

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 426 of 1991

MURAYA KATHLEEN BUTLER.....PLAINTIFF

(*Suing as administratrix of* MICHAEL DERYCK BUTLER – DECEASED)

VERSUS

DALY & FIGGIS1ST DEFENDANT

KILOMBE LIMITED.....2ND DEFENDANT

RULING

This ruling is delivered in the chamber summons dated 25th March 2006 which seeks orders for the setting aside of the orders of this court issued on 4th October 2004 thereby dismissing the suit herein for want of prosecution. The applicant also prays that, upon the setting aside of the said orders, the suit herein be reinstated for hearing and be determined on merit. The orders of 4th October 2004 were recorded in the absence of the appellant or her advocate, when the respondents attended to argue the 1st defendant/respondent's application of 25th September 2000 in which they sought orders for the dismissal of the suit for want of prosecution. The court, after satisfying itself that a hearing notice and the application had been duly served, as was confirmed by an affidavit of service duly filed, the court treated the application as being unopposed and proceeded to allow the same.

Without offering any explanation as to why no one attended at the hearing of the 1st defendant/respondent's application in order to defend the same, the chamber summons before me sets out only three grounds in support, namely,:

- a) (That) Failure to fix the case for hearing was due to the negligence of the applicant's advocates.
- b) The applicant desires to prosecute his (?) case for the determination on merit.
- c) Ends of justice calls on (sic) reinstatement of the suit for determination on merit. (*alterations and additions by this court*).

The application is supported by an affidavit sworn by the plaintiff/applicant in which it is deponed, inter alia, that the applicant was served with a bill of costs scheduled for taxation on 25th March 2005 and that the applicant had, at the time, retained the services of J. A. B. Orengo & Company Advocates, of whom she says "**is my advocate on record**". The applicant depones also that she had not received any communications from the said advocates for over three years prior to being served with the bill of costs and that it was only after visiting the said advocate, to inquire what had transpired, was she informed that the suit had been dismissed for want of prosecution. She swears further that, had she known that her advocates had not bothered to fix the case for hearing she would have fixed the same for hearing or retained another advocate to represent her in the suit. The applicant blames the said law firm of J. A. B. Orengo & Co. Advocates for her predicament and contends that the suit is a serious one deserving a determination on merit.

The application is opposed by both respondents who have filed grounds of opposition in answer thereto. Basically the respondents contend that the application has no merit and that no proper explanation or valid reasons have been given to warrant the setting aside of the court's order or to reinstate the suit. In their grounds of opposition the 1st defendant/respondent reiterate that hearing notice for their application dated 25th September 2000 had been duly served and that the applicants' advocates, J. A. B. Orengo & Company were well aware of the application for the dismissal of the suit for want of prosecution.

The present application was argued at length with several authorities being cited in support of each party's position. The same, together with the submissions made by counsel have been carefully considered and so has the record of the court. The suit, the subject matter of this application was filed way back on 8th July 1991. Without an explanation as to why the applicants herein did not attend court to defend the application seeking orders for dismissal of the suit for want of prosecution, I do not consider myself well placed to set aside the Hon. Justice Kimaru's order of 4th October 2004, particularly because the applicant, in her affidavit in support of the present application clearly states that the firm of J. A. B. Orengo are still the advocates on record and were representing her even at the time she filed the present application. Nothing has been said in regard to the 1st respondent's contention that the said firm was duly served with the application for dismissal and had been on notice of the hearing of the same on 4th October 2004. Without such explanation this court has no reason whatsoever to upset the orders made on that date by the Hon. Mr. Justice Kimaru. Even considering what has been said by Mr. Kimatta, whose appearance for the applicant appears irregular under the circumstances, the record shows that the applicant has not explained the lapse of time between the time she filed the suit in 1991 to the time the 1st respondent applied for its dismissal in 2000. She has also not explained what steps she took to oppose the application for dismissal between the time it was filed and the time the suit was dismissed at the hearing thereof.

The appellant blames everybody but herself and has not bothered to obtain any confirmation from the firm of J. A. B. Orengo & Co. that they had not received notice of hearing as she alleges. Mr. Kimatta has not demonstrated any attempts made to seek an explanation as to the non-attendance on the 4th October 2004. Great injustice would be done to the respondents if this suit was to be reinstated given the circumstances under which it was dismissed. It is clear to me, all facts considered, that the applicant has been far too indolent in prosecuting the suit and cannot therefore benefit from the orders sought since equity cannot assist her. The fact that she considers the suit important ought to have engineered her towards having the same heard and determined expeditiously. In my view she is not an innocent litigant since she clearly condoned the action of her duly appointed advocates who she blames for her predicament. I am of the view that the present application has no merit and I hereby dismiss the same with costs.

Dated, signed and delivered at Nakuru this 23rd day of July 2009

M. G. MUGO

JUDGE