REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 755 of 1995

PAUL RONO…….....…….……..1ST PLAINTIFF

JOHANA RONO…….....…….……2ND PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF BOMET…….....……DEFENDANT

RULING

On the 14th of February 2005, the plaintiffs fixed the suit herein for hearing on the 11th of July 2005. The fixing of the said hearing date was *exparte*. The plaintiffs served the defendant to attend court on the said date that the case was fixed for hearing. On the 11th of July 2005 when this case was called out, neither the plaintiffs nor their counsel was present. Mr. Oboso, the advocate for the defendant was present in court. The defendant's representative was also present in court. In the absence of the plaintiffs and their counsel, the suit filed by the plaintiffs was dismissed with costs. On the 4th of August 2005 the plaintiffs filed an application under **Order IXB rule 8** of the **Civil Procedure Rules** seeking an order to set aside the dismissal of their suit by this court on the 11th of July 2005. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Maragia Elijah the advocate for the plaintiffs. The application is opposed. Ngei wa Mutinda, the Town Clerk of the defendant swore a replying affidavit in opposition to the application.

At the hearing of the application, Mr. Akangó, learned counsel for the plaintiffs reiterated the contents of the application and the supporting affidavit. He submitted that Mr. Maragia, an advocate who had been instructed to hold brief for the plaintiffs, had attended court but could not address the court because he was not robed. He went to robe and returned to the court only to realise that the plaintiffs' suit had been dismissed. He submitted that Mr. Maragia had communicated with Mr. Oboso that he would be ready to proceed with the case. He took issue with the fact that Mr. Oboso had not communicated the presence of Mr. Maragia to the court before the court dismissed the plaintiffs suit for non-attendance. The plaintiffs pleaded with this court to reinstate their suit so that the matters in dispute may be determined on merits. He urged this court not to punish the plaintiffs for the mistakes of their counsel. He further urged this court to exercise its discretion in favour of the plaintiffs so that this case could be heard and determined on its merits. Mr. Akangó relied on three decided cases in support of his submissions for the reinstatement of the plaintiffs' suit.

Miss Manyoni learned counsel for the defendant opposed the application. She relied on the replying affidavit sworn by the Town Clerk of the defendant. She submitted that the Town Clerk was present when the plaintiffs' suit was dismissed. She submitted that neither the plaintiffs nor their advocate were present in court when the case was called. She argued that there was no evidence that the plaintiffs were present in court when the suit was dismissed. This is because the plaintiffs had not sworn affidavits in support of the application that they were present in court. She submitted that the reason given by the advocate of the plaintiffs for failing to be present in court when the case was called was not tenable and should not be favourably considered by this court. She urged this court to dismiss the application with costs.

I have considered the pleadings filed by the parties in support of this application. I have also considered the rival submissions which were made before me by the learned counsel for the plaintiffs and the learned counsel for the defendant. The issue for determination by this court is whether this court

should exercise its discretion to set aside its dismissal of the plaintiffs' suit for non-attendance. As was held by O'kubasu J. (*as he was then*) in **Maina –vs- Muriuki [1984] KLR 407** at page 409:

"***The court has a wide discretion and there are no limits and restrictions on the discretion of the judge except that if the judgment is set aside or varied it must be on terms that are just. I would add that before the court can set aside the judgment it must be satisfied that there is a valid defence. In the present suit a defence was filed and even third party notice issued and a defence filed by the third party. This discretion for setting aside judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice (See Shah –vs- Mbogo & Anor. [1967]EA 116 at page 123 by Harris J. and as approved by the Court of appeal for East Africa in Mbogo –vs- Shah [1968]EA 93)."***

The principles to be considered by this court when deciding whether to set aside its order of dismissal are similar to the principles to be considered by a court when deciding whether or not to set aside an *exparte* judgment. In the present case the plaintiffs and their counsel failed to attend court on the day when they had fixed the case for hearing. They served the defendant to attend court but absented themselves from court on the day that the case was scheduled to be heard. The counsel for the plaintiffs deponed that he had gone to robe when the case was called and dismissed by the court for non-attendance. He deponed that the plaintiffs were ready to proceed with the case on the day that the said case was fixed for hearing. However there is no evidence that the plaintiffs were present in court when the case was called out by the court. No affidavits have been sworn by the plaintiffs to support what their counsel deponed that they were present in court and ready to proceed with the hearing.

The reason given by the counsel for the plaintiffs for his absence in court is untenable. If the said counsel was actually present in court and was ready to proceed with the case, he should have been robed. The said counsel, being an officer of the court, was aware that this court does not give audience to counsels who are not robbed during the hearing of cases. He therefore ought to have attended court fully robed. In my opinion, the issue of the robe has been raised as a red herring by the plaintiffs in a futile attempt to divert this court's attention from the fact that the plaintiffs and their counsel had failed to attend court without any justifiable reason. This suit was filed in 1995. At the time the suit was listed for hearing, it had been pending for a period of over ten years. It is clear that the plaintiffs were not interested in the prosecution of the case and it was just for this court to dismiss the said suit.

This court is not prepared to exercise its unfettered discretion to aid indolent litigants. I therefore find no merit with the application filed by the plaintiffs to set aside the order of dismissal issued by this court on the 11th of July 2005. The application dated the 25th of July 2005 and filed on the 4th of August, 2005 is therefore dismissed with costs to the defendant.

DATED at NAKURU this 14th day of July, 2006.

L. KIMARU

JUDGE