



**IN THE HIGH COURT OF KENYA
AT NAIROBI HIGH COURT**

CIVIL APPEAL NO.361 OF 2004

REPUBLIC OF KENYA

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SAMUEL MUREITHI.....APPLICANT

VERSUS

NJOROGE MIGWI.....1ST RESPONDENT

KIAMBU COUNTY COUNCIL.....2ND RESPONDENT

JUDGMENT

On 2nd March, 2004 the appellant's suit in the lower court was dismissed for want of prosecution. An application filed by the appellant to set aside the said dismissal was dismissed by the learned trial magistrate on 24th May, 2004. The appellant, aggrieved by the dismissal of his suit in the lower court, filed this appeal setting out 12 grounds contained in the amended Memorandum of Appeal dated 6th March, 2008.

The appeal is opposed and both learned counsel filed written submissions. I have looked at the Memorandum of Appeal and related the same to the record before me. On the date of the said dismissal, that is 2nd March, 2004, the learned counsel for the appellant did not attend but detailed another counsel, one Mr. Ndwiga, to inform the court that Mr. Wanjama was held up at Milimani Commercial Courts. The case was stood over to 10.40 a.m. and when the matter was called out the learned trial magistrate endorsed in her record "**adjournment not granted. Case has to proceed.**" The learned counsel who was sent to hold brief for the counsel for the appellant said "I leave the matter to the court". Thereafter the learned trial magistrate wrote a brief ruling of two sentences in the following manner;

"Ruling, This case is too old. The case is hereby dismissed with costs to the defendants for want of prosecution."

In the subsequent ruling where again the learned trial magistrate dismissed the appellant's application to set aside the dismissal order, more information was included than what the above ruling stated. I note that it is the dismissal ruling that is in issue and not the ruling that was made on 24th March, 2004. It would be prejudicial therefore to address this appeal with reference to the subsequent ruling which was in effect not a judgment. I say so because, in the said ruling it transpired that the learned trial magistrate addressed the record and with particular reference to the history thereof that, it was the appellant who had previously been given the last chance to prosecute his case. Those are not matters that were canvassed when the case was dismissed on 2nd March, 2004.

Order IXB Rule 4 of the Civil Procedure Rules provides; **“if on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”**

There is no evidence on the record to show that either the defendants or the plaintiff was in court on that day. There was therefore non-compliance with the said order and rule. It was incumbent upon the learned trial magistrate to confirm whether or not the defendants were in court and, not only that but also, whether or not they admitted any part of the plaintiff's claim. Good practice would also require that the learned trial magistrate confirms whether or not the plaintiff was in court and whether or not he will be prepared to prosecute his case the absence of his advocate notwithstanding.

At page 49 of the record the learned trial magistrate said as follows; **“and therefore the court order was properly entered. The failure by counsel to attend court on basis that matter was not diarized is not excused for reasons that the counsel instructed to hold brief had the chance to raise him wherever he was failed to do. This application lacks merit and is hereby dismissed with costs to the respondents.”** With profound respect, the record of 2nd March, 2004 bears no evidence of this observation by the learned trial magistrate. She took into consideration extraneous circumstances to the prejudice of the appellant. Above all, summary dismissal of cases such as the present one should be made only where it is clear the party is not ready to proceed.

Dismissal for want of prosecution is not based on merit and the court should always embark on an inquiry especially in respect of the attendance of the parties. I also note that the subject matter herein is land and the plaintiff should be given an opportunity to pursue all the legal avenues available.

Accordingly, I allow this appeal and set aside the dismissal order of the learned trial magistrate dated 2nd March, 2004 and reinstate the plaintiff's suit which I order should be heard by another magistrate of competent jurisdiction on priority. The appellant shall however, pay the respondents all the costs occasioned by this appeal.

Orders accordingly.

Dated, signed and delivered at Nairobi this 19th day of October, 2010.

A. MBOGHOLI MSAGHA
JUDGE