



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI (MILIMANI LAW COURTS
CIVIL SUIT 311 OF 2006

JANET GACHERI KITHELA PLAINTIFF

VERSUS

NATION MEDIA GROUP..... 1ST DEFENDANT/RESPONDENT

HELLEN N. MBUGUA 2ND DEFENDANT /RESPONDENT

RULING

Before me is an application by way of Chamber Summons dated 18th February, 2009. The same is brought under the Provisions of Order IXB Rule 8 of the Civil Procedure Rules & Section 3A of the Civil Procedure Act. It is supported by the affidavit of *M. S. Ligunya* Advocate sworn on the 18th of February, 2009. The application is seeking to set aside ex-parte orders issued on the 13th of November, 2008 dismissing the suit.

The Respondents vehemently opposed the application and relied on 12 authorities in total in support of their opposition.

The applicant's counsel, who swore the affidavit in support of the application contends that the orders were issued ex-parte as she was not present in court, secondly that she had asked a colleague to hold her brief she had requested the court to place the file aside to a later time as she was engaged in another courts. She was later to learn that the said colleague did not hold her brief after all. She urges the court not to punish the applicant due to her negligence.

Counsel for the Respondents took issue with the affidavit as sworn by the counsel for the applicant. She contends that the same is defective as the applicant's counsel had no direct authority so to do. Further that no good reason has been given for the court to exercise its discretion.

I have considered submissions by both learned counsels and authorities cited. Before the court are the following issues for consideration.

1. Whether the affidavit in support of the application is competent.
2. Whether or not there are good grounds to set aside the order dismissing the suit.

A look at the court record shows that Visram J dismissed the suit on 2 grounds. Firstly as the applicant's counsel was absent. Secondly the Judge found that the Respondents had satisfied the court that no steps

had been taken for a period of over 1 year to set the suit down for hearing.

In arriving at a decision I will start by considering whether the affidavit in support of the application is competent or not. From the affidavit it is clear that the counsel for the applicant has deponed to information within her knowledge & Information that come to her knowledge within her course of acting for the applicant. It is notable, that no where does she depone that she has been authorized to swear the affidavit by the applicant. However, this application was necessitated by the failure on the part of counsel i.e. failure to attend court. One would therefore expect such information to come from the counsel herself. In the case of **Pattni & Ali & 2 Others** (2005) I KLR the Court of Appeal stated:-

“there is otherwise no express prohibition against an advocate who of his own knowledge can prove same facts, to state them in an affidavit.”

Guided by the above authority I find that the counsel deponed on facts within her knowledge and I therefore do not find the affidavit offensive or incompetent.

On the second issue for consideration by the court whether or nor to exercise discretion to set aside the order dismissing the suit due to the non-attendance by the applicant's counsel I have carefully examined the affidavits on record and submissions.

The Plaintiff/Applicant's Counsel ***Mrs. M. Sande Ligunya*** depones in section of her affidavit dated 18th February, 2009:-

- 2. That the firm diligently proceeded to file suit and that at all times endeavoured to proceed with the matter to its conclusion.***
- 3. That between April, 2007 and April, 2008, there were changes in the law firm of Gitobu Imanyara & Co. Advocates upon which the counsel on record therein Wambui Kabage left the firm without proper hand-over thereby prompting the belief she had taken over the matter.***
- 4. That sometimes in the month of May, 2008, I received an application from the defendants advocates seeking to dismiss the suit (annexed and marked MSL 1 is a copy of the application.)***
- 5. That thereafter I proceeded to file a replying affidavit sworn on the 6th day of October 2008 explaining the circumstances surrounding the delay therein (annexed and marked MSL 2 is a copy).***
- 6. That the application came up for hearing on the 13th day of November, 2008, wherein I was ready to proceed with the same.***
- 7. That on the same day I had two other matters slated for hearing before Justice Dulu and Hon. Muya being HCCC No.691 of 2007 and EP No.23 of 2003 (Eldoret E.P. No.4 of 2003) Annexed and marked MSL3 are copies of Mention Notice and Taxation Notice)***
- 8. That I proceeded to seek a colleague Miss Dorothy Ombajo to hold my brief and to request the court to place the matter aside until 11.00 am to enable us proceed.***
- 9. That upon finalizing with the other two matters I proceeded to Hon. Justice Visram's Chambers and upon inquiry was directed that the matter had been stood over generally.***
- 10. That I had all reasons to believe that Miss Dorothy Ombajo had proceeded to hold my brief as requested.***
- 11. That it was only until the 10th day of February, 2009 that I became aware that the suit had been dismissed on account of non-attendance, vide the defendants letter dated 27th January, 2009 and upon perusal of the court file (Annexed and marked MSL 4 is a copy of the letter).***

12. *That the mistake herein was not intentional, neither was it in my knowledge at the time.*

On their part, the Respondents contend that no documents have been annexed in supported of averments in the said affidavit and that there are no sufficient reasons to set aside the order. The Respondents have cited authorities to the effect that a litigant ought to be vigilant and ought not to seek to set aside a suit solely due to the mistake of his/her lawyers, as it is the duty of the Litigant to check on the progress of the matter.

The plea to have the case reinstated herein is by counsel herself. Indeed she depones that upon learning of the dismissal within days she filed this application.

This court is being urged to exercise its discretion in setting aside the order for dismissal. The courts discretion is wide but ought to be exercised judicially to avoid any hardship and injustice to the parties before it.

I have taken into account the circumstances of the case and the fact that in dismissing the case for want of prosecution, Visram J. did not have the benefit of hearing from the applicant's counsel. I find that the reasons given for the delay in prosecuting the suit are sufficient to warrant another chance being given to the applicant to pursue the claim. It is trite law that a litigant ought not to be punished due to the negligence and/or inadvertence of their counsel I am of the view that the applicant herein ought not to suffer due to the negligence and/or inadvertence of her counsel I therefore accordingly make the following orders :-

1. *That the order dismissing the suit herein on the 13th of November, 2008 be and is hereby set aside.*
2. *That the Plaintiff do take steps within the next 45 days to set the suit down for hearing failure of which the same will stand dismissed.*
3. *The Applicant/Plaintiff do pay to the Defendants/Respondent throw away costs of **Kshs.7,500/=**.*

Dated and delivered this 23rd day of September, 2009.

ALI- ARONI

JUDGE