejudice befalling another. And such cannot be excused by the court as prayed. Indeed if the court introduced acts of negligence in such circumstances to excuse parties and grant them discretionary orders, the path to injustice will be wide open – against the other side/party.

In sum this application is dismissed with costs.

Ruling delivered on 4.4.11.

**J. W. MWERA
JUDGE**