



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET  
Civil Case 37 of 1997**

**ELISHA KARE BUSIENEI .....PLAINTIFF**

**=VERSUS=**

**PAUL RACHUHI THUITA.....1<sup>ST</sup> DEFENDANT  
KENYA COMMERCIAL BANK EASTLEIGH BRANCH NAIROBI.....2<sup>ND</sup> DEFENDANT**

**RULING**

**I. Background**

1. The disputes between the original Plaintiff/Applicant and the original three Defendants is fraud. It concerned a guarantee upon land parcel Eldoret Municipality/Block/23 measuring 0.0483 hectares, 99 year leasehold with effect from 1st September 1985 made out to the Kenya Commercial Bank (Original Defendant No.3).
2. The Plaintiff/applicant had alleged in his suit filed, on the 29th January, 1997 that he never at any one time gave the said guarantee. It was allegedly a fraud. He only came to know of the matter when his land was to be auctioned by the said third Defendant/Respondent. He applied for orders of injunction on 3<sup>rd</sup> July 1997, which was granted by Nambuye J, to stop any sale of his property.
3. Hearing dates were taken at the registry on 2nd November 2000, 30th October 2001, 15th July 2004. No hearing took place nor did the parties appear before any Judge except on 15th July 2004 when the matter was stood over generally (Gacheche J).
4. By a notice dated 28 August 2006 issued by the Court to M/s Kimaru Kiplagat and B.A. Achieng & Co. Advocates for the respective Plaintiffs and Defendants, that under Order 16 r 5 and 6 Civil Procedure Rules, the High Court would dismiss the suit for want of prosecution; namely that no action had been taken by both parties 3 months after the last date it was in Court. The matter came before Ibrahim J on 18/10 2006 and the said Suit was dismissed for want of prosecution. The said date of 18th October 2006 had alterations from 7th November 2006.
5. The Plaintiff knew nothing of this until 1st October 2009 when his advocate appeared before Mwilu J stating that an auction of the parcel of land was due for 6th October 2009. Order of status quo was made

exparte. The inter partes hearing was to be on 14th October 2009. The Advocate for the Applicant had attended Court late. The same was given new dates in Court for 2nd December 2009. Status quo was to be maintained. It was not reached. New dates were taken for 3rd February 2010. On that day the record indicates Osiemo J took new dates and the Hon. Judge extended the status quo dates to 19th May 2010. Both Ibrahim and Osiemo J were not in this High Court on the day called out for hearing. The application that required the same Judge who made the order hear it namely Ibrahim J was heard under Order XVII r 10 Civil Procedure Rules. In the absence of the said Judge who heard and made orders a new Judge may handle the case.

II. **Application dated 30<sup>th</sup> September 2009 to reinstate the suit for hearing**

6. The Advocate for the Applicant argued that he sought the discretion of the Court in having the suit reinstated. The reasons being that the applicant's former advocate M/s Kimaru Kiplagat and Co. Advocates failed to notify the Plaintiff of the notice that the suit would be dismissed.
7. He relied on the case law of **Ngondi –versus- Ngondi (1991) KLR 317 (Gachuhi, Cockar JJA, Omolo Ag. JA)** Where a suit is dismissed without going into the substantive claim another Judge may deal with the same matter and cannot say that another Judge is sitting on appeal of the first Judge and cannot deal with the matter.

In the case of

**Dhillon and another -versus- Dhillon(2006) 1 EA 59 Emukule J**

The Hon. Judge stated that the discretion of the Court is to be exercised to bring justice to the parties.

In the case of **Invesco Assurance Co. Ltd -versus- Cyrus Nganga Njeu and 2 Others Mombasa (2006) EKLR I. Lenaola** Where a suit dismissed was reinstated under order IX b r 8 Civil Procedure Rules.

III. **In Reply**

9. The respondent argued the suit was properly dismissed as no action was taken after 3 months. That since the dismissal three years had lapsed thereafter. The application be dismissed.

IV. **Opinion**

10. The authorities herein as provided by the Advocates for the Plaintiff dealt with as follows:

In the **Ngondi's case** (Supra)The orders by Togbor J for dismissing the substantive claim was because the Judge had ordered compliance. There was non compliance and dismissal made without disclosing the orders so used to dismiss. The said Orders to my mind for non compliance was and may be under Order X r 20 Civil Procedure Rules. The setting aside of the said orders could be done by another Judge. The case law did not deal with Order XVI Civil Procedure Rules.

In the case of **Invesco Assurance** (Supra) The Orders brought to Court was irregular that was to have been used to set aside a dismissal. This may have been order IX b r 8 Civil Procedure Rules. This present case

being under Order XVI Civil procedure Rules does not apply for this authority

The **Dhillon and another case** (Supra) dealt with the defence. The Court exercised its discretion to allow a defence be condoned in the case.

11. In this application to set aside orders under Order XVI Civil Procedure Rules as stated is not provided for under the rules. Nonetheless, I have perused the notice issued to the parties and note that the said notice had alterations made to the date issued. The original date was 17<sup>th</sup> November 2006. It was then altered to read 18 October 2006. This brings doubt to my mind as to whether the correct dates were communicated to the parties.
12. The applicant has since changed advocate as has the 2<sup>nd</sup> Defendant.
13. I accordingly allow the application on grounds that a notice having been issued after 3 months but before the three years required by law to dismiss a suit but notes that notice was altered as to the date that parties ought to appear. Proof of service was necessary by the Court process server to prove that service upon the parties has been made. Due process had not been exercised.
14. To this end the said application is granted. This suit is reinstated for hearing.
15. There will be no orders as to costs as both advocates failed to attend Court on the day called out for reading of the ruling.

**DATED THIS 26<sup>TH</sup> DAY OF MAY, 2010 AT ELDORET.**

**M.A. ANG'AWA,  
JUDGE.**

**READ ON THIS 31<sup>ST</sup> DAY OF MAY 2010 AT ELDORET.**

**M.A. ANG'AWA,  
JUDGE.**

**Advocate:**

- (i) *Kibichiy Advocate instructed by the firm of M/s Kibichiy & Co.  
Advocates for the 2<sup>nd</sup> Defendant - Absent*
- (ii) *Gumbo Advocates instructed by the firm of M/s Gumbo  
and Associates for the Plaintiff – Absent*