



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

Civil Case 17 of 1999

CHEPKULUL ARAP MELEKPLAINTIFF

VERSUS

KIBIMAR ARAP MELEK DEFENDANT

RULING

Application to set aside dismissal orders of the Court Chamber Summons dated 10th December, 2008

I: Background

1. The parties herein are related to each other as step-brothers. The plaintiff/applicant sued the defendant/respondent in the High Court of Kenya at Kericho on the 23rd July, 1997 on a dispute of Land ownership to parcel land LR kericho/Chemaner/1292.
2. When the case was called out for hearing on 25th July, 2001 the defendant was present but the plaintiff and his advocate were absent. Rimita J dismissed the suit for non attendance.
3. Nothing occurred in this case further until sometime in the year 2007, the defendant served the plaintiff with a bill of costs. The plaintiff/advocate applied by an application 3rd November, 2007 for stay of execution and setting aside the Court's orders. This was withdrawn and another filed on 2nd December, 2008 that was duly struck out.
4. The Plaintiff's advocate had completed dealing with the issue of representation when he filed the application of 10th December, 2008. The said application was partially abandoned on the issue of stay of execution.

II: Application 10th December, 2008

On the setting aside the courts dismissal orders.

5. The Plaintiff and through his advocate gave an explanation that the service upon him had been done by registered post to the advocate. It was inadvertently not diarized and the notice somehow was misplaced.
6. The plaintiff was therefore not aware of the dismissal orders until he was served with a bill of costs sometime in the year 2007. It was then he became aware of the dismissal orders.

7. The advocate filed an application of 3rd November, 2007 and 2nd December, 2008 which was then withdrawn and or struck out due to the issue of representation.

8. An application of 10th December, 2008 was partially allowed on the prayers for stay of execution. The prayers for setting aside the dismissal orders was changed.

9. In reply the advocate for the respondent noted the application had been brought within an inordinate delay. That in fact the application had not been made by good faith. That there was no adequate reasons given for bringing the application that was dismissed in the year 2001. That the plaintiff failed to appear for taxation and only became active when he was to be attached.

10. The advocate relied on the case law which demonstrated that the mistake of advocate may be excusable but in instances this indulgence of advocate may not be excusable. (**Thrift Homes Limited v Kays Investments Ltd(Nrb) HCCC 1512/98 Githinji J**

Madison Insurance Company Ltd v Samwel Ndemo Makori CA 10/2003)

11. The applicant has relied on the case of **Maina v Muriuki (1984) KLR 407** Okubasu J. That this be at the court discretion on whether a matter dismissed for non attendance be dismissed or not.

III: Findings

12. None of the parties have been heard on merits in this case. The Plaintiff failed to attend court and the Hon. Judge (Rimita J) was correct in dismissing the case for non attendance. This occurred in 2001. For six years the plaintiff never moved this file until he was served with taxation and attachment notices.

13. The advocate for the plaintiff then made application to stay the execution and further set aside the exparte judgment.

14. I am made to believe that from 2001 to 2007 the plaintiff was unaware that his matter had been dismissed. He then, as soon as practicable made similar application.

15. The advocate for the plaintiff admitted some oversights on their part which should not be visited on their clients.

16. In the case law of **MAINA V MURIUKI (1984) KLR 408** the discretion of the court is relied on in matter of setting aside the orders of the court.

17. I find that the said orders dismissing the suit for non-attendance has been explained by the plaintiff as to his absence. The delay further in bringing this matter to court laid with the advocate. They also failed to sort out the issue of representation and to be diligent in this matter.

18. The court hereby allows the application to set aside the orders of July, 2001 dismissing this suit for non attendance. The plaintiff be and is given leave to prosecute his case.

19. I award the costs of this application to the defendant/respondent to be borne by the advocate for the plaintiff personally thrown away at Kshs. 5,000/=.

DATED this 17th day of December, 2008 at **Kericho**.

M.A. ANG'AWA

JUDGE

Advocate

S.T. Khalwale instructed by Kimaru Kiplagat & Co. advocates

for the Plaintiff/applicant – present

A.C. Bett instructed by M/S Bett & Co. advocates

for the defendant/Respondent - present