



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 128 of 2006

NICHOLAS MUNYOKI

MASYA.....APPELLANT/APPLICANT

VERSUS

1. JOEL NGEI KITEME

2, MATHA NGEI.....RESPONDENTS

RULING

1. I am being asked to set aside the order dismissing the present Appeal on 26.3.2009 because there was none present to prosecute it. The Notice of Motion dated 7.4.2009 is premised on the following grounds.

a) *“That failure to attend court to prosecute the Appeal on 26th March 2009 was not deliberate but caused by the honest belief that this matter had been cause listed for mention and not hearing.*

b) *That counsel for the Appellant was on sick leave and both the Respondent’s Advocates and the Court were duly notified in advance of her inability to attend court on 26th March 2009.*

c) *That the Appellant is keen on prosecuting the Appeal and has promptly complied with the requirements of setting the appeal down for hearing.*

d) *That the Respondents have a decree in their favour for Kshs. 320,986/= and the Appellant has deposited the decretal amount with the court as security for the Appeal which is readily available for the Respondent.*

e) *That no prejudice will be occasioned to the Respondents that cannot be compensated by costs.*

f) *That the Appellant does not have any deliberate intention of delaying the prosecution of the Appeal.*

g) *That it is fair and just that the orders sought herein are granted”.*

2. The grounds are supported by the Affidavit of Barbara Lunani sworn on 7.4.2009 and she only adds that her absence in court on 26.3.2009 was unintentional and that the Respondent will suffer no prejudice if the Appeal is reinstated and determined on the merits.

3. The objection to reinstatement of the Appeal is contained in the Replying Affidavit of Muigai Gachau, advocate and in it he depones that the non-attendance on the material day was nothing new as the advocates for the Appellant had failed to attend court in the subordinate court and the hearing proceeded ex-parte. That their negligence cannot be perpetuated and that the delaying tactics should not be countenanced.

4. Firstly, there is the contention that on 26.3.2009 the Appeal was coming up for a mention to take a hearing date. The record does not bear the Appellant out because the mention was slated for 19.11.2008 “*to take dates*” for hearing and indeed on that date the record states that “*Lunani Advocate*” was present and took the hearing date ex-parte and hearing was set down for 26.3.3009. On that day, I refused to grant an adjournment because the argument that the matter was for mention was superfluous and I repeated the fact that the advocate for the Appellant is the one who took the hearing date. It is instructive that the same advocate who took the hearing date, Barbara Lunani admits that fact and shifts the burden to one Lillian Auma who allegedly informed her that the Appeal was to be listed for mention on 26.3.2009. I am unable to understand the genesis and basis for that shift of position.

5. Secondly, setting aside of an order of dismissal is a matter of discretion on the part of this court and the same should be exercised to ensure that Justice is done- see *Shah vs Mbogo & another* [1967] E.A. 116.

6. In this case, notwithstanding what I have said above the explanation given is to my mind reasonable in spite of my misgivings about the basis for the submissions about the mention date. I say this because I have seen a letter dated 12.3.2009 addressed to the advocates for the Respondent. In that letter, Ms Lunani stated that she was attending medical check up and would not attend court on 26.3.3009. The letter was copied to court and I see that the court copy was received on 23.3.3009. That matter was not brought to my attention because one Mr. Mutinda who held Ms Lunani’s brief never raised it all. He was intent on the mention issue only. To my mind, the fact that Ms Lunani had the courtesy to explain her predicament to her adversary in good time means that she was neither negligent nor disrespectful. She was in fact, sadly, the opposite of what most advocates sometimes do in the same circumstances.

7. I will say in conclusion that the inconvenience to the Respondent can be assuaged by an order of costs. The decretal sum is safely deposited and no prejudice would be caused because if the Appeal is heard on its merits.

8. The Application dated 7.4.2009 is allowed and the Appeal reinstated for hearing but the Applicant will pay Kshs. 2,500/= as costs thereof.

9. Order accordingly.

Dated and delivered at **Machakos** this **29th** day of **October 2009.**

Isaac Lenaola

Judge

In the presence of; Mr. Makau h/b for Mr. Muigai for Respondent

No appearance for Applicant

Isaac Lenaola

Judge