



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 29 OF 2002

ROBERT RUGENDO NJERU.....APPLICANT/PLAINTIFF

VERSUS

CHARLES NGARI MUCHIRA.....1ST RESPONDENT/DEFENDANT

LEONARD GATUIGI NYAGA..... 2ND RESPONDENT/DEFENDANT

RULING

1. The Plaintiff seeks Orders that the Orders issued herein on 6.10.2003 be set aside. The Application is a Chamber Summons under Order 1XB Rule 8 of the Civil Procedure Rules and S.3A Laws of Kenya.

2. On 6.10.2003, **Khamoni, J.** struck out the suit herein as it contravened Order VII Rule 1 (2) in that it had no Verifying Affidavit attached to it.

3. The Applicant now says that on that day, his Advocate not having been served with a hearing notice, was not in Court and therefore could not oppose the Application for striking out as instructed. That therefore this Court ought to exercise discretion and reinstate the suit upon setting aside the Orders of **Khamoni, J.** In the Supporting Affidavit sworn by one **John Wanjohi**, Advocate, it is stated at paragraph 9 thereof that one Alfred Ndambiri Advocate was aware of a hearing date for 29th September 2003 and had spoken with Counsel for the Respondent, **Mr. Maina Kagio** who informed him that the High Court would not be sitting on that day. Thereafter he had no knowledge of the matter until he heard that it had been struck out.

4. Counsel for the Respondent in opposing the Application pours very cold water on the Applicant's assertions that neither he nor his Advocate knew of the hearing on 6.10.2003. In his Replying Affidavit, he states that **Mr. Ndambiri** aforesaid spoke to him on 3.10.2003 and sought indulgence for the hearing on 6.10.2003. **Mr. Kagio** could not do so for obvious reasons, and it was agreed that **Mr. Ndambiri** would either send an Advocate from Nairobi or ask an Embu - based Advocate to hold his brief and seek an adjournment. As it happened, he did neither and the matter proceeded. Counsel also deponed and argued that all parties received notices to attend Court on that day and the conduct of **Karen Mosoti and Co. Advocates** for the Applicant smirks of negligence which this Court should not countenance.

5. I have looked at the record herein and noted that a notice was issued to all parties that the hearing scheduled for 29.9.2003 had been rescheduled to 6.10.2003. Indeed **Mr. Kamuga Mburu** Advocate who appears for the 1st Defendant has sworn a Replying Affidavit stating that although he and his client had no interest in the Application to strike out the suit, he received notice from Court on the change of dates. Coupled with **Mr. Kagio's** averment that he spoke with **Mr. Ndambiri** on 3.10.2003, which fact has not

been denied or controverted, I am inclined to believe that the Applicant's Counsel had notice of the hearing date for 6.10.2003 but ignored it or just refused to make an appearance. The only ground therefore for seeking setting aside the Orders of 3.10.2003 must fail.

6. Even if I was to say that the conduct of Counsel should not affect his client's case, is there any worth in reinstating this suit? On 6.10.2003, **Khamoni, J.** heard Counsel for the Respondent and granted Orders that the suit be struck out for reasons given. **Miss Munyi** who argued the instant Application did not tell me what was wrong with that Order and that the suit as filed complied with Order VII Rule 1 (2). The Application itself says nothing about the propriety or otherwise of that Order so that even if the Applicant had not been heard, there may not have been a difference in the final Order given. If there would have been, no one has pointed me in that direction. In effect, I see no reason to disturb the decision reached by my senior brother and would best let the Orders stay as they are.

7. This being the case, the Application dated 22.10.2003 is hereby dismissed with costs to the 2nd Respondent/Defendant. The 1st Respondent/Defendant has no interest in the Application and no costs are awarded to him.

Orders accordingly.

Read in Open Court on this 23rd day of February 2005

I. LENAOLA

JUDGE

In the presence of;

Mr. Maina for 2nd Defendant/Respondent

Plaintiff/Applicant in person

N/A for 1st Defendant/Respondent

I. LENAOLA

JUDGE