



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII Civil Case 119 of 1994

NYACHIRO SIRIBA PLAINTIFF

VERSUS

ONCHWARI MOGAKA 1ST DEFENDANT

GORI KIBONDORI 2ND DEFENDANT

A BANCHANI FARMERS CO-OPERATIVE SOCIETY3RD DEFENDANT

RULING

On 13th November, 2008 the Plaintiff's suit was dismissed with costs for want of prosecution. The suit was scheduled to be heard on that day, the hearing date having been taken by consent. When the matter was called out, both the plaintiff and his advocate were not in court but the defendants and their counsel were present.

On 20th November, 2008 the Plaintiff's advocate filed an application seeking to set aside the aforesaid dismissal order and have the suit reinstated to hearing. The application was supported by an affidavit sworn by the plaintiff. He stated that on 7th November, 2008, he telephoned his advocate, Mr. Migiro, to confirm whether they were to meet at Kisii law courts for the hearing of the suit. His advocate informed him that one Mr. Kibegwa of the High Court Registry had told him that the hearing will not proceed because the trial judge was hearing an election petition.

On 14th November, 2008 the plaintiff heard a son of the first defendant saying that the suit had been dismissed on the previous day. Alarmed by that information, the plaintiff went to his advocate's chambers to find out whether indeed the case had been dismissed. Mr. Migiro telephoned Mr. Kibegwa who informed him that the suit had been dismissed. Mr. Kibegwa allegedly said that the information that he had given to Mr. Migiro was erroneous.

Mr. Migiro also swore an affidavit to re-affirm the aforesaid.

The defendants' advocate, Mr. Soire, swore an affidavit in opposition to the said application. He contended that there was no sufficient material upon which the court could exercise its discretion in favour of the plaintiff. He urged the court to dismiss the application.

The record shows that this is a part heard land case. It is not disputed that the hearing date was taken by consent. There was no notice to the effect that the case was not going to be heard on 13th November, 2008 as scheduled. It is therefore not clear why Mr. Kibegwa advised Mr. Migiro that the case would not

be heard. I have no reason to doubt the contents of the plaintiff's affidavit as well as those contained in his advocate's affidavit. Mr. Migiro should have acted diligently by attending court together with his client on the hearing date inspite of what he may have been advised by the said High Court registry staff. Though counsel was negligent, that does not disentitle this court from exercising its discretion to avoid injustice or hardship being occasioned to the plaintiff. The defendants can be compensated by an award of costs.

I allow the plaintiff's application but he will bear costs of the application assessed at Kshs. 5000/=.

DATED, SIGNED AND DELIVERED AT KISII THIS 29th DAY OF OCTOBER, 2009.

D. MUSINGA

JUDGE.

29/10/2009

Before D. Musinga, J.

Mongare – c/c

Mr. Migiro for the Plaintiff

Mr. Soire for the Defendant

COURT: Ruling delivered in open court.

D. MUSINGA

JUDGE.