



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 11 of 2002

JACOB MURIUNGI MWENDA.....DEFENDANT/RESPONDENT

VERSUS

**MBAYA M'MWENDWA.....1ST DEFENDANT/APPLICANT
JAMES MWENDA M.....2ND DEFENDANT/APPLICANT
SILAS MWITI M'MUGWIKA3RD DEFENDANT/APPLICANT**

RULING

This case was fixed for hearing by the plaintiffs for 9th February 2010. When the case was called out before me in the morning, Mr. Mbaabu, learned counsel appeared for the plaintiffs. Mr. Kaimenyi, learned counsel appeared for the defendants. Mr. Kaimenyi made an application for an adjournment on the basis that counsel who has conducted this part heard matter, learned counsel Mr. Gikunda Anampiu, was not present before court and that further, the defendants, although had been informed of the hearing date had failed to attend court. The application for an adjournment was opposed by the plaintiff's counsel and in his response Mr. Kaimenyi stated that if an adjournment was not granted, he was seeking leave to cease to act for the defendants. The court rejected the application for an adjournment on the basis that no sufficient material had been supplied to enable the court to exercise its discretion in favour of the defendant. The court also ruled that leave to cease to act would not be given since the defendants would have no notice of it. The plaintiff had given evidence in chief before Justice Sitati and was now to be cross examined. Mr. Kaimenyi proceeded to cross examine the plaintiff and the plaintiff at the end of that cross examination was re examined by learned counsel, Mr. Mbaabu. PW2 was called and during his testimony learned counsel Mr. Gikunda walked into court. Mr. Gikunda was able to cross examine PW2. The case proceeded for hearing until it was adjourned for further hearing at 1.45pm. The court resumed at 1.45pm but this particular matter was called out at 2pm. By then, only Mr. Mbaabu was in court. The court therefore ordered that since the plaintiff had closed his case and since the defendants had failed to attend court at the appointed time, the matter be adjourned to 8th of March 2010 when parties would submit their submissions. Before that date arrived, the defendants filed a Notice of Motion dated 11th February 2010. In that application, the defendants are seeking for a review variation or the setting aside of the orders of 9th February 2010. That application was brought under Order XLIV Rule 1 of the Civil Procedure Rules. That Order is in the following terms:-

“1. (1) Any person considering himself aggrieved-

- (a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or***
(b) By a decree or order from which no appeal is hereby allowed

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the other made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passes the decree or made the order without unreasonable delay.”

It was argued on behalf of the plaintiff that the defendant's application could not be brought under the provisions of that Order because no new evidence had been discovered, that there was no error apparent on the face of the record, and that there was no sufficient reason to

warrant relief sought. In my view, the application is competent. The defendant's application as can be seen does not claim to be based on discovery of any new or important evidence or on error on the face of the record. It does in my view fall squarely under "sufficient reason." The application is supported by two affidavits. One affidavit is sworn by Silas Mwititi one of the defendants in this matter. He deponed that he and his co-defendants arrived at court at 2pm but stood outside the court waiting for their advocate. They confirmed that their advocate arrived at 2.15pm when they walked into court only to find that the case had been adjourned for submissions. On his part, learned counsel Mr. Gikunda Anampiu stated that during the break given by the court he had to rush home to deliver some drugs for his daughter and after carrying out that errand he returned to court at 2.10pm. It is on that basis that the defendant seeks orders. The application was vigorously opposed by the plaintiff and in support of his submissions plaintiff's counsel relied on the case of M'Murungi M'Mbwiria Vs. Julius Mutwiri M'Mungania Civil Appeal No. 126 of 2003. The facts of this case are very similar to our case. The court adjourned that case for hearing at 2pm in the presence of the defendants and his counsel. When the matter came for hearing in the afternoon, neither the defendants nor his counsel were present in court. The case proceeded for hearing. In their application to set aside the judgment of the court, the court declined and the matter was taken to the Court of Appeal. The judges in the Court of Appeal found that the reason given for failing to attend court should have been made known to the judge before the adjournment was given. The court further found that counsel had failed to supply sufficient information to enable the court to exercise its discretion in favour of the defendant. The Court of Appeal was in agreement with the High Court that there was no sufficient reason to set aside the judgment of the court. I confirm that I have considered the matter before me and I am of the view that the justice of the case require that the defendants be given an opportunity to present their case before court. In reaching that finding, I do not overlook the arguments raised by the plaintiff's learned counsel in respect of the deficiency of the affidavits in support of the defendant's application. In reaching the decision that the justice of the case would best be served by allowing the defendants to present their evidence I do not overlook the fact that the defence counsel was obviously not intending to proceed with the hearing on the 9th February 2010 from the applications made at the beginning of the hearing. As stated above, the matter begun with the defence counsel seeking an adjournment and also seeking to cease to act. In my view, defence counsel were ill prepared or unwilling to proceed with the case. However, bearing in mind the overriding objective of the Civil Procedure Act and Rules in Section 1A (1) this court in exercising the powers under the Act and Rule, is required to give effect to that overriding objectives. It provides:-

"The overriding objective of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolutions of Civil disputes governed by the Act."

If I am to facilitate the just and expeditious resolutions of this dispute in my view, I ought to allow the defendants their day in court. The reason given for the defence counsel, although unsupported by documentary evidence is reasonable. For that reason, the order of 9th February 2010 ordering that this case do proceed for submissions is hereby set aside and at the reading of this ruling the court will give further hearing dates of the defence case. The defendants will in any event pay the plaintiff's costs of the Notice of Motion dated 11th February 2010.

Dated and delivered at Meru this 12th day of March 2010.

MARY KASANGO
JUDGE