



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 699 of 2005

JULIE MIGARE..... PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA.....DEFENDANT

R U L I N G

The Notice of Motion herein, under Sections 3, 3A and 63(e) of the Civil Procedure Act, Cap. 21, Laws of Kenya, dated 29/2/08, seeks the following orders:

1. That this court's orders of 25/3/07, dismissing the suit for want of prosecution, be set aside and this suit re-instated;
2. The suit be set down for hearing within 3 months of its reinstatement.
3. Cost of the application.

The application is on the grounds, **inter alia**, that in the interest of fairness and justice the Plaintiff should be accorded an impartial hearing of her case on merit; that the suit raises triable issues; that the circumstances leading to the dismissal of the Plaintiff's case emanated from previous advocate's mistake for which the Plaintiff should not be punished; that the Defendant will suffer no prejudice if the suit is reinstated.

In opposition, the Respondents aver that the applicant failed to disclose material facts in her application and that she failed to notify the Respondents of her changed address too late, and in any case she was aware of the date of the formal proof but failed to appear in court. The Respondents aver too, that the Applicant failed to comply with this court's orders and her application should be dismissed.

I have perused the massive pleadings in this case, and considered the submissions by learned Counsel for both sides and I have reached the following findings and conclusions.

Section 63(e) of Cap. 21, Laws of Kenya, under which the application is brought provides as under:

“In order to prevent the ends of justice from being defeated, the court may, make such other interlocutory orders as may appear to the court to be just and convenient.”

The same is contained in Section 3A of the same Act, where it provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such

orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

The applicant's case is that all through until just before this Notice of Motion, she had been represented by Sheila Mugo Advocate who was attached to the firm of Kipsang & Co. But Shiela Mugo was not part of the firm and the applicant dealt with her directly, even though the address the applicant gave was “c/o Kipsang & Co.” In other words, the Respondents knew that the applicant's counsel was Shila Mugo, not the firm of Kipsang & Co. That is supported by hand written notes at the back of the Respondent's Replying Affidavit, Notes and order of this court, dated 7/9/05 where it is clear that Sheila Mugo could not be traced and had left the Address used earlier i.e. c/o Kipsang & Co.”

The Applicant should under the above circumstances have been served in person, since the Respondents knew that the counsel – Sheila Mugo, was no longer available to be served with such a Notice.

I am convinced, from the evidence on record that when Sheila Mugo left the address “c/o Kipsang & co” the applicant had no information as to what was happening, especially the fact that the interlocutory judgment, by this court, **vide** Ransley J, was subject to formal proof. These matters, I find, came to the applicant only after her current Advocates perused the file, by which date it was too late and the suit had been dismissed for want of prosecution.

The law is that mistakes of an advocate should not be visited upon the litigant. To fail to reinstate the suit herein would be condemning the applicant for the mistakes of her counsel who left without informing the applicant of what was happening and the status of the case which had been entrusted to her by the Plaintiff/Applicant.

That would not be fair or justice, coming from a court of equity which infact had granted an interlocutory judgment to this same applicant earlier on. To lose the case simply because of the mistake of the counsel in not informing the litigant would be unmitigated injustice.

This court would not be party to such move.

I find the submission by Respondent's Counsel that prior to 23/11/07 the Respondent had served all pleadings on the earlier address [Sheila Mugo, c/o Kipsang & Co.] and that had not been challenged in this application to be untruthful. The remarks in the Replying Affidavit herein before referred to are sufficient to rebut such a submission.

Even if Sheila Mugo received the Replying Affidavit, the bottom line is that Sheila Mugo had abandoned the Applicant and did not pass on such information to the Plaintiff. Should the litigant be punished for that?

The response is obviously “no.”

The submission by the Respondent that the applicant did not comply with this Court's orders of 19/2/08 is another untruth. That day, this court ordered that an appropriate application be made by the applicant. My perusal of the Notice of Motion herein, which was filed on 21/11/07 after the applicant had withdrawn the inappropriate one earlier, clearly shows that the order was complied with – namely that it is the court setting aside the order, and not the applicant/Plaintiff, as was the prayer in the earlier Application.

All in all, I grant the Notice of Motion herein, dated 29/2/08, and set aside this court's orders of 25/3/07 dismissing this suit for want of prosecution. I further reinstate the suit herein and order that a date for hearing of the same, on merit, be set down within the next three months from today's date.

The Respondent to bear the cost of this application.

DATED and delivered in Nairobi, this 29th Day of January, 2009.

O.K. MUTUNGI

JUDGE