

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 320 of 1996

JAMES KIMANI

JAMES MAINA KAMAU

SIMON NGUGI GITHUKU
.....PLAINTIFFS

Versus

FREDRICK MWANGI

NJOROGE MWANGI

DAVID WAINAINA.....
DEFENDANTS

RULING

The plaintiffs filed this case in July 1994 against defendants alleging assault and claiming general special damages. The defendants filed their defences on 22nd August 1996. The pleadings therefore closed 14 days after 22nd August 1996. The case was transferred to this court from Machakos High Court by an order of 19th September 1996. Directions for hearing of this case were given on 27th November 1998. It was not until 16th December 1999 that the plaintiff counsel attended this court's registry and obtained a hearing date for this case that is, 11th December 2000. On 11th December 2000 the case was adjourned generally by consent. On 13th December 2005 the defendant fixed this case for hearing on 24th November 2006. This case was removed from the hearing list of 24th November 2006 at the call over of 26th September 2006 in absence of all the parties. On 17th October 2006 the defendant obtained an ex parte hearing date for 8th May 2007. A hearing notice was served upon the plaintiff's counsel on 20th February 2007. On 8th May 2007 the plaintiff and their advocates failed to attend court and the case was dismissed for non attendance. The plaintiffs have now filed a chamber summons dated 3rd September 2008 brought under Order IXB Rule 8 of the Civil Procedure Rules. The plaintiff seeks an order that the court do set aside the order of dismissal of the suit dated 8th May 2007. The plaintiff seeks reinstatement of the suit. The application is supported by 3 affidavits. One is sworn by the plaintiffs' counsel. The second is sworn by the court clerk. The third is sworn by 3rd plaintiff Simon Ngugi. The plaintiffs' counsel deponed that on 8th May 2007 he had another High Court matter No. 1100 of 1991. He does not state in which court that case was but he states that due to that case he was unable to attend to this case and he sent his court clerk in the company of the 3rd plaintiff to attend the case with a view to applying for an adjournment. He does not state that he communicated his difficulties to the defendants' counsel. The court clerk Bonface Murage deponed that on the:-

“ way to Nyeri the car broke down and we were unable to reach Nyeri that upon perusal

of the court file I realized that the matter was dismissed on 8th May 2007 for want of attendance of the plaintiff.”

The third plaintiff Simon Ngugi Githuku deponed:

“That before we arrived at Nyeri the car broke down and due to the delay occasioned we could not arrive in time.”

The application was opposed by the defendants’ counsel who relied her own replying affidavit. Defence counsel deponed in the replying affidavit that she was not informed by the plaintiff’s counsel that he was engaged in another court matter. Further she deponed that the plaintiffs’ advocate were served with defendants’ bill of costs on 1st November 2007 and again on 15th February 2008. She was of the view that it was the service of that bill that caused the plaintiff to act by filing the present application. It was deponed that the application was made after inordinate delay.

The application although dated 3rd September 2008 was not stamped by this court registry as having been filed. I have also noted that the plaintiffs’ counsel only paid for one affidavit that is Kshs. 75 yet the application relied on three affidavits. It therefore follows that two of those affidavits which are before court were not paid for. The explanation given why the plaintiffs’ court clerk and the 3rd plaintiff failed to reach in court on time is unsatisfactory. The question that rises in my mind is whether they were traveling by private vehicle or a public one. If their vehicle broke down it is not clear why one of them could not take public means to court. But most unsatisfactory is the lack of an explanation of the delay of making this application. The suit was dismissed in May 2007. The application to set aside the dismissal is dated 3rd September 2008. That is one year and four months later. Although counsel now on record for the plaintiffs’ Mr. Mukunya tried to explain from the bar that the delay was caused by the previous counsel Mr. Kenneth Nganga Mungai there is no affidavit to support that statement. It is after all a very serious allegation against another counsel. Mr. Mukunya should have sought time to file an affidavit to support that contention. In going through the court file I did note that the 3rd plaintiff Simon Ngugi Githuku perused the court file on 7th May 2008. By that date he must have known that the suit had been dismissed. The application to set aside the dismissal however was filed in September 2008. It therefore follows that there is no explanation of what occurred between May 2007 and September 2008 to cause the delay of filing the present application. In reading the plaintiffs’ affidavit one gets the picture that not only the firm of Kenneth Nganga Mungai but also the plaintiff have failed to be truthful of why they failed to attend court on 8th May 2007. In those circumstances the plaintiffs are not deserving in the exercise of this court’s discretion in their favour. In the case of CMC HOLDINGS LIMITED V NZIOKI (2004)1 EA it was held:-

“A court should exercise its discretion in an application to set aside judgment judiciously. a litigant who suffers loss through the mistake of counsel can obtain recourse through suing his former counsel. However where the litigant has not deliberately sought to obstruct or to delay the cause of justice, ex parte judgment should be set aside to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error (Shah v Mbogo and another (1967)EA 116 approved.”

I find that the failure to attend court on 8th May 2007 was not due to excusable mistake and accordingly I will not grant the prayers sought by the plaintiff.

The plaintiff’s application dated 3rd September 2008 is hereby dismissed with costs to the defendants.

Dated and delivered this 27th day of January 2009.

MARY KASANGO

JUDGE