



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

Civil Case 2224 of 2007 (OS)

MIREILLE LOUSE NADINE SAGBOHANPLAINTIFF

versus

PETER WACHIRA NDIRANGU DEFENDANT

RULING

Following a successful application by Mr. Amuga who appeared before me as counsel for **PETER WACHIRA NDIRANGU** ('Peter), on 23/10/2008, I struck out a suit by Peter's wife **MIREILLE LOUSE NADINE SAGBOHAN** ('Mireille'), in an ex-parte hearing.

Being aggrieved by that decision, Mireille has now moved this court and she seeks an order to set aside the proceedings of the aforementioned day and all the consequential orders flowing there from and that she be allowed to prosecute the application which I had dismissed. She also prays for costs.

She relies on the grounds that:

- (i) *Her Notice of Motion which I dismissed in which she sought drastic orders was heard Ex-parte.*
- (ii) *The suit had been transferred from the Civil Division to the Family Division and that she had not been notified of the new case number.*
- (iii) *On checking the cause list, her counsel did not see HCCC NO. 2224 of 200, and that he consequently concluded that the matter was not listed.*
- (iv) *There is thus reasonable excuse for her advocate's failure to appear and to defend the application.*
- (v) *The failure to attend to this matter was not deliberate but was a result of the confusion occasioned by the alteration of the case number without due or proper notice.*
- (vi) *The said errors ought not to be visited upon an innocent litigant who has a meritorious defence to the application and a good cause to litigate.*
- (vii) *It is only fair just and correct to grant the orders sought.*

The application is opposed on the grounds that the applicant was aware of the change of the cause number; that notices were duly served and finally that the Originating Summons is incurably defective and would be struck out even if the suit is reinstated.

I however note that the applicant's counsel concedes that he was served with the hearing notice, and that they had filed their grounds of opposition, but that the matter listed under a different cause number. Mr. Kipkoge, the applicant's counsel who deposes as follows:

.. *'That on 23rd October 2008 I had instructions from Ms. Kigano & Associates to hold their brief in this matter with a view to defending the Chamber Summons dated 19th June 2008 which was opposed by virtue of the grounds of opposition dated 16th October 2008 and filed in Court on 17th October 2008'.*

.. *'That I on the said date I obtained a copy of the cause list and sought to establish where HCCC NO. 2224 of 2007 had been listed and on failing to identify the said number on the list I concluded that the same was not listed. (Attached and marked MKK1 is a copy of the cause list for the day)'.*

.. *'That I went to the Civil Registry seeking to know why the same was not listed and the Registry informed me that the said file was not traceable from its appropriate pigeon hole. I was informed that it was likely to be among the several matters which had been removed from the list for the day as the division had few Judges an explanation I thought was reasonable, I left the Court precincts'.*

.. *'That on 21st of November 2008 a notice of taxation of accounts was served upon M/s Kigano & Associates indicating that taxation of cost in this matter will be on 26th November 2008, apparently the matter was heard Ex parte on the 23rd of October 2008 and the application was allowed and suit was consequently struck out with costs (attached and marked MKK 2 is a copy of the bill)'.*

.. *'That I am informed by Mr. Kigano Advocate which information I believe is true that his firm was never informed of the new case number after the matter was transferred from the Civil Registry to the Family Division'.*

.. *'That but for the said error, the applicant was ready to defend the application and ultimately prosecute her suit fully'.*

.. *'The said error ought not to be visited upon the applicant who has genuine interests to litigate and will lose the opportunity to do so unless the orders sought are granted'.*

.. *'That the applicant is an innocent litigant who ought not to be visited by the errors of either the Court registry or of his advocates'.*

In an application for reinstatement, the applicant must demonstrate that he had plausible reasons for non attendance on the appointed day.

I have considered the pleadings herein and the submissions by both counsel and there is no doubt that this case was transferred to the Family Division from the Civil Division of this Court, on 18/6/2008, upon which transfer the cause was allocated new cause number. There is also no doubt that the cause number 30 of 2008 was listed for hearing on the said date, and that the parties names were indicated on the cause list.

I would however give the applicant, the benefit of doubt especially because her counsel has demonstrated that he had filed grounds of opposition and further that his non attendance was caused by the change in the cause number.

Having found as I do, I will not delve into the issue of the validity of the Notice of Motion at this stage for to do so would be prejudicial to the final hearing and determination of this suit.

The applicant shall bear the thrown away costs.

Dated and delivered at Nairobi this 30th day of April 2009.

JEANNE GACHECHE

Judge

Delivered in the presence of: