REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 3 of 2001

PAUL OLANDO .....PLAINTIFF

V E R S U S

BERNARD LISIAGALI ..... DEFENDANT

R U L I N G

On 5th January, 2005, the Plaintiff, *Paul Olando*, made an application dated 15.12.2004 to this court under Order IXB Rule 8 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act, Cap 21, seeking orders that the dismissal of the suit on 30.11.04 be set aside and the suit be aside and the suit be reinstated.

By its order of 30.11.2004, the court dismissed the suit under Order IXB Rule 4(1) of the Procedure Rules as the plaintiff had failed to attend court to prosecute it.

The application to set aside the said dismissal order was supported by an affidavit sworn on 21.12.04 by Mr. Laban Akula Anziya, learned counsel on record for the defendant. The defendant filed a replying affidavit sworn by him on 27th May, 2005 in opposition to the application.

The upshot of the affidavit of Advocate Laban Akula was that he had instructed Advocate Onsando to hold his brief on 30.11.04 to apply for adjournment (as he was engaged in the High Court at Kisumu in a matter that had been adjourned previously for the last time) and to seek leave to file the missing verifying affidavit and an amended counter-claim. The plaintiff who did not attend court had been advised by Advocate Anziya not to attend as Mr. Anziya anticipated the hearing would not proceed. Mr. Onsando attended court and held brief for Mr. Anziya and sought adjournment which was denied.

The Respondent in his replying affidavit averred that the plaintiff had on the morning of 30.11.2004 filed a Preliminary Objection and it was his belief that it was designed to facilitate an adjourned because the plaintiff was not serious in prosecuting the suit.

When the application came up for hearing on 26.6.06, Advocate Anziya submitted that his failure and that of his client to attend court on 30.11.04 was not deliberate and that he had instructed counsel to hold his brief. He said he told his client not attend court because he had filed a notice of Preliminary Objection the hearing of which would pre-empt the hearing of the suit and in his reckoning there was no need for his client to attend court as he anticipated the hearing of the suit would collapse.

Mr. Athung'a, learned counsel who held brief for Mr. T.T. Aswani for the defendant, opposed the application and in doing so relied on the replying affidavit sworn by the defendant. He contended that the applicant had not shown the court that there existed reasons or factors which would entitle the court to exercise its discretion in his favour. In this regard, Mr. Athung'a cited the case of MAINA v. MUGIRIA [1983] KLR 78.

I have duly perused the application and the replying affidavit. I have also duly considered the submissions of both counsel. The court has discretionary power under Rule 8 of Order IXB to set aside judgment entered or order made under order IXB in consequence of non attendance of a party. This discretionary power is exercised so as to do justice to the parties. Rule 8 of Order IXB gives the court unfettered discretion to vary an ex-parte judgment or set aside an order. It was said in **MBOGO v. SHAH (1968)EA 93** that –

"***while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, it would not assist a person who has deliberately sought to obstruct or delay the course of justice".***

In **PATEL v. EA CARGO HANDLING SERVICES [1974] EA 75,** it was said that -

"…..no judge would, in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose would be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action and (b) how it came about that the applicant found himself bound by a judgment regularly obtained to which he would have set up some serious defence."

This court has in the past proceeded in similar cases on the footing that no litigant should be shut out from putting forward his/her version of facts and while it is cognizant of the axiom that to error is human and is alive to the fact that there is no default or error that cannot be compensated by way of costs save where irremedial prejudice would be caused it will unless a litigant has acted deliberately to obstruct justice or delay the cause of justice, normally exercise its discretion so as to do justice by hearing the matter on merit. Harris J.succintly put the principle thus:-

"*…….this discretion is intended so to be exercised to avoid injustice, or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who had deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice…..".* See SHAH v. AMBOGO (1967) EA 116 at page 123.

The case of MAINA v.MUGIRA [1983]KLR 78 referred to by Mr. Athung'a in this connection is germane.

Applying these principles to the application, should the court exercise its discretion to set aside the order dismissing the suit? It was presumptuous of Mr. Anziya to expect that the suit would not proceed to hearing merely because of the Preliminary objection filed on his behalf on the morning of the hearing on 30.11.2004. While the failure of the plaintiff to attend court on 30.11.04 may be explicable on Mr. Anziya's advice to him, Mr. Anziya's failure to attend court appears to have been due to over-commitment. He was however alive to the need to attend the hearing and he did send counsel to hold his brief. His Notice of Preliminary Objection was an attempt to thwart the hearing, albeit without success. His conduct cannot, however, be described as a design to obstruct justice but it was certainly a desperate attempt to forestall the hearing. That he was before another judge in Kisumu in HCCC No.347 of 1988 is not disputed. His failure to attend court was neither an accident, inadvertence, nor an error. It was caused by bad judgment on his part. He wrongly advised his client not to attend court and secondly, he failed to liaise in good time with counsel for the defendant about his predicament. Mr. Onsando did tell the court that Mr. Anziya had a part-heard case in Kisumu. Mr. Anziya was between a rock and a hard place. He has shown candour. Law ought to be applied so as to do justice. I think the prejudice that may be suffered by the defendant if the suit is restored is not irremedial and costs would be an adequate remedy. I do not think the plaintiff ought to be punished in the circumstances of this case where he would

probably have attended court but for the advise from his advocate. The advocate for the applicant has also shown to my satisfaction that he was prevented from attending court due to circumstances beyond his control. He was in a catch 22 situation.

I am inclined to allow the application. I order that the suit be restored together with the counter-claim which had been withdrawn following the dismissal of the suit. I also order that the applicant/plaintiff shall pay in full the thrown away costs. I direct that the suit be set down for hearing on priority at the beginning of next year. The respondent shall have the costs of this application as well. The application is allowed on these terms.

Delivered, dated and signed at Kakamega this 30th day of November, 2006.

G. B. M. KARIUKI

J U D G E