



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1120 of 2006

IRENE WAMBUI MUCHAI PLAINTIFF

VERSUS

SAMUEL MBURU MUNGEMWE DEFENDANT

RULING

APPLICATION TO SET ASIDE ORDERS

DISMISSING SUIT FOR NON ATTENDANCE

TO COURT ORDER IXB R 8 CIVIL PROCEDURE RULES

I: Background

1. The plaintiff applicant filed this Originating Summons under order XXXVI r 3F for the rectification of the register,

Section 143 RLA Cap.300 Laws of Kenya on alleged grounds of fraud. The dispute concerns land parcel LR 102/Kinyona/2077 on encroachment/boundary with her neighbour and Land Parcel

LR Loc.2/Kinyona/2076.

2. Parties appear to have had duplicity of suits filed in various courts a few being Hccc545/06, Misc. Appear No.2/06 Muranga LDT Case No.3104 Kigumo and P.M. CC344/99 Muranga.

3. The Originating Summons dated 26 October 2006 was fixed for hearing between the parties by consent on 8 April 2008. On the day called out for hearing the plaintiff and her advocate were absent. The suit was dismissed for none attendance.

4. A later application of 30 November 2006 was withdrawn that had sought the striking out of the Originating Summons. This application had been filed by the defendant/respondent.

II: Application 23 April 2008.

5. The plaintiff applicant filed application 23 April 2008 seeking for the setting aside of this courts orders dismissing her suit for non attendance to court.

6. The reason given is that instead of diarizing 8 April 2008 the advocate by mistake diarized 24 April 2008 as the date of hearing. This mistake he stated should not be visited upon his client. He relied on the case law of **Maina v Muriuki(1984) KLR 407** Okubasu J where the mistake of an advocate failure to attend court and judgment entered ex parte was held to be at the discretion of the court to set such judgment aside. A second case relied on of **Mugatcha v Mwakibundu (1984) KLR 572** Hancox JAa Chesoni and Nyarangi AG JJA where by the court dealt with the discretion by the High Court may be interfered by the court of appeal. The advocate for the plaintiff admitted the latter case may not be relevant to our situation.

7. The application was opposed by respondent/defendant on grounds that the applicant really did not have a valid case before court.

III: **Opinion**

8. Where a party does not attend court and the court dismisses the matter for non attendance, that party is permitted to attend court and make an application under order IXB r 8 Civil Procedure Rules to set aside the said order of the court. However to do so “good cause” must be shown that there indeed was an acceptable reasons why that party did not attend court.

9. I rely on the case law of **Ngome v Plantex Company Ltd 1984 KLR 794, Kneller, Hancox, Chesoni, JJA** that deals with Order IXb r 4 Civil Procedure Rules where once a suit is dismissed then there the plaintiff is not permitted to apply for the setting aside of the courts orders. Chesoni J (as he then) was argued that for “good cause” the order of dismissal may be set aside.

10. I note that in this matter there was an inordinate delay in bringing this application. I also noted that the advocate explained he had mistakenly given the wrong dates for hearing in his diary. This was an error on his part.

11. I would hold that the orders dismissing the said suit be accordingly set aside. There will be costs to the respondent/defendant.

Dated this 10th day of June 2008 at Nairobi.

M.A. ANG’AWA

JUDGE

Z.N. Gathaara instructed by Z.N. Gathaara & Co. Advocates for the plaintiff/applicant – present

E.N. Gitonga instructed by E.N. Kibunja and Associates Advocates for the defendant/respondent - present