

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 175 of 2001

GEORGE ONYANGO LIEWAPLAINTIFF

V E R S U S

MADISON INSURANCE CO. LTD.....DEFENDANT

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

On 31st January, 2006 the court (Ransley, J) dismissed this suit with costs to the Defendant under Order 9B, rule 4 (1) of the Civil Procedure Rules (the Rules). The Plaintiff now seeks (by chamber summons dated 28th February, 2006) an order under rule 8 of the same Order to set aside the dismissal and reinstate the suit for hearing. Under the said rule, the court has an unfettered discretion to grant the order sought upon such terms as are just. It is a judicial discretion that must be exercised judicially upon settled principles.

The application is supported by the affidavit of WILLIAM OCHANDA ONGURU, the Plaintiff's advocate. On its part the Defendant has opposed the application (grounds of opposition dated 10th May, 2006) upon grounds, *inter alia*, that the non-attendance by the Plaintiff or his counsel at the hearing of the suit showed their disinterest in the matter, and that therefore the court properly dismissed the suit.

I have considered the submissions of the learned counsels appearing. I have also perused the court record. This suit was part-heard by Mwera, J before he was transferred to another station. The Plaintiff testified on 7th April, 2003 and was cross-examined. On 4th June 2003 the Plaintiff closed his case without calling any other witness. When the matter came up for hearing before Ransley, J on 31st January, 2006, therefore, only the Defendant's case remained to be heard. Directions under Order 17, rule 10 of the Rules on how to proceed had not been given, but Ransley, J could have given them then. In the absence of the Plaintiff or his advocate, how should the court have proceeded? In my respectful view, the court should have proceeded to hear the Defendant's case as the Plaintiff had already closed his case. It appears from the record that it was not brought to the attention of Ransley, J that the case was part-heard and that the Plaintiff had already closed his case. I am persuaded that had this state of affairs been brought to his attention, Ransley, J would have proceeded to hear the Defendant's case rather than dismiss the Plaintiff's case. It is anyone's guess why the Defendant's counsel did not alert the judge to the status of the case; I read mischief.

At any rate, I am satisfied with the explanation given in paragraphs 3 and 4 of the supporting affidavit for the failure of the Plaintiff's advocate to be in court when the suit was dismissed.

The justice of this matter cries out that the order of dismissal be set aside to enable the suit to proceed to defence hearing. The ends of justice will be best served that way. I will therefore allow the application. The order of 31st January 2006 is hereby set aside and the suit reinstated for hearing as the succeeding judge may order under rule 10 of Order 17 aforesaid. Costs of the application shall be in the cause. There will be orders accordingly.

DATED AT NAIROBI THIS 10TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 14TH DAY OF SEPTEMBER, 2007