



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL APPEAL 392 OF 2003

PETER WAWERU.....APPELLANT

VERSUS

**KARURA HOLDINGS
LTD.....RESPONDENT**

J U D G M E N T

1. This appeal arises from an order which was made by a Senior Resident Magistrate on 18th June, 2003, dismissing an application brought by Peter Waweru, (hereinafter referred to as the appellant). The application was a chamber summons brought under Order IX B Rule 8 of the Civil Procedure Rules seeking to reinstate the appellant's suit which was dismissed on 3rd April, 2003 for non-attendance.
2. The appellant's counsel swore an affidavit in which he explained that on the material day, he was suffering from a severe headache which caused him blurred vision forcing him to stop by the roadside for about 30 minutes. As a result, he arrived in his office late. He found the appellant waiting for him in his office and together they proceeded to the court. They arrived at the court at 9.45 a.m. and found the appellant's suit already dismissed.
3. In his ruling, the trial magistrate was not impressed by the explanation given by the appellant's counsel. He noted that there was no medical evidence in support of counsel's alleged illness. And, that there was no affidavit from the appellant to explain his absence. He further noted that the appellant brought the application after a delay of 1½ months. He therefore dismissed the application.
4. Being aggrieved by that ruling, the appellant has raised 5 grounds of appeal as follows:
 - (i) That the learned trial magistrate erred in law and fact by failing to carefully consider the peculiar circumstances surrounding the application therein.
 - (ii) That the learned trial magistrate erred in law and fact for visiting mistake of counsel on the appellant.
 - (iii) That the learned trial magistrate erred in law and fact by holding the appellant was guilty of inordinate and unexplained delay.

(iv) That the learned trial magistrate erred in law and fact by failing to take in account that the appellant's failure to attend court for the hearing satisfactory explained.

(v) That the learned trial magistrate erred in law and fact by denying the appellant a hearing by dismissing the suit therein and deriving the appellant from the seat of judgment thereon.

5. In support of the appeal, Mr. Shimenga who appeared for the appellant submitted that the trial magistrate visited the mistake of the counsel on the appellant. He maintained that the reasons for the delay were explained. Relying on *CMC holdings Ltd vs Nzioki [2004] 1 EA 23*, counsel argued that the appellant should not have been shut out from the sit of justice.

6. Mrs. Mutava who appeared for the respondent opposed the appeal maintaining that the trial magistrate was right in dismissing the appellant's suit, as the court had nothing to confirm the counsel's alleged illness. Counsel maintained that there was no explanation as to why the appellant was not in court. Counsel stated that there was no admission of liability nor did the negotiations entitle any of the party to a judgment.

7. I have considered the record of the lower court and the submissions made by counsel. It is evident that although the appellant's advocate took a hearing date *ex-parte*, neither the appellant nor his advocate was in court for the hearing of the suit. Counsel for the appellant has sworn that he was late because he was unwell. His explanation is however unconvincing for three reasons. First, there is no averment or evidence that counsel sought any medical attention.

8. Secondly, although counsel became aware of the dismissal of the appellant's suit on the same day, it took him another 1½ months to bring the application to have the suit reinstated. Thirdly, the appellant has not sworn any supporting affidavit to confirm the allegations made by his counsel. In the circumstances, the trial magistrate could not be blamed for rejecting the appellant's application. It is apparent that this was not just a case of counsel failing to attend court, but even the appellant himself was not in court.

9. For these reasons I find no merit in this appeal, and do therefore dismiss it with costs.

Orders accordingly.

Dated and delivered this 21st day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Kabaru for the appellant

Advocate for the respondent absent