



**REPUBLIC OF KENYA**

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

**Civil Case 1511 of 1997**

**DIDAR SINGH SEHMI & 3 OTHERS .....PLAINTIFFS**

**VERSUS**

**ELIZABETH MWARI MAINGI.....DEFENDANT**

**R U L I N G**

The Chamber Summons herein, dated 18/4/08, under Order 9B rule 8; Order 22 Rules 6 and 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap. 21, Laws of Kenya, seeks the following orders:

- 1.
3.       Already spent
- 4.
2.       The orders of this court, dated 14/3/07, dismissing the suit for want of prosecution be set aside or varied.
5.       The Matter be allowed to go for hearing on merit
6.       Costs of this application be in the cause.

The application is on the grounds, *inter alia*, that the matter was last in court on 14/3/05 when it was stood over generally, the order and decree of 14/3/07 has never been prepared, submitted or served upon the Plaintiffs/Applicant's Counsel, Mr. Ngunjiri as per Order 22 rules 6 and 7 of the Civil Procedure Rules; that the dismissal of the suit was done in absence of the Plaintiff's Counsel who had been taken ill and admitted at View Park Medical Consultants Limited where he suffered memory loss hence unable to recall 95% of all the things he had done, in turn necessitated a sick off for 21 days with effect from 26/2/07; the file had gone missing and that is why the Plaintiff could not take any steps in the matter and they are greatly prejudiced and aggrieved. The Plaintiffs had no intention of not setting down the matter for hearing.

In opposition, the Respondents, **vide** their Replying Affidavit of 24/4/08 **aver**, **inter alia**, that no decree had been extracted as per the law; that the Plaintiff's Advocates were served with the Notice of Dismissal

but failed to respond; they sent a clerk who got an Advocate to hold brief and apply for adjournment but the same was not properly clear on the issues and hence the application was unopposed and that is why it was granted by the court; it is not true that the Plaintiffs/Respondents were not aware of the dismissal application; the Supporting Affidavit by Mr. Ngunjiri is incompetent as it was done without authority; if the Plaintiff's Counsel was not aware of the application how did they send a Representative to the Court? There is no medical evidence that Mr. Ngunjiri, the Plaintiff's Counsel, was sick or he lost his memory; there is no discharge summary, and no treatment sheet. The receipts which are attached don't show what was being paid for and they are all dated 12-16<sup>th</sup> January 2007, no evidence that the Counsel was indisposed as at the date the application was served, on 14/12/06. Finally, the Respondent's Counsel submitted that there was no truth in the file going missing. Whenever the respondent needed to file anything for example on 2/6/06 – Notice of Change of Advocate; and on 10/1/07 when this application was filed, the file was always available.

I have carefully and closely perused the pleadings and submissions by learned Counsel for both sides and I have reached the following findings and conclusions.

At the beginning of this application there was a Preliminary Objection by the Respondent that the matter was not properly before this Court. That objection was overruled by this Court on the basis that the Notice of Objection was so vague: "on a point of law" that it was not fair to expect the applicant to hazard a guess as to what law was being alluded to and therefore how to respond to the same.

The following Ruling is, thus, confined to the issues raised in the Chamber Summons of 18/4/08.

The key ground relied on for this court to set aside its dismissal orders or vary the same is that the failure to appear and or defend the dismissal application was not intentional. Rather, it is because the Counsel for the Respondent/Plaintiffs – Mr. Ngunjiri – was unwell, admitted in hospital arising from which illness he lost 95% of his memory, and, the Clerk/Secretary in the Advocate's offices did not diarize the matter. Hence, the reason for the non-attendance and appearance.

My reading of the pleadings does not support the above submission by the Applicant/Plaintiffs. To begin with, there is no medical report to support the claim that Mr. Ngunjiri was hospitalized and suffered a 95% memory loss. In the absence of such documentary evidence as to what Mr. Ngunjiri was treated for and the status of his memory faculties, the averment is in the air. The receipts which are attached to the application do not suffice in that they don't say what the payment was for.

Further, the receipts are confined to a period of only five days – 12<sup>th</sup> to 16<sup>th</sup> January 2006. The impression from the entire application is that Mr. Ngunjiri was under treatment – for whatever it was – for much longer than five days.

Of even greater concern to me is the failure by the applicants to show that when the application for dismissal was served on the Applicant's Counsel's Chambers on 14/12/06, that is the time Mr. Ngunjiri was in hospital. Besides, the averment that the Counsel did not know of the hearing date for the dismissal application is belied by the fact that there was a representative holding brief for Mr. Ngunjiri, only that he was so poorly briefed that he said nothing in the court during the dismissal application, leading the court to conclude that the application was unopposed, therefore granted.

If the matter was not diarized in Mr. Ngunjiri's Diary, how did the Representative appear to hold brief?

The Applicant/Plaintiffs appear to be economical with the truth.

I have looked at the claim that the File had gone missing and that is why the Applicant/Plaintiffs had not taken any steps to prosecute the case. That claim is not substantiated. How come the file was available whenever the Respondents wanted it and not when the applicants needed it? I don't believe the claim.

On the submission that the Defendant/Respondent failed to fix a hearing date, even though the Plaintiff/Applicants also failed to fix such a date, my understanding of the law and the practicalities of its

application is that Order 16 rule 5(d) of the Civil Procedure Rules gives the Defendant an option to either set the suit down for hearing or apply for its dismissal.

Such an option does not exist for the Plaintiff whose duty it is to prosecute the suit expeditiously and with diligence.

This court has consistently, and persistently, held that no reasonable Defendant would opt to set down the hearing of a suit against him/her if he/she can have the suit dismissed altogether for want of prosecution. That is what happened in this case.

In the result, I find and hold that the Applicant/Plaintiffs have not made a case to warrant the orders they seek of setting aside this court's orders of 14/3/07 or varying of the same.

The application is accordingly dismissed with costs in favour of the Respondent/Defendant and against the Plaintiff/Applicants.

It is so ordered.

DATED and delivered in Nairobi, this 25<sup>th</sup> Day of November, 2008.

**O.K. MUTUNGI**

**JUDGE**