



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISII

Civil Case 185 of 2004

JAMES SHANI SINDIYO PLAINTIFF

VERSUS

TOBIKO OLOLENKUSO DEFENDANT

RULING

This is an application seeking setting aside of ex-parte orders made on 11th March, 2008 and reinstatement of the defendant's application dated 5th February, 2008 which sought dismissal of the plaintiff's suit for want of prosecution. Mr. Soire for the plaintiff/applicant swore an affidavit and stated that on 11th March, 2008 he came to court at 9.00 a.m. but he was under the impression that the application dated 5th February 2008 was slated for hearing at 2.30 p.m. as had been the practice. However, the said application had been set down for hearing in the morning hours. When it was called out, Mr. Soire was not in court and Mr. Minda for the defendant urged the court to dismiss the suit for want of prosecution.

On the following day, Mr. Soire filed the present application.

The defendant opposed the plaintiff's application. Mr. Minda submitted that when he served his client's application upon Mr. Soire, it was clearly indicated that the same would be heard on 11th March, 2008 at 9.00 a.m. He added that the plaintiff's advocate came to court at 9.00 a.m. but went out shortly thereafter. He returned at about 11.30 a.m. when the court had already dealt with the application. In his view, there were no good reasons as to why the plaintiff's advocate did not attend court.

I have considered the rival arguments as briefly stated above. It is not in dispute that the defendant's application dated 5th February, 2005 was scheduled to be heard on 11th March, 2008 at 9.00 a.m. Mr. Soire had filed and served grounds of opposition to the said application. He says that he was of the mistaken belief that the application would be heard at 2.30 p.m. but he came to learn that it was heard in the morning hours. It cannot be denied that in this court applications are ordinarily heard in the afternoons and main hearings in the morning hours. I agree that Mr. Soire may have made a genuine mistake in failing to attend court when the application came up.

I have also looked at the pleadings herein. The dispute is over a parcel of land registered as TRANS-MARA/KERINAKANI/138. The said parcel of land is registered in the name of the defendant but the plaintiff claims that the defendant was so registered in trust for him (the plaintiff) and wants the court to order a transfer of the same. It is in the interest of justice that the case be determined on its merits.

For the above reasons, I allow the plaintiff's application as prayed. The plaintiff will however bear the

costs of this application which are assessed at Kshs.5,000/=. The said costs should be paid before the plaintiff takes any further step in the matter.

DATED, SIGNED and DELIVERED at KISII this 29th day of September, 2008.

D. MUSINGA

JUDGE

Delivered in the open court in the presence of:

Mr. Anyona HB for Mr. Soire for the Plaintiff.

Mr. Bosire HB FOR Mr. Minda for the Defendant.

D. MUSINGA

JUDGE.