



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

CIVIL CASE 363'A' OF 1993

MUCHIRI KARAYA)

MARY NYAMBURA KARAYA).....PLAINTIFFS

VERSUS

EPHRAIM MWANGI KARAYA)

BENSON GATEI MACHARIA).....DEFENDANTS

R U L I N G

I have before me a chamber summons application dated 6th February, 2008 and filed in court the same day. It is expressed to be brought under *Order 1XB rule 8* of the Civil Procedure Rules. It seeks orders that this court may set aside its order of 28th January, 2008 dismissing the applicant's suit for non-attendance and reinstate the said suit for hearing. It is anchored on the grounds:-

- a) That failure to attend court on 28/1/2008 by the plaintiffs' was neither intentional nor deliberate.
- b) That the plaintiffs' (sic) letter inviting them to attend court on 28th January, 2008 did not reach them.
- c) That the plaintiffs' have always attended court on previous occasions and have been more than willing to have the suit heard and determined.
- d) Their application has been brought without delay.
- e) That factors leading to their non-attendance are beyond control.

It is further supported by an affidavit dated 6th February, 2008 sworn by the applicant. This affidavit and the court record provides some history of this matter which is that on 27th September, 1993 the applicants sued the respondents praying that the respondents be ordered to split land parcel number Magutu/Ragati/257 into two equal portions and give one portion thereof to the 1st applicant. They also asked for costs. Subsequent thereto a defence was filed in which the respondents denied the applicants' claim. They went on to contend that the suit premises belonged to the 1st respondent's step mother who had adopted him as her son and caused the suit premises to be registered under his name by way of a gift *intervivos* and therefore the applicants had no right to claim the same. Finally they contended that the 1st respondent was no longer the registered proprietor of the suit premises as he had already transferred it to a third party.

On 12th July, 1995, the applicants amended their plaint and brought in the 2nd respondent. In the

amended plaint, the applicants now sought the cancellation of the 2nd respondent as the registered proprietor of the suit premises. It would appear that thereafter the applicants went to sleep and did not bother to set down the suit for hearing. By an application dated 18th January, 2003 and filed in court on 22nd January, 2003, the respondents applied for the dismissal of the suit for want of prosecution. The application was however opposed and in a ruling delivered by Justice Okwengu on 27th July, 2006, she disallowed the application but ordered the respondents to fix the case for hearing within 60 days failing which the applicants were at liberty to re-apply for the dismissal of the suit. On 9th October, 2006 the applicants fixed the case for hearing for 24th January, 2007. It should however be noted that that date was way beyond the 60 days grace period granted to the applicants by the judge within which to fix the case for hearing. Be that as it may, the case eventually came up for hearing on 24th January, 2007. However it could not take off as the 1st respondent was sick. The case was then stood over to a date to be fixed in the registry. The matter was again fixed for hearing on 28th January, 2008. On that occasion, the matter came before me. Mr. Mwangi, learned counsel applied for adjournment for the reason that he had last seen the applicants when the case last came up in court for hearing. That thereafter he had written to them severally without any response.

Mr. Njuguna, learned counsel for the respondents opposed the application for adjournment and rightly so in my view stating that the case had been in this court corridors for over 15 years and that the applicants had not been enthusiastic to prosecute the same. I rejected the application for adjournment and there being no evidence in support of the applicant's claim and the respondents not admitting any part of the claim and their being no counterclaim, I proceeded to dismiss the suit for want of attendance and or evidence. It is this order that I am now being asked to vary and or set aside.

What are the reasons? Essentially the applicants are saying that when their counsel fixed the case for hearing, he wrote a letter to them alerting them of the developments but the letter failed to reach them. Accordingly they were unable to attend court. Had they received the letter, they would definitely have attended court as they had always done. They claimed that their application was made in good faith, without delay and that justice will only be served after both parties have been accorded an opportunity to be heard.

The application was opposed. Through Messrs S.K. Njuguna & Co. Advocates, the respondents filed a replying affidavit in which in the main they deponed that the applicants were not being candid, that there was no proof that their counsel had communicated to them the hearing date and that from their conduct, they were indolent. Finally they contended that the application did not have enough material for the court to exercise its discretion in the applicants' favour.

In their oral submissions in support and in opposition to the application respective counsel merely reiterated and expounded on what had been deponed to in the supporting and replying affidavits.

Under *order 1XB rule 8* of the Civil Procedure Rules, this court has wide and unfettered jurisdiction to set aside or vary the judgment or order upon such terms as are just. However in exercising this discretion just like every other judicial discretion it must be exercised judicially and not capriciously. A litigant who wishes the discretionary hand of this court to tilt in his favour must be candid in whatever he says and demonstrate that he has not been indolent but enthusiastic in the prosecution of his case. A glance at the history of this case and the conduct of the applicants does not give that comfort.

This case has now been pending in this court for the last 15 or so years. The record does not show that the applicants have been anxious or indeed enthusiastic in their prosecution of the same. After the filing of the suit and close of pleadings it was not until after 3 years down the line that summons for directions were taken out and granted on 27th September, 1996. Thereafter the case was not fixed for hearing until 11th December, 1998 a period in excess of two years. The case then came up for hearing on 20th December, 1999. On that occasion though Mr. Njuguna for the respondent was present, neither the applicants nor their counsel were present. Accordingly the suit was stood over generally. Thereafter the matter next came before the Deputy Registrar on 30th June, 2003 and was again stood over generally in

the presence of both counsel. It is not apparent from the record what necessitated that order.

Thereafter the respondent filed an application for the dismissal of the suit claiming that the applicants had not taken any action to prosecute their case for over 3 years since 20th December, 1999. As already indicated, the application was opposed. However the learned Judge reluctantly turned down the application but directed the applicants to fix the case for hearing within sixty (60) days. That order again was not complied with as it was flouted. Instead the applicants fixed the case for hearing after seventy seven (77) days.

Again when the case came up for hearing though fixed outside the time frame set by the learned Judge, it could still not take off. This time around, it was due to the illness of the 1st defendant. That was on 24th January, 2007. Thereafter it was not until 15th October, 2007 that the applicants again fixed the case for hearing again. This was again ten months down the line. On 28th January, 2008 when the case was scheduled for hearing, the applicants were absent for no apparent reason(s).

It is clear from the above narrative that the applicants have not been keen on prosecuting the case. They have been indolent. It is not for this court to assist the indolent. As stated by Lord Denning in *Fitz Patrick V Batger & Co. Ltd* (1967) 2 ALL E.R.657, Public Policy demands that the business of the courts should be conducted with expedition. It is also in the interest of public policy that litigation must come to an end at some point. I do not think that it is fair for a case to be left hanging around the necks of the respondents for too long for no fault of their own.

The hearing date for the suit was taken by the applicants' counsel *exparte*. Subsequent thereto he served a hearing notice on the respondents' counsel. When the case came up for hearing, the applicants' counsel could not proceed as the applicants were absent even after he had written to them severally notifying them of the hearing date. That is what the applicants' counsel told the court on that day whilst seeking for an adjournment. The applicants now would wish this court to believe that their counsel only wrote to them once. I choose to go by the word of counsel. And even if he wrote to them once, how come between 24th January, 2007, when the case was last in court and 28th January, 2008 when it was dismissed, they had never bothered to call upon their counsel to check on the progress of their case. This was a whole year down the line. That the applicants would take a whole year without calling on their counsel regarding their case smacks of precipitate indolence for which this court has no sympathy. It is the contention of the applicants that their failure to contact their lawyer on the matter for over a year was due to an agreement reached between them and their lawyer that once a new hearing date was taken, their lawyer would inform them through the physical address of their friend one, John Kimuhu. I do not believe this assertion. First and foremost their counsel has not deposed to that agreement. Secondly, no reason is given why it became necessary that their lawyer should this time around communicate with them through the physical address of their friend instead of the normal postal address. The record shows that in all their pleadings the applicants had all along used their postal address as P.O. Box 241 Karatina. Thirdly, there is no evidence from their alleged friend that he had accepted to be the contact person between the applicants and their lawyer. Fourthly, the applicants have admitted that their counsel forwarded a letter regarding the hearing date through their alleged friend. Now if the agreement reached as claimed by the applicants was that they should be reached through the physical address of their friend, why then would their counsel overlook that agreement and instead forward the letter through the postal address of their friend. Fifthly, the applicants claim to have visited their alleged friend on 4th February, 2008 and established that on 22nd December, 2007, their friend had travelled to Kericho but never informed them. This assertion begs one question, how would they have known that the said letter will have reached their friend on that date. It is instructive though that a copy of the said was not even annexed to the affidavit in support of the application. Is it not possible that the said letter if at all may have reached their friend much earlier or even later? After all the hearing of the case was on 28th January, 2008. It is also not lost on me that in the present application, the applicants have deliberately used C/O Mathira Division as their physical address and not their alleged friend's physical address. Is this a tactical ploy to hoodwink this court into believing that the applicants no longer have a postal address? If that was the intention, it is obvious that they have miserably failed.

It is for all the foregoing reasons that I am of the view that the applicants have not been candid with the court.

In view of the foregoing, I find that this application is unmerited. Accordingly it is dismissed with costs to the respondents.

Dated and delivered at Nyeri this 20th November, 2008.

M.S.A MAKHANDIA

JUDGE