



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA Civil Suit 26 of 2009**

**BETH WANJIRU MULINGE.....PLAINTIFF
VERSUS
JAMES MUTONGA MULINGE.....DEFENDANT**

RULING

The plaintiff's application dated 9th February, 2009, was dismissed for none-attendance on 21st October, 2009. The application was primarily for a temporary injunction restraining the defendant from among other things selling, transferring and/or charging the suit properties pending the hearing and determination of the suit. The application had been by consent fixed for hearing on the said 21st October, 2009 but when it was called out for hearing, only counsel for the defendant attended and applied that the said application be dismissed for none-attendance. The plaintiff now seeks, by her Chamber Summons dated 27th October, 2009, an order setting aside the said order of dismissal and that the dismissed application be heard on merits. The application is predicated upon the main ground that the plaintiff's counsel by inadvertent mistake failed to indicate in his diary that the said application was listed for hearing on 21st October, 2009, which mistake should not be visited upon the plaintiff. The application is supported by two affidavits sworn by the plaintiff's advocate Justus Mulwa Nduya which affidavits elaborate the above ground. Annexed to the affidavit is a copy of counsel's diary for 21st October, 2009, on which day this case is not indicted as listed for hearing. Counsel has further deponed that the mistake was inadvertent and that unless the dismissal order is set aside, the plaintiff, who is innocent, will suffer.

The application is opposed and there is a replying affidavit and a supplementary affidavit sworn by the defendant. The gist of the opposition is that the plaintiff's desire is to delay the hearing and disposal of this matter which suit is unfounded.

When the application came up for hearing on 14th June, 2010, counsel agreed to file written submissions which were in place by 15th July, 2010. The submissions restated the parties' stand-points taken in their respective affidavits.

I have considered the application, the affidavits on record and the submissions of counsel. Having done so, I take the following view of the matter. The plaintiff has invoked Order IXB Rule 8 of the Civil Procedure Rules. Under the rule, the main concern of the court is to do justice to the parties. The discretion of the court is wide. However, the discretion should not be exercised where a party is deliberately obstructing or delaying the course of justice. It should however, not punish honest, inadvertence, accident or excusable mistake or error. In exercising its discretion, the court should consider, *inter alia*, the facts and circumstances both prior and subsequent and all the respective merits of the parties. The question as to whether the other side can reasonably be compensated by costs for any delay that may be occasioned by the setting aside of the order should be considered and it should be remembered that to deny a litigant a hearing should be the last resort of the court. All the above are settled principles applied when considering an application to set aside a default judgment or order.

In the matter at hand, the application sought to be reinstated was fixed for hearing by consent but come the date of hearing only counsel for the defendant attended. The plaintiff's advocate now says that the application was not diarised with the consequent that he did not attend the court when his client's application was called out for hearing. I have perused a copy of the diary for the day of the plaintiff's advocate. This case is not indicated as coming up for hearing on 21st October, 2009. The diary does not appear to have any alterations and does not also appear to have otherwise been interfered with. In my view it is evident that counsel indeed did not diarise the application. On discovery of the mistake, counsel took what, in my view, was expeditious action. He lodged this application on 27th October, 2009, which was just five (5) days after the mistake was detected.

It must be remembered that cases do not belong to advocates. They are only agents of their clients. Counsel herein has freely admitted his mistake. In the premises, I accept his explanation and find that he did not deliberately fail to attend the court when the plaintiff's application came up for hearing on 21st October, 2009. The plaintiff did not know that her advocate would not attend the court when her application was listed for hearing. The allegation that she is bent on delaying the hearing of this case cannot apply to the proceedings of 21st October, 2009.

The defendant has also not shown that the delay to be occasioned by the setting aside of the order of dismissal cannot be compensated by costs. I am not persuaded that that is the case. The upshot is that the plaintiff's application dated 27th October, 2009 is allowed in terms of prayers 2 and 3 of the application. The plaintiff shall however pay the defendant's costs.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF SEPTEMBER 2010.

**F. AZANGALALA
JUDGE**

Read in the presence of:-
Mr. Mulwa for the Plaintiff.

**F. AZANGALALA
JUDGE
13TH SEPTEMBER 2010**