REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 82 of 2000

PETER NJOGU MBACHU …….……...…...…..…… PLAINTIFF

VERSUS

HANNAH MUKUHI MURIGU ……...…...……. DEFENDANT

RULING

Peter Njogu Mbachu filed the Chamber Summons application on *25th August 2005* seeking for stay of taxation proceedings and more importantly for varying or setting aside the orders of this court which were made on *12th November 2003* whereby his suit was dismissed for non-attendance.

The application is expressed to have been brought under the provisions of **Order 1XA Rule 10** of the **Civil Procedure Rules** and **Section 3(A)** of the **Civil Procedure Act**.

The application is grounded on the fact that the plaintiff's inability to prosecute this matter was not deliberate and it will be in the interest of justice to allow him prosecute his case on merit. The supporting affidavit by the applicant further expounds the reasons why the applicant failed to attend court on *12th November 2002* when his case came up for hearing.

The applicant depones that the last time the matter was in court was in the year 2002 when the court file could not be traced. He further states that he was not aware that his case was dismissed on account of his non-attendance until he received a notice by the defendant of the taxation and bill of costs. The applicant claims that he never received any correspondence from his advocate and blames this to a problem with Post Office.

Moreover the applicant states that on the day the matter came up for hearing he had been hospitalized at Tigoni Sub-District Hospital and was discharged from hospital on *17th November 2002*.

In further arguments, Counsel for the applicant urged this court to exercise its discretion and find that the applicant's failure to attend court on *12th November 2002* when his case was dismissed was not deliberate and was not meant to obstruct justice. Counsel relied on the decision in the case of **Ngome VS Plantex Co. Ltd [1984] K.L.R 792** where the Court of Appeal held

*"Where a suit has been dismissed for non-attendance under **Order 1XB Rule 4(1)** the court has a duty to hear the applicant and if the applicant satisfies the court of the existence of good cause, the court may set aside or vary the judgment."*

In further arguments Counsel also put forward the decision in the case of **Macauley Vs De Boer & Another [2002] 2 K.L.R page 260** where the High Court set out the matters or factors to take into consideration in deciding whether the court should exercise its inherent power and discretion to set aside an exparte judgment.

On the part of the defendant, this application was opposed on four main grounds;

Firstly, Counsel for the defendant submitted that the application is premised on the wrong provisions of the law and thus the jurisdiction of this court has not been properly invoked. When this matter came up for hearing, the records will show that the plaintiff was absent despite the fact that the date was fixed by consent of both parties. Counsel for the plaintiff who was present applied for an adjournment and the court considered the application but rejected the reasons. In this regard therefore, the proper provision would have been **Order 1XB** of the **Civil Procedure Rules**.

Secondly, Counsel for the defendant argued that the reasons advanced for setting aside the order are not reasonable and the court can only exercise its discretion judicially. For instance, there is no explanation why this application has been brought after such an inordinate delay. The order dismissing the suit was issued on *12th November 2002* and this application was filed in August 2005 when the defendant attempted to file a bill of costs for taxation. Besides when the Counsel for the plaintiff applied for adjournment, the reasons that the applicant is advancing now that he was in hospital three (**3**) days prior to the date of the hearing, such information was not availed to the court.

Thirdly, Counsel argued that the fact that there was poor communication between the Counsel for the plaintiff and his client is not a ground for setting aside a judgment, the plaintiff should have been diligent.

Finally, Counsel for the defendant distinguished all the authorities that were cited by the Counsel for the applicant and submitted that the application for adjournment was argued and the court considered the reasons and refused to grant the adjournment and the remedy available to the applicant was by way of an appeal as this court cannot be asked to sit on its own decision why the adjournment was rejected.

I have taken all the above submissions into consideration. The single issue for determination is whether this court should exercise its discretion and set aside the orders made on *12th November 2002* when the plaintiff's suit was dismissed for his failure to attend court to prosecute the same. I agree with Counsel for the defendant that since the suit had been fixed for hearing by consent and on the day of hearing the plaintiff failed to attend court, when the court proceeded to dismiss the suit; the proper provisions of the law under which this application should have been field is **Order 1XB** of the **Civil Procedure Rules**. However, this being a defect in form, I would not dismiss the application but I will proceed to consider the merits of the same.

In deciding whether to set aside the order dismissing the suit, I have taken into consideration the following factors: -

1) Whether or not the applicant's application was filed without delay.

2) Whether or not the applicant has generally moved diligently.

3) Whether or not the granting of the prayers to set aside the dismissal order would easily be compensated in costs and considering all the circumstances of the case whether the ends of justice will be served by the court exercising its discretion in favour of the applicant under the provisions of Order 1XB Rule 8.

"*Where judgment has been entered under this order the court, on application by summons, may set aside or vary such judgment and any consequential decree or order upon such terms as are just*."

In the present case, has the plaintiff shown good cause?

In the first instance, the plaintiff claims that he never got communication from his advocate that his suit was dismissed and the last time he knew about his matter was in the year 2002 when his file was lost.

It is clear from the records that this suit was fixed for hearing by consent of the parties who were present with their clients before a Judge.

Secondly, there is no material on record to show the alleged breakdown of communication between the plaintiff and his advocate, that is, letters that were returned to sender. More fundamentally, it defeats logic why the applicant who is the plaintiff never took any initiative to inquire about his case from his advocate after he was discharged from hospital on *17th November 2002*. No explanation has been given why it took the plaintiff a period of about two (**2**) years and ten (**10**) months to file this application. The applicant has not been diligent, this application has not been brought without undue delay and for these reasons this is not a suitable case where the court should exercise its discretion in the favour of the applicant. The applicant has not been able to show good cause.

For the foregoing reasons, I dismiss the plaintiff's application dated *29th June 2005* with costs to the defendant.

It is so ordered.

Ruling read and signed on 15th December 2006.

MARTHA KOOME

JUDGE