



1. Land and Environmental Law Division

2. Subject of main suit TORT

Police shooting

3. Civil Practice and Procedure

1) Suit dismissed for non attendance of plaintiff to court order IXb r 4 Civil Procedure Rules 16 January 2006.

2) Application to set aside dismissal orders 22 January 2007

i) Reasons

a. The advocate informed the plaintiff not to attend court on the day matter fixed for hearing as negotiation are to continue

b. Out of court settlement

3) No opposition to application

4) Held:

I) a party is not to assume that on the day the case or any matter is fixed for hearing they can adjourn the same without a court order

ii) That the plaintiff relied on advocate who asked her not to come to court. This was erroneous as the advocate was being presumptuous.

ii) Application brought with due delay

iii) Courts discretion – dismissal orders be set aside

5) Case law

a) Python Waweru Maina v Thuku Mugua CA 27/82

b) Ngome v Plantex Co Ld CA 91/83 792

Kneller, Hancox JJA & Chesoni Ag. JA

6) Advocate:-

B.K. Bosire for J.D. Murimi & Co. Advocates for the applicant

M.A. Stima State Counsel for Attorney General the defendant

**NANCY YABSABILA MBITO Suing as the legal representative of
the Estate of ALLAN KIMTAI MBITO (Deceased).....PLAINTIFF**

VERSUS

THE HON. ATTORNEY GENERALDEFENDANT

RULING

INTRODUCTION

1. The original suit involves TORT- and concerns police shooting that turned fatal.
2. On the day the suit was called out for hearing the parties were absent. The advocates acting in this matter had their briefs held and were unable to call evidence.
3. The suit was dismissed under Order IX (b) r 4 Civil Procedure Rules for non attendance on 16th January 2007.
4. The plaintiff's applicant filed an application dated 22 January 2007 seeking leave to set the dismissal orders aside. The affidavit was deponed to by her advocate only. With leave of his court the plaintiffs/applicant deponed to an affidavit explaining the reasons why she was absent.

II: APPLICATION 22 JANUARY 2007

5. The reasons the advocate deponed to for the non attendance to court is that the parties were negotiating an out of court settlement and as such the advocate did not think the matters would proceed to trial. The plaintiff stated in her affidavit that the advocate had advised her not to attend court on the day the trial was fixed for hearing. She therefore did not attend court.

III FINDING

6. The old practice rules, that have not been changed states where a suit has been confirmed for hearing it **cannot** be taken out of the hearing list "By consent." Parties must attend to court and give very good reasons why a suit should be removed from the hearing list. This, as stated earlier cannot be done by consent as attempted to so do in this matter.
7. A consent to take out a matter **before** the call over can actually be done.
8. In this particular case the advocates were presumptuous and assumed the suit having been set down for hearing can be taken out. The advocate for the applicant by asking him plaintiff not to attend court was regrettably not correct to do so.
9. The blame of all this misapprehension lies with the advocate whose client trusted him to give her good and correct directions.
10. In this matter, I have seen that the application was dismissed under order IXb r 4 Civil Procedure Rules. Is this dismissal final and orders not to be set aside? In the case law of:-

Ngome v Plantex Co. Ltd

CA 91/83

Kneller Hancox JJA & Chesoni Ag JA

The court held that a dismissal order may be set aside if the party can show for “good cause” that the reasons for dismissal was done due to non-attendance or a reason that can well be explained.

In the case law of:-

Python Waweru Maina V Thuku Magua CA 27/82.

The discretion of the court is relied on the issue as to whether to allow the setting aside of a dismissal order by court or not.

The delay in bringing this application to court must not be inordinate. In this case the application was brought within six days.

16. I hereby accept the application given by the applicant/plaintiff. The fault for non-attendance was not attributed to her. I hereby set aside the orders of dismissal of this suit of 16 January 2007. I further order that there be no orders as to costs as the respondent/defendant was absent during the hearing of the application.

Dated this 30th day of May 2007 at Nairobi.

M.A. ANG’AWA

JUDGE

B.K. Bosire for J.D. Murimi & Co. Advocates for the plaintiff

M.A. Stima state counsel for Attorney General