



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 1 of 2007

JOHN WAMBUGU KIMENJU PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL DEFENDANT

RULING

This suit was scheduled for hearing on 1st April 2009. However the case could not proceed as Mr. Nderi, learned counsel holding brief for Mr. Nganga, learned counsel for the Plaintiff applied for adjournment. The application was necessitated by the fact that Mr. Nganga, who had the personal conduct of this matter was engaged in another matter in the High Court of Kenya. Though Ms Munyi, learned Provincial Litigation counsel did not oppose the application, I nonetheless declined to grant the same on the grounds that it was the plaintiff's counsel who had taken the hearing date. Accordingly there was no justification for him to take up the Nairobi case on the same date. Thereafter, since no evidence was led by the Plaintiff in support of his case as he too was absent, I proceeded to dismiss the suit for want of attendance.

On 30th April 2009 the instant application was filed. In the application, the Plaintiff hereinafter referred to as "*the applicant*" seeks that the order dismissing the suit recorded herein on the 1st of April 2009 be set aside and the suit be re-instated for hearing and final determination on merit. The applicant also seeks that the costs of the application be provided for.

The application is anchored on the grounds that counsel's failure to attend court on the material day was not deliberate as he had another matter in the High Court of Kenya at Nairobi being ELC No. 607 of 2008. That he had already given notice of the Nairobi case to this court, that the parties to this suit had agreed to adjourn this case by consent and finally that the applicant would suffer irreparable damage if orders sought are not granted.

In support of the application, Mr. Nganga Esq swore an affidavit. In the main he deponed that much as he had fixed the hearing of this case on 1st April 2008, the judge in the Nairobi case fixed the same for hearing on the same date. Upon realizing that fact, counsel wrote a letter dated 20th March 2009 to the Deputy Registrar of this court requesting that this suit be taken out of the hearing list. He copied the letter to the Defendant's counsel. Assuming that his request had been taken up he proceeded to handle the Nairobi case. According to counsel therefore his failure to attend court was not deliberate and that the interest of justice would be better served if the application is allowed and the suit re-instated for hearing on the merit.

The application was opposed. The Defendant through Ms Munyi filed grounds of opposition to the effect that the application was incurably defective, an abuse of the due process of the law and that litigation must come to an end.

In his oral submissions in support of the application, Mr. Nganga simply reiterated the grounds for the application as well as what he had deposed to. Suffice to add that the instant application had been filed with due haste.

In opposing the application, Ms Munyi submitted that litigation must come to an end. The applicant took over a month to file the instant application. The defendant was never served with the letter referred to by the applicant. That the applicant's counsel elected to proceed to Nairobi at the expense of this case at his own peril.

I have carefully considered the application, the supporting affidavit, the annexures thereto, grounds of opposition, rival oral submissions and the law. The application is expressed to be brought under Order Rule 8 of the Civil Procedure Rules. This provision of the law gives this court unfettered discretion to set aside an order dismissing the suit upon such terms as are just. Like every discretion, however, it must be exercised on sound judicial principles and not capriciously. In doing so the conduct of the parties prior to and after the order of dismissal was made must come into focus.

This suit was filed on 9th January 2007. The Attorney General entered appearance on 28th August 2007 and filed defence on the same date. On 17th December 2008, the applicant fixed the case for hearing. On the hearing date, the case was dismissed for want of attendance by the Plaintiff and or his counsel. From the foregoing, it is quite clear that the applicant has exhibited the urgency to have the case heard and determined. Following the order of dismissal, the applicant timeously filed the instant application. Indeed he filed the application 29 days later. He cannot therefore be accused of inordinate delay.

The suit was dismissed because the applicant's counsel having fixed this case for hearing elected to proceed to handle another matter in the High Court of Kenya at Nairobi. It would appear that the Nairobi case was fixed for hearing by the judge. Having noted the mix-up as regards the dates, the applicant's counsel duly wrote to this court seeking to have the suit taken out of the hearing list for the day. Unfortunately that letter was not acted upon by the Deputy Registrar of this court. Had the letter been acted upon the order of dismissal could as well have been avoided. I think that this is a classic example where the sins of counsel should not be visited upon a client and or litigant.

I think I have said enough to show that I am in favour of allowing the application. Accordingly I grant prayer 1 of the application. However the applicant shall pay the respondent the costs of the application.

Dated and delivered at Nyeri this 17th day of September 2009

M. S. A. MAKHANDIA

JUDGE