REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL DIVISION

CIVIL CASE NO. 32 OF 1999

SAMWEL KIPSANG KITUR……...……1ST PLAINTIFF

SIMEON KIBET KETER……...…..2ND PLAINTIFF

VERSUS

EUNICE KITUR…….……...…….1ST DEFENDANT

DAVID KITUR……..…….2ND DEFENDANT

PHILIP KITUR…….…….……3RD DEFENDANT

RULING

This is an application made by the plaintiffs under the provisions of Order XXI rule 22(2), Order IXB rule 8 of the Civil Procedure rules and Section 3A of the Civil Procedure Act. The substantive prayer sought by the plaintiffs is the setting aside of the order of dismissal of the plaintiffs' suit issued on the 24th of September 2003. The plaintiffs have further sought to have the said suit, which was dismissed, reinstated to hearing. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Simon Kibet Kitur, the 2nd plaintiff. The application is opposed. Dominic Rono has sworn a replying affidavit in opposition to the said application filed by the plaintiff. At the hearing of the application, Mr Nyamokeri, Learned Counsel for the plaintiffs basically reiterated the grounds stated in support of the application and the plaintiff's affidavit annexed thereto. He submitted that the plaintiffs were not informed of the date when the case had been fixed for hearing by their former advocates on record. It was submitted that the plaintiffs should not be punished for the mistakes of their former counsel. It was further submitted that the court erroneously dismissed the plaintiffs' case for want of prosecution instead of dismissing it for non-attendance of the plaintiffs. The plaintiffs were further aggrieved that the taxation of the defendant's bill of costs was procured fraudulently as the former advocates of the plaintiffs were not served with the notice of taxation before the said costs were taxed by the court. The 2nd plaintiff was aggrieved that the defendants had attached his properties yet the 1st plaintiff, who had died, had not been substituted as a party in the suit. Learned Counsel urged the court to allow the application as prayed by the plaintiffs.

Mr Rono, Learned Counsel for the defendants opposed the application. He submitted that the counsel who argued the application on behalf of the plaintiffs was improperly on record; He had not sought the leave of the court before he filed the application on behalf of the plaintiffs. He submitted that the former advocates of the plaintiffs were properly served with the notice of taxation before the said costs were taxed. Learned Counsel further submitted that the plaintiffs' suit had been properly dismissed by the court under the provisions of Order XVI Rule 5 of the Civil Procedure Rules. He argued that the application, filed by the plaintiffs two and half years after the dismissal of the suit, was unmeritorious. He stated that the plaintiffs were guilty of laches. He further argued that there was no evidence that the former advocates of the plaintiffs had not informed the plaintiffs of the date that the hearing of the case had been fixed. He finally submitted that the plaintiffs had not established sufficient grounds to enable this court grant the orders sought. He urged the court to dismiss the application with costs.

I have considered the submissions made before me by the parties to this application. I have also perused the pleadings filed by the parties in this suit. The then advocate for the plaintiffs fixed the suit for hearing

on the 24th of September 2003. On that day, Mr Kirui, the advocate for the plaintiffs was present in court. He made an application for an adjournment. He told the court that he had made efforts to contact the plaintiffs in vain. The plaintiffs were absent from court. Lessit J declined to grant the said adjournment sought. Mr Kirui then told the court that in the circumstances, he did not have any evidence to offer. Nothing of significance took place until the 28th of June 2004 when the Deputy Registrar of this court taxed the defendant's bill of costs. It was taxed as drawn in the absence of the plaintiffs. The 2nd plaintiff has made submissions through counsel seeking to have the said order of dismissal set aside and the suit reinstated to hearing.

I have considered the grounds that the 2nd plaintiff has advanced in support of his application. I have also considered the objections to the application made by the defendants. The 2nd plaintiff has advanced three main grounds in support of his application. He has stated that his former counsel on record had not informed him of the date that the suit had been fixed for hearing on the date the suit was dismissed due to his absence. He has further submitted that the mistake of counsel should not be visited on him. He had argued that he was not aware of the date that had been fixed for the taxation of the defendant's bill of costs as he was not served with the notice of taxation. The 2nd plaintiff pleaded with the court to set aside the dismissal of his case to enable him ventilate his case on merits.

Having carefully considered all the facts relevant to this application, I do hold that the 2nd plaintiff has not made out a satisfactory case to enable this court exercise its discretion in his favour. This suit was filed in 1999. It was dismissed on the 24th of September 2003. Since then, until the defendants attached the 2nd plaintiff's properties to recover their costs, the 2nd plaintiff made no effort to follow the progress of his case. Whilst it could be plausible that the 2nd plaintiff was not informed of the date the case was fixed for hearing when it was dismissed, there is no explanation forthcoming from the 2nd plaintiff as to why he took no action for a period of nearly two years to remedy the situation and make an appropriate application to set aside the dismissal of the said suit.

The 2nd plaintiff would like this court to believe that it was his then counsel on record who caused him to be in the situation he now finds himself in. I do not accept that proposition. Cases are owned by litigants and not their advocates. It behoves a litigant to closely follow the progress of his case. A litigant should always be vigilant in the pursuit of his case to its conclusion. He cannot leave such responsibility to his advocate. It will not do for a litigant whose case has been dismissed due to his failure to attend court to bring up the excuse that he was not informed of the date that the case was fixed for hearing by his advocate. In this regard, the 2nd plaintiff fell in the category of such a litigant.

The 2nd plaintiff has not explained why for a period of nearly two years since his suit was dismissed, he had not gone to the offices of his advocate to make inquiries on the fate of his case. The 2nd plaintiff was only jolted into action when the defendants proclaimed his property in an effort to recover the costs awarded to them by the court. In the circumstances of this case, I agree with the defendants' submission that the 2nd plaintiff was indolent. He failed to prosecute his case for four years prior to its dismissal by the court. To allow him to revive the suit nearly two years after its dismissal would be a wrong exercise of discretion on the part of this court. The death of the 1st plaintiff would not exonerate the 2nd plaintiff from liability to settle the costs awarded to the defendants.

The application filed by the 2nd plaintiff dated the 8th of June 2005 therefore lacks merit. It is therefore dismissed with costs to the defendants.

DATED at NAKURU this 22nd day of July 2005.

L. KIMARU

JUDGE