



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 318 of 2004**

**AYUB K.N REUBEN.....PLAINTIFF**

**VERSUS**

**MBURU KIMANI & 2 OTHERS.....DEFENDANT**

**RULING NO. 1**

The plaintiff applicant has moved to this court, by way of a chamber summons under order IXB rules 4, 8, section 3A of the CPA, and all other enabling provisions of the law. The application is dated 9<sup>th</sup> day of April 2009 and filed on the 13 day of May 2009. It seeks three prayers namely:

- “(1) That the order of dismissal of this suit, made on 12/2/2009 by this Honourable court be set aside.*
- (2) That this suit dismissed on 12/2/2009 BE re-instated for hearing.*
- (3) That costs be in the cause.”*

The grounds in support are set out in the body of the application, grounds in the supporting affidavit, and annexures as well as oral highlights in court. The major ones are that:-

- Indeed the matter is ripe for hearing.
- The plaintiffs counsel has been dutifully taking exparte hearing dates and then serving them on to the respondent.
- That the matter was to come up for the call over in the month of February 2009 but it was not confirmed.
- That they do not know how the same matter came to be listed for the hearing in the month of February 2009.
- That they came to learn of the matter having been listed for hearing and dismissed for want of prosecution when they went to fix the same for hearing.
- That it is in the interest of justice, that the matter be reinstated for hearing so that the same is disposed off on its own merits.

The defendant, has moved to oppose the application on the basis of the grounds set on in the replying affidavit. The major ones being that:-

- Concede that the plaintiffs counsel has unilaterally been fixing the case for hearing.
- That the hearing date for 12<sup>th</sup> February 2009 had similarly been fixed by them.
- The hearing notice was served on them on the 17<sup>th</sup> day of November 2008.

- It is their stand that, dispute whether or not the matter appeared on the call over list, they should have made effort to attend the hearing.
- The court, is invited to note that the matter had previously been listed for hearing on 11<sup>th</sup> June 2008, in respect of which date they had been served with a hearing notice. They duly attended the hearing, and the matter was allocated time for hearing. The plaintiff and his counsel, were not present, and the same could have been dismissed for non attendance had it not been for constraints of time, and in respect of which the court, advised to have the matter marked stood over generally.
- The court, is invited to take note that the conduct of the plaintiff is simply to perpetuate the procrastination of the proceedings and decline to indulge the plaintiffs.
- By reason of what has been stated above, the court, should decline the orders sought and then allow the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to proceed on with their lives and business without the burden of a suit hanging on to their heads. No case law was referred to the case.

On the courts assessment of the facts herein, it is clear that, indeed, the plaintiff's counsel has been making efforts to fix the matter for hearing as shown by the annexed notices OMM 1. Indeed these efforts yielded the acknowledged hearing dates, one in June 2008, and another one on the 12<sup>th</sup> February 2009. It is not denied that on the hearing date, fixed in June 2008, the plaintiff nor his counsel attended, but their no attendance yielded non penal consequences as the court, was not able to reach it due to constraints of time. Where as the hearing of 12/2/2009 invited penal consequences sought to be reversed because the court, was in a position to hear the matter.

That notwithstanding, the plaintiff applicant has approached the seat of justice seeking its indulgence. They seeks the court's discretion, though no case law on the exercise of the court's discretion has been cited to the court, this court, has judicial notice of the applicable principles on the same and these are:-

- (i) The exercise of the court's discretion is unlimited, unfettered, with the only fetter being that it has to be exercised judicially and with reason.
- (ii) It is exercised in favour of a party who through inadvertence, or excusable mistake or error, failed to take a procedural step, leading to the adverse orders being made against him. But not in favour of a litigant who has chosen, deliberately by whatsoever means to delay or derail course of justice.
- (iii) A court of law should take note that denying a litigant a right to be heard should be a last resort.
- (iv) A court of law should strive at all times to dispose off disputes on their merits as opposed to them being disposed off on a point of technicality.
- (v) Where an aggrieved party can be compensated for by way of costs, the court should not decline setting aside exparte orders.

This court has applied the above principles to the facts herein and finds that indeed there is evidence which has not been controverted by the respondents that the matter was not confirmed at the call over for the month of February 2009. That notwithstanding the matter was listed.

It has not been demonstrated how the matter came to be listed. But that notwithstanding, the applicants should have been on the lookout, and then attended court, and explained any predicament that they may have found themselves in. They are therefore to blame for what befell them. The above finding notwithstanding, it is to be noted, that the plaintiff has counsel on record. It was the mistake of counsel, not to attend court and shutting out the litigant on that account, would be too punitive. For this reason the court is inclined to reopen the matter for the plaintiff to be heard on the merits of the plaint. The defence will be compensated for by way of costs, both for the application and thrown away costs for 12/2/2009, to be assessed and paid for in the usual manner.

The applicants' application dated 9<sup>th</sup> April 2009 and filed on the 13<sup>th</sup> May 2009 is found to be meritorious prayers 1, 2 are allowed as prayed.

(2) Costs of the application as well as costs of 12/2/2009 thrown away, to the respondents.

**Dated, Read and delivered at Nairobi this 10<sup>th</sup> day of July 2009**

**R.N.NAMBUYE**

**JUDGE**