



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE 252 OF 2002

IRENE W. KAGONDU.....1ST PLAINTIFF

MARY WANDIA KAGONDU.....2ND PLAINTIFF

*(Suing as the legal representative and administrators of the estate of the late
PATRICK MWANGI KAGONDU)*

VERSUS

W. K. TILLEY (MUTHAIGA) LIMITED.....1ST DEFENDANT

WALTER JUMA APONDI.....2ND DEFENDANT

RULING

The defendants/applicants sought for stay of execution of the judgment delivered on 13th June 2008. They also prayed for; the judgment to be set aside, the defendants be allowed to call defence evidence on terms that the court may deem just and expedient; the defendants be allowed to lead evidence against the plaintiffs claim.

The application is premised on the grounds that the suit was fixed for further hearing on 22nd April 2008. Mr. James Rimui who had previously attended court during the hearing of this matter, was instructed by Mr. Amoko. However Mr. Rimui was unable to attend court on 22nd April 2008 because he was scheduled to attend another urgent matter thus he requested another counsel Mr. Nyaribo to attend court on his behalf. The vehicle transporting Mr. Nyaribo broke down due to mechanical problems along the way. There are three affidavits which explain in detail how **Mr. Rimui** was unable to make it to court, he instructed **Mr Nyaribo** whose vehicle broke down and called another counsel by the name **Mr Waichungu** who appeared in court and applied for an adjournment on grounds that Mr Rimoi was held in the Court of Appeal. The court declined to grant the adjournment and ordered the matter to proceed at 12 noon.

There being no appearance at 12 noon counsel for the plaintiff addressed the court and closed the plaintiffs' suit. The court directed the parties to file written submissions for hearing on 5th May 2008. On that day, it was **Mr. Ndumia** who held brief for the defendants counsel and sought for an adjournment which was refused. The court therefore proceeded to receive submissions from the plaintiffs and a judgment was delivered on 13th June 2008. Mr. Rimoi also filed an application dated 2nd May 2008

seeking to re-open the matter for the hearing of the defence which application was subsequently withdrawn.

Mr. Amoko urged this court to set aside the judgment and allow the defendants to call evidence from the driver of the motor vehicle and the police officers who carried out the investigations. He submitted that failure to appear in court on 22nd April 2008, was a mistake by counsel which should not be visited on the defendants. The defendants are desirous of calling a defence witness and adduce evidence on the issue of liability and even quantum. Counsel made reference to the case of **Shabir Din vs. Ram Parkash Anand, Civil Appeal No. 72 of 1952 [EACA] 48** where it was held that:

“(1) The mistake or misunderstanding of the plaintiff’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief under Order IX, rule 20 aforesaid, the discretion of the court being perfectly free and the words “sufficient cause” not being comparable or synonymous with “special grounds”. Whether the grounds for granting relief will be accepted, depends on the facts of the particular case, it being neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.”

Mr. Amoko argued that re-opening the case to tender evidence will not prejudice the plaintiffs in any event this suit was filed six years ago and the plaintiffs can be adequately compensated by payment of thrown away costs and other conditions that the court may deem fit to impose.

This application was opposed by the plaintiffs. They relied on the affidavit of Mr. Henry Aming’a who detailed that on 22nd April 2008 Mr. Rimui informed him that he will attend court at about noon and requested the file be placed aside until noon. However Mr. Waichungu who held brief for Mr. Rimoi applied for an adjournment which the court refused to grant and the matter proceeded, by plaintiffs closing the case and since there was no evidence by the defence, the court directed parties to file written submissions for hearing on 5th May 2008. The plaintiff should not be made to account for the inefficiency in defendant’s advocates offices. It is the defendants who chose an ally of lawyers to wit; **Mr. Amoko, Mr. Rimui, Mr. Nyaribo, Mr. Waichungu, Mr. Matiri, Mr. Ndumia**. Behind these lawyers is a Corporation and an Insurance company who are pitied against the plaintiff, a widow who is seeking compensation in respect of her deceased husband’s estate.

The plaintiff will suffer prejudice because these lawyers have been set up and the application before the court are contrived to ensure that, she will not enjoy the fruits of her litigation. The plaintiff lost her husband eight years ago, he was the sole bread winner, and setting aside a judgement will occasion her prejudice. While the defendants seek to filibuster the proceedings. Even the application before the court is filed by the advocates. There is no indication that the defendants are associated with the application. On the day the matter was fixed for hearing on 22nd April 2008 the matter was called out, defendant did not show up or any of the witnesses. There was also counsel in court who could have proceeded to lead evidence as he held Mr Rimui’s brief.

This matter was determined based on the evidence on record and on a balance of probabilities. The court relied on evidence of an inquest that was conducted by the Police. Counsel for the plaintiff urged the court to dismiss this application. He relied on the case of **Muthaiga Road Trust Company Ltd vs. Five Continents Stationers Limited & 2 Others [2003] KLR 714** where the Court of Appeal held that:

“3. The court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.

4. A defence on the merits does not mean a defence that must succeed but rather a triable issue that is an issue which raises a prima facie defence and which should go to the trial for adjudication.”

In this particular case, it is alleged that the defendants intend to call the Police and the driver of the defendant’s motor vehicle. However, I find that on the day the matter was set for hearing these witnesses were not in court. There is a judgment of an inquest that was conducted by the Police. It was held that the driver of the defendant’s motor vehicle should be charged with causing death by dangerous driving.

Are there triable issues in this matter really?

The defence participated in these proceedings, even when the matter came up for further hearing on 22nd April 2008, a counsel made an application for adjournment which the court declined to grant. Even if their counsel was held up, the defendant or their witness could have offered the evidence. In the absence of the defendant, the court closed the defence and fixed the matter for submissions. Even on the date fixed for submissions, the defendants did not tender their submissions and judgement was delivered on the 13th June 2008.

That is the judgement counsel for the defendant applies to set aside on two grounds, if I understand him well, firstly, failure by counsel to attend court was a mistake by counsel and should not be visited upon the innocent defendant. As stated above, the defendants or their witnesses were not in court on the 22nd April 2008. More fundamentally, they have not even sworn an affidavit in this matter to explain themselves or as **Mr Kagucia** submits, to associate themselves with this application. I am afraid the defendant in this matter chose to be represented by his advocates; they should suffer the consequences arising from the choice of their own lawyers.

On the second issue, that the defence raises triable issues, again I am aware that the discretion to set aside a judgement is flexible and it is exercised on terms that are just. The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence error or excusable mistake. It is not to assist a person who deliberately seeks to obstruct the course of justice.

This question of why the defendants whose case was set down for hearing on, 22nd April 2008, was not in court for the hearing of their own case or their witnesses still remains unresolved. What defence is to be given by the police, in the face of the outcome of an inquest also abounds and lends credence to my view, that there is no triable issue demonstrated by this application to warrant the exercise of this court's discretion.

In the result I find no merit in this application, which is dismissed with costs.

Ruling read and signed on 14th November, 2008

M. KOOME

JUDGE