

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

CIVIL SUIT NO.140 OF 2001

ALPHAEL OKEMWA NYANCHIRI PLAINTIFF

VERSUS

SOSPETER OTETE OKEMWA DEFENDANT

RULING

The applicants application seeks court to set aside its orders made on 18th October 2004 dismissing the applicants application dated 28th September 2004. That application dated 28th August 2004 was set for hearing on 18th October 2004 as it was under Certificate of Urgency. On that day Ms. Obaga for the applicant and her client were not in court. Mr. Ondika for respondent applied for the application to be dismissed and the court did so. It is that dismissal order the applicant want set aside and the application be reinstated for hearing.

There are two supporting affidavits one from the Advocate herself and another from her court clerk. She explained that on that day she was before Nairobi High Court in HCCR.A.NO.244 OF 2003 which had been ordered to proceed on day to day basis. She sent her clerk who requested Mr. Lebu to hold her brief. The court was however dealing with criminal cases and Mr. Lebu left in the afternoon. The clerk left at 4 p.m. when the court was still dealing with Criminal matters.

Application was opposed by Mr. Ondika who said the application is only meant to delay the matter. The application had not come to court with clear hands and the court should therefore not allow the application.

I have considered the application. The applicant's application dated 28th September was dismissed because of non-prosecution. The counsel was absent. Ms. Obaga has explained that she was before High Court in Nairobi on a matter ordered by the Chief Justice to proceed on day to day basis. This averment has not been challenged or contraverted in any way and I would take it that it is the truth. Of course Mr. Lebu should have sworn an affidavit to state that he had instructions to hold her brief but that omission alone do not make the application fatal.

I therefore allow the application and set aside the order dismissing the application dated 28th September 2004. The same is reinstated for hearing. The applicant will however pay costs of this application to the respondent whose court assess as shs.3000/=.

Dated 25th May 2005.

KABURU BAUNI

JUDGE

cc. Mobisa

Mr. Ondika for Respondent.

N/A for Applicant.