



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 39 of 1989

TERESIAH NDUTA KAMUNGE PLAINTIFF

VERSUS

CMB PACKAGING LIMITED DEFENDANT

RULING

APPLICATION TO SET ASIDE DISMISSAL

ORDES OF SUIT FOR NON ATTENDANCE

CHAMBER SUMMONS 14 FEBRUARY 2008

I: Background of Application

1. The original suit was filed sometime in 1989. The subject is TORT. A male adult aged 51 years old on 6 January 1988 was allegedly working for his employer CMB Packaging (K) Ltd. In the course of his employment it was the duty of the employer to provide transportation. The said male adult was dropped 2½ kilometers from his residence instead of his residence. Thugs or robbers attacked him and he sustained fatal injuries. His widow Teresiah Nduta Kamunge, the plaintiff herein, sued for General and Special Damages.

2. Trial commenced 10 years later before Mitei J (12.5.99 – 7.10.99) who heard the plaintiff's evidence and adjourned to hear the defence case. The judge last handled this case on 12 April 2000. It is unclear from the records what occurred but this court presumes that he may have been transferred to another station. The case came before Mbito J who ordered that the proceeding be typed. He later declined to hear this case.

3. It took three years before the proceeding were typed and as at July 2003 Nyamu J ordered a further mention to clarify whether the proceeding were typed.

II Representation

4. The plaintiff by now had informed Mbito J on 26 March 2003 that she wished to act in person. A notice of appointment of advocate was filed by M/s Sitati Mulisa & Co. Advocates representing the plaintiff on 11 December 2003. Consent dates were taken by both parties for hearing on 26 and 27 November 2003. The case was never set down for hearing on 11 December 2003. A further consent date was taken for 26 and 27 April 2004.

5. On the 26 April 2004, when the matter was called out for hearing the plaintiff and the advocate were absent. The suit was dismissed under order IXB r 4 Civil Procedure Rules for none attendance by the plaintiff.

6. Whilst her advocate was still on record, the plaintiff came to court seeking orders to set the dismissal orders aside.

7. To do so, she required to seek the courts leave to have her advocate come on record or as in this case to notify her former advocate that she did not intend to continue with the advocate (Order III r 9(a) Civil Procedure Rules.

8. Her application having been filed without leave of the court was struck out.

9. The plaintiff appointed Edward M. Maina Mwangi as an agent to represent her. He appeared before the Hon. Deputy Registrar who in effect gave leave for the Agent to come on record. The said Edward M. Maina Mwangi filed the current application to set aside the dismissal orders.

10. By the Annexures and the affidavit filed, it transpired that the former advocate had no practicing certificate for the year 2004 when this case came up for hearing. It also transpired that the plaintiff may not have been informed of the said failure of the advocates failure to attend court.

11. The said Edward M. Maina Mwangi informed the court that he acts as an agent for the plaintiff but also for others. He explained that he has a limited liability company duly registered with the Registrar of Companies at the Attorney Generals Chambers known as Edmoonma Agencies and Ent Ltd. It is a company that deals in "investigations, debt collection and commissions." after he investigates a case, he would request the client to give him a Power of Attorney and would then represent the said client in court.

12. In this particular case Edward M. Maina Mwangi informed the court that he worked in the police force as a civilian clerk. He qualified in his education up to Form II sometime in the 1960's before embarking in his business of investigations in his company.

13. He stated that his fees is Ksh.50,000/- that he is to charge the plaintiff when the case is complete.

14. Has the said Edward M. Maina Mwangi powers to represent the plaintiff as an advocate/agent? In order that he and the company be referred to the Law Society of Kenya to be investigated as to whether his action as an agent/holder of a power of attorney is permitted together with the action of charging fees for his services as an agent? Under the Civil Procedure Act Order III and the Advocates Act Cap.16 Laws of Kenya.

15. The former advocate, M/s Sitati Mulisa t/a Sitati Mulisa & Co. Advocate be investigated as to whether he was representing the plaintiff without a practicing certificate. That the Law Society do investigate this position and refer the same to the Advocates Complaints Commission.

III: Application

16. The plaintiff herein has been embarrassed on the issue of representation. I use my discretion herein and order that this suit be reinstated forthwith for further hearing. The investigations on representation should continue and a report given to this court within 30 days (formal mention 16 July 2008).

17. The said respondent had opposed the application on grounds that the delay in bringing the application was inordinate. That the said witnesses to be called may no longer be with the defendant company. This should be dealt with at stage of trial.

18. I nonetheless am of the opinion that the "good cause" shown be such that the plaintiff herein be permitted to precede with her application either in person or through another advocate.

19. The costs will be to the defendants to be paid by the plaintiff.

DATED THIS 16TH DAY OF JUNE 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

E. Maina (Agent) for the plaintiff/applicant – present

A. Muema holding brief for G. Mungara instructed by Hamilton & Mathews Co. Advocates for the defendant/Respondent