REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Civil Case 142 of 2002

ENVOY WAFULA NAKITARE.....PLAINTIFF

~VRS~

MULONGO SILUNGI.....DEFENDANT

RULING

The Applicant Envoy Wafula Nakitare in his application dated 18th December 2007 seeks for orders to reinstate his suit which was dismissed on 13th January 2007 for non-prosecution. The Applicant who appeared in person depones in his supporting affidavit that he was in court on 20th July 2006 when he was given a hearing date of 13th November 2007. He followed up with the registry unsuccessfully to have the hearing notice served on the Defendant's counsel. He was informed that the court file was missing. He confused the hearing date and thought it was on 15th November, 2007. When he went to court on that day, he found that the case had come up for hearing on 13th November 2007 and dismissed for his non-prosecution. The failure to attend court was not deliberate. He is still interested in prosecuting his case and urges the court to grant him the orders sought.

Mr. Ikapel for the Defendant filed grounds of opposition dated 3rd June 2008. He argued that the application is brought under the wrong provisions of the law namely Order IX A while the dismissal was not under that law. The Applicant's memory lapse is not an excuse to non attendance.

The court record shows that the Plaintiff took a hearing date in the registry on 20th July 2006. He was given 13th November 2007 as the date for hearing. There was no service on the Defendants of the hearing notice. On the hearing date, none of the parties were in court. The case was dismissed for non-prosecution under Order IX B, rule 4 by my sister Justice W. Karanja. This application for reinstatement was filed on 18th December 2007 which was only five (5) days after the dismissal. This is an indication that the Plaintiff is still interested in prosecuting his case. He pleads memory lapse on the confusion in hearing dates. This is a mistake that is human and excusable once he satisfies the court that the non-attendance was not deliberate. The only substantial ground in opposition to this application is that it was brought under the wrong provisions of the law. The dismissal was under Order IX B rule 4 and this should have been the law used by the Applicant herein. The Applicant is in person and may not be well versed with the law. His application leaves no doubt in the mind of the court that he wants orders of reinstatement of the suit. This court is a court of justice not one of technicality and will focus on the contents of pleadings rather than the form. The doors of justice should not be shut on a litigant who is not a lawyer due to such an anomaly. I hold that the application is properly before the court despite the use of the wrong legal provision.

The Applicant has explained himself. The mistake is excusable and I am convinced that it was not deliberate. He has shown keen interest in prosecuting the suit given the speed at which he filed this application.

I find his application merited and I hereby set aside the orders made on 13th November 2007. The suit should be fixed for hearing as soon as hearing dates are available in the registry. Costs in the cause.

F. N. MUCHEMI

JUDGE

Dated, Delivered and Signed at Bungoma

This 11th day of NOVEMBER 2009 in the presence of Mr.Ikapel for Defendant.