REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Civil Case 122 of 1996

ELISHA MBAABU ……..…… PLAINTIFF/APPLICANT

VERSUS

EUSEBIO KWIRIGA …….. 1ST DEFENANT/RESPONDENT

KENYA PLANTERS CO-OP. UNION LTD. ……. 2ND DEFENDANT/RESPONDENT

RULING OF THE COURT

What is before me is an application dated 18.5.2005 brought by way of chamber summons under the provisions of Order 9B Rule 8 of the Civil Procedure Rules. The application seeks an order setting aside the order given by this honourable court on 18.5.2005 dismissing the plaintiff's suit for non-appearance. The application also asks for an order providing for the costs of the application.

The application is premised on the one ground that the suit was dismissed while counsel for the plaintiff was on the way traveling by public means from Nairobi to Meru and on the grounds contained in the affidavit made and sworn by Boniface Njiru advocate for the plaintiff/applicant. In the said affidavit sworn on 18.5.2005, it has been deposed that the hearing date for the case was taken by the plaintiff and a hearing notice served on all the parties to the suit. That on the 18.5.2005, Mr. Njiru traveled by public means from Nairobi to Meru and that by the time he arrived at the court at 11.00am, he found that the court had already dealt with the file and dismissed the suit for non-appearance of the plaintiff and his counsel. That at the time when the case was called out, even the plaintiff was not in the court room as he is said to have been out answering a call of nature.

Briefly, when this case came up before me on 18.5.2005 for hearing, Mr. Njiru for the plaintiff was not in court by the time the file was called out. There was also no response from the plaintiff. Mr. Mesa for the 1st defendant who was then present in court applied to have the suit dismissed for non-appearance of the plaintiff. Mr. Mesa informed the court and as confirmed by Mr. Njiru in the affidavit in support of the application, that it was the plaintiff who fixed the case for hearing and then served hearing notices on the other parties. There was no appearance for the 2nd defendant.

Being satisfied that there was no good reason shown why the plaintiff and his counsel were not in court the court proceeded to dismiss the suit against the 1st defendant with costs to the 1st defendant. It is that order of mine that the applicant now seeks to have set aside. I need to mention here that a little while after the suit had been dismissed, Mr. Njiru appeared in court and sought to address the court but since orders of dismissal had already been made, the court declined to hear him hence this application which was drawn, dated and filed on the same day that the suit was dismissed.

The plaintiff's application for reinstatement of the suit was opposed. In his replying affidavit made

and sworn by Mesa N. Linus advocate it is deposed that he too traveled by public means from Nairobi to Meru on the 18.5.2005 and that he arrived in court at around 10.00am before the matter was called out. That the plaintiff and his counsel had no good excuse why they were not in court by 9.00am the scheduled time for beginning court sessions. That if the plaintiff's counsel knew that he was going to be late, then it was incumbent upon him to make adequate arrangements for another counsel to hold his brief when the file was called out so that it could be placed aside awaiting his arrival. It is also deposed that when the matter was last in court on 17.6.2004 the plaintiff applied for an adjournment to explore an out of court settlement but that todate, no such settlement had been reached. That the plaintiff is applying delaying tactics well knowing that his claim against the 1st defendant has no chances of success. It was also deposed that there was no proof that the plaintiff had diligently prosecuted his case against the defendants and especially against the 1st defendant. Mr. Mesa urged the court to dismiss the plaintiff's application.

In the case of **Pithon Waweru Maina v. Thuku Mugira** – Civil Appeal No. 27 of 1982, the Court of Appeal (Potter & Kneller, JJA and Chesoni Ag JA) set out the principles applicable concerning the exercise of the judicial discretion under order 9A Rules 10 to set aside an exparte judgment (or order) upon the failure of either party to attend the hearing. Drawing from the judgment of Duffus P in the case of **Patel V. E.A. Cargo Handling Services Ltd (1974) EA 75** at page 76C and E the learned judges said:-

> "**There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just …….. 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 to it by the rules."**

Order 9B Rule 8 provides as follows:-

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

Drawing further from the decision of Harris J in the case of **Shah V. Mbogo (1967) EA 116 at 123 B**, the Court of Appeal Judges stated that:-

> **"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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."**

In the case of **Shabir Din V. Ram Parkash Anand**, 22 EACA 48 Briggs JA said the following at page 51:-

> **"I consider that under Order IX Rule 20, the discretion of the court is perfectly free and the only question is whether upon facts of any particular case, it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."**

Applying the above principles to the facts of this case, I am persuaded that the applicant is entitled to the relief sought. The discretion of this court in granting such orders is wide and unfettered. The facts are clear that the plaintiff's counsel did appear in court a little while after the plaintiff's suit had been dismissed. It is clear to me therefore that neither the plaintiff nor his counsel was deliberately seeking to obstruct or delay the course of justice as alleged by the 1st defendant. It is also clear to me that it was the mistake of the plaintiff's counsel that led to the plaintiff's suit being dismissed. If the relief sought is not granted by this court, a great injustice would be caused to the plaintiff by this mistake on the part of his

counsel. The mistake is, in my considered view excusable and should not be visited upon the plaintiff. In the case of **Gurcharn Singh T/A Kessar Singh V. Khudroad Rhan s/o Khudadad Construction Co.** – HCCC NO. 1547 of 1969, Hancox J (as he then was) was of the view:-

> **"…….that the advocate's mistake (or that of his clerk) should not weigh unduly, and in my view that should be the correct approach to an application of this nature. As I said in Eldoret HCCC No. 14 of 1980 – <u>The Municipal Council of Eldoret V James Nyakeno</u>, "the court goes by the principle that such an ex-parte judgment having been entered neither upon merits of the case nor by consent of the parties is subject to the court's power of revocation at its discretion." It is unfortunate that advocates' sins and omissions are sometimes visited on their clients who are left without the remedy they sought, but to sue the advocate for professional negligence, but where a litigant shows that his default has been due to the party's advocate's mistake in an application of this nature, unless injustice would be occasioned to the other party the court should consider the applicant's case with broad understanding."**

Applying all the above principles to the circumstances of the application before me, I would set aside my order of 18.5.2005 dismissing the plaintiff's suit for nonappearance and I so do. Mr. Njiru advocate took immediate steps to make amends for his sins of omission and filed the present application on the same day that the order of dismissal was made. It is also my considered view that any inconvenience caused to the 1st defendant can be adequately compensated in costs. For this reason the applicant shall pay to the 1st respondent and his counsel throw away costs assessed at Kshs. 5000/= payable within twenty one (21) days from the date of this ruling.

This is a 1996 case and as rightly pointed out by Mr. Mesa for the 1st respondent, litigation must come to an end. To expedite the process of having this case prosecuted without further undue delay, the plaintiff/applicant shall proceed to set down this suit for hearing within ninety (90) days from the date hereof in default thereof, the suit shall stand dismissed against the 1st defendant.

It is so ordered.

Dated and delivered at Meru this 26th day of July 2005.

RUTH N. SITATI

JUDGE

26.7.2005