

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Suit 107 of 1994

WELLINGTON WANYONYI WANDABWA1ST PLAINTIFF

MARTIN WERE WANDABWA.....2ND PLAINTIFF

VRS

CHRISTOPHER NABANGA S/O MATAYO MUKUYI..... DEFENDANT

RULING

This is a ruling on an application dated 7th November, 2006 and brought under Order IXB Rule 8 of the Civil Procedure Rules and section 3A of the Civil Procure Act seeking for the following prayers:

- 1. That the exparte judgment entered and or orders made on the 13/7/2004 be set aside.*
- 2. That this suit be set down for interparte hearing.*
- 3. That costs of this application be in the cause.*

The grounds are on the face of the application and in the supporting affidavit of 1st Plaintiff/Applicant Wellington Wanyonyi Wandabwa. He depones that his case was dismissed by the court for want of prosecution on the 13th of July 2004. The Applicant contends that he was not served with the said mention date or with any notice of dismissal. Mrs Change represented the Applicant while Mr. Situma represented the Defendant/Respondent. The Applicant's counsel submitted that the suit was filed by her client through Onyinkwa and Co. Advocates and on several occasions the suit could not proceed for hearing. The Plaintiff later changed his advocates and was still waiting for the case to be fixed for hearing by his counsel. He kept coming to the court registry to check on his case but he was informed that there were no hearing dates. The Applicant lives in Funyula in Busia District and has shown a lot of interest in his case. He came to the registry at one time and was informed of the dismissal. The court record has no evidence of service of the dismissal notice on the Applicant. The Applicant should not be condemned to be unheard according to the counsel. The Respondent opposed the application relying on the replying affidavit of Mr. Christopher Nabangala. The Respondent depones that, there is exparte judgment on record which needs to be set aside. Further that the 1st Plaintiff has no authority to swear the affidavit on behalf of the 2nd Plaintiff. Mr. Situma submitted that for 2 ½ years the Plaintiffs never took a hearing date and therefore failed to show diligence in his case to justify this court to exercise its discretion. The fact that the applicant came to court on 13th July, 2004 shows that when the suit was dismissed, he was aware of the date. The Respondents therefore submits that the application is not merited and should be dismissed.

The court has perused the court file and agrees with respondent that the plaintiffs failed to move the court to hear their suit for a period of about 2 years. However the court record shows that the notice for dismissal issued by the court was not served on the Applicant and 2nd Plaintiff. A return of service filed in court on 9/7/2004 and sworn by the process server one Rasmus Otieno Orano indicates in paragraph 3B that efforts to trace Wellingtone Wandabwa and Martin Were failed and that they are not known within Funyula town. This clearly shows that they were not served with the notice of dismissal.

On perusal of court record, I find that, interlocutory Judgment was entered for the Plaintiffs against the defendants by the Deputy Registrar, Bungoma, on the 7/12/1994 contrary to what the Respondent stated. There is judgment in existence which was entered in default of appearance.

For the foregoing reasons the court finds the application merited and allows the same as prayed. The Plaintiffs' suit is hereby reinstated. A hearing date to be fixed in the registry. Costs in the cause.

Dated, Delivered and Signed this 10th Day of June 2009.

F. N. MUCHEMI

JUDGE