



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 432 of 2002

JOHN NGARI MACHARIAPLAINTIFF

VERSUS

FRANCIS KIARIE MBUGUA & ANOTHERDEFENDANT

RULING II

1. BACKGROUND

1. This is a running down suit. There was a collision between an Isuzu Bus and a Volvo Trailer motor vehicle. One Francis Muhoro Ngari (now deceased) was a traveller in the said bus. He suffered fatal injuries.

2. His father sued the 1st and 2nd defendants allegedly the registered owner and driver respectively of the motor vehicle that the deceased was travelling in. The defendants took out 1st and 2nd 3rd party.

3. On the day the suit was called out for hearing on the 5 July 2004, the plaintiff and his advocate were absent. The defendant, the 1st and 2nd 3rd party were present.

4. This court noting that the suit was fixed for hearing for two days adjourned the case to the 6 July 2004.

5. On the 6 July 2004, the defendant, the 1st and 2nd 3rd party were again present for trial. The plaintiff and his advocate were absent. The court waited until the time of 11.30 a.m.

6. The defence and 3rd parties then stated that they make no admission to any part of the claim. The suit was duly dismissed under order 9b r 4 Civil Procedure Rules by the court.

7. It should be noted that it was the plaintiffs agent one "Wainaina" of Kinyanjui and Njau advocates who took ex parte dates for hearing.

8. An attempt was made by M/s Judy Thongori & Company advocates to come on record by a chamber summons dated 9.2.05. At all times the application being defective in substance, namely leave to come on record was to be made in a separate application as the plaintiff was changing his advocates.

9. No action was taken by the plaintiff until 13.10.05 when another advocate (now representing

him) properly on record (Kihara Kariuki,J).

II APPLICATION

10. An Application dated the 23.2.06 prayed that the orders be set aside dismissing this suit. The application disclosed that the original plaintiff/applicant had been informed by his then advocate that he need not come to court as the judge dealing with his case was not sitting. He got a shock when he discovered that a bill of costs was forwarded to him to pay upon the dismissal of the said suit. He later discovered that his former advocate tried to revive this same suit through M/s Judy Thongori & Company advocates, a firm that he had never instructed. He prays that the said suit be now reinstated as the fault laid with his former advocate.

11. No affidavit has been deponed by his former advocates is before court.

12. The present advocate for original plaintiff/applicant submitted quite differently on this court from what the affidavit had deponed. What she submitted was contrary to what was recorded.

13. One is bound by their pleadings which I will rely on.

II: OPPOSITION

1. The application is opposed to due to the inordinate delay. I believe this was caused by the application that had been duly struck out. Nonetheless the defendants state that this present application is res judicata. If not the then both former advocates to the applicant should depon the facts as alleged that the plaintiff was misled not to attend court.

III FINDING

This matter came about to this situation when the advocates for the plaintiff failed to attend court together with his client. A mistake of the advocate has been often stated should not be visited upon his client.

16. I would believe the applicant not having instructed the second advocate as the signature on that affidavit differs from that of this current application.

17. The applicant may wish to take up the forgery of his signature with the Law Society and police.

18. I find that I will allow the setting aside of my orders dismissing this suit. I do so with costs to the 1st and 2nd defendants. There will be no costs awarded to the 1st and 2nd third party who are absent.

Dated this 13th day of June 2006 at Nairobi.

M.A. ANG'AWA

JUDGE

Rubua Ngure & Co. Advocates for the plaintiff

Christine Oraro & Co. Advocates for the defendant