



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 81 OF 2009

NDUNDA MIANO.....APPELLANT
VERSUS
MUGO RIAKATHARI.....RESPONDENT

R U L I N G

The Application at bar is the one dated 18/2/2010. It is brought to court under Order IXB Rule 4 and 8. It is seeking orders to set aside this court's orders issued on 2.2.2010 which orders dismissed the Applicant's Application dated 15.7.09. It is premised on 5 grounds on its face and on the supporting affidavit of one David Osoro. The same is opposed by way of the 3 grounds of opposition by counsel for the Respondent dated 25.2.2010. I wish to state however that Order IXB Rule 4 & 8 do not apply in these circumstances. The Application is therefore brought under the wrong provisions of the law but in the interests of justice I will disregard that defect.

The application that was dismissed had been fixed for hearing inter partes on 2.2.2010. That date was actually taken by somebody from counsel for the Applicant's office. They served the hearing notice on counsel for the Respondent and he came to court in obedience to the said notice. On the assigned date however, counsel for the applicant failed to attend and so the court in its inherent jurisdiction dismissed the said Application.

The applicant subsequently filed this application to set aside the dismissal. The reasons given for the non attendance was that the advocate's secretary failed to enter the hearing date in counsel's diary. I have considered the explanation given. I am nonetheless not convinced that the failure on the part of the counsel's secretary to diarize the matter is an inadvertent or excusable mistake. In my view it is sheer and unmitigated carelessness. I say so because they are the ones who took the date, and the assumption is that they came to court with the same kind of diary and must have noted immediately in their diary. They must also have been very much alive to the date in question as at the time they prepared a hearing notice and served it on the other counsel. That failure to attend court cannot be justified at all. I have nonetheless looked at the nature of the application. I note that the Applicant stands to suffer serious prejudice if the said dismissal is not set aside. Like I said on 16.7.09 when I gave the ex-parte orders, the Applicant does have a good Appeal. He should therefore be allowed to argue it. If the orders of the Wanguru Resident Magistrate's court are not stayed, then the Appeal could be rendered nugatory as the subject matter – which is land might change hands.

I will therefore allow this Application and set my earlier orders of dismissal aside on condition however that the applicant pays counsel for the Respondent herein thrown away costs of 10,000Sh. within 7 days from the date hereof failing which the orders of 2.2.2010 will be reinstated automatically and the Respondents will be at liberty to execute them.

W. KARANJA
JUDGE

Delivered, dated and signed at Embu this 13th day of October 2010.

In presence of:- Mr. Okwaro for Mr. Muriithi for Respondent and Okelo for Ogutu for Applicant.