



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 339 of 2002

ENOCK ONDENGO PLAINTIFF

- Versus -

1. KENYA BROADCASTING CORPORATION

2. DIRECTOR OF CULTURE AND SOCIAL SERVICES

3. ATTORNEY GENERAL DEFENDANTS

Coram: Before Hon. Justice L. Njagi

Mr. Mwakireti h/b for Mr. Ongera for plaintiff

Mrs. Oloo for the defendant

Court clerk – Kinyua

R U L I N G

By this application, the plaintiff in this suit moves the court to set aside the order made on 15th June, 2006, dismissing the plaintiff's suit herein with costs, and to provide for the costs of this application. The application is made by a chamber summons dated 21st July, 2006, and expressed to be brought under Order IXB rule 8, Order XXI rules 22 and 25 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and all enabling provisions of the law.

The application is supported by the annexed affidavits of Rev. Enock Ondego, the plaintiff/applicant, and Mr. Asige, advocate, both sworn on 21st July, 2006. It is based on the grounds that when the matter was called out, the plaintiff was physically present in court. However, Mr. Asige had gone out briefly to collect the file on the matter, which file he had inadvertently left behind in another court where he had first appeared for a mention.

The 1st defendant, through its counsel, filed the following grounds of opposition –

(a) That the application is frivolous, vexatious and an abuse of court process.

- (b) That the application lacks merit and should be dismissed with costs to the respondent.**
- (c) That the application is incompetent and is incapable of being granted.**
- (d) That the plaintiff's case has no chances of succeeding at all.**

During the hearing of the application, Mr. Mwakireti held brief for Mr. Ong'era for the applicant, and Mrs. Oloo appeared for the respondent. Mr. Mwakireti relied on the two affidavits of the applicant and Mr. Asige. The two depose that they were actually in court, but that Mr. Asige went out briefly to collect his case file from another court. In his brief absence, the matter was called out and the case dismissed with costs.

On her part, Mrs. Oloo adopted the grounds of objection stated herein above and submitted that the applicant had not shown good and sufficient reasons as to why they were not present. She prayed that the application be dismissed.

I have considered the application and the submissions of both counsel. From the outset, I wish to observe that reference to Order XXI rules 22 and 25 as some of the rules upon which the application is based is erroneous. Those rules are irrelevant to an application of this nature. The proper rule upon which to base it is rule 8 of order IXB of the Civil Procedure Rules. That rule states as follows –

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such terms as are just.”

This rule vests in the court an unfettered discretion to set aside an order dismissing the suit. The discretion to do so is intended to be exercised in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist a party who has deliberately sought to obstruct or delay the course of justice. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given by the rule.

In his affidavit in support of the application, Mr. Asige, an Advocate of this court, has sworn that he attended court on the material date. Before the matter was called out, he suddenly realized that he had left his file in another court where he had appeared earlier for a mention. While he was away, the matter was called out and dismissed. He avers that his absence at the material time was not deliberate but purely inadvertent.

I agree with Mrs. Oloo when she says that Mr. Asige should have instructed another counsel to hold his brief while he was away. But sometimes we overlook the obvious. Mr. Asige mistakenly thought that it would take a little while before the case was called out, and that was where he went wrong. Considering all the surrounding circumstances, and especially seeing that no prejudice will be suffered by the defendants, in order to do substantive justice to all the parties, this court is minded to set aside the order dismissing the suit, and to reinstate the same. As it was the plaintiff whose counsel precipitated this untoward state of affairs, the plaintiff will meet the 1st defendant's costs of this application in any event.

Dated and delivered at Mombasa this 27th day of October, 2006.

L. NJAGI

JUDGE