



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

Civil Suit 2050 of 1993

CONSOLATA NDINDA OWIRA..... 1ST PLAINTIFF/APPLICANT

SALINA OWUOR..... 2ND PLAINTIFF/APPLICANT

JOHANA OGUYO AWANA3RD PLAINTIFF/APPLICANT

THEODORE A. SURE.....4TH PLAINTIFF/APPLICANT

JENIFFER ATIENO ONGORO.....5TH PLAINTIFF/APPLICANT

VERSUS

BANUELBOVIS OMAMBIA.....DEFENDANT/RESPONDENT

RULING

By chamber summons dated 16.03.05 and filed on 18.03.05 brought under Order IXB rule 8 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap. 21), the plaintiffs/applicants applied for the following orders:-

1. That this honourable court do allow the reinstatement of the suit dismissed on 08.02.05.
2. That costs of this application be costs in the cause.

The grounds advanced for the application are:-

- a) That the suit was dismissed when in essence the plaintiffs/applicants were not aware that the matter was coming up for hearing since it was not confirmed during call-over.
- b) That the plaintiff's advocate who came on record in June, 2004 has moved with speed to expediate the hearing of this matter and the non-attendance on his part was because he was not aware that the matter would be coming for hearing on 08.02.05 when the same was not confirmed during the call-over.

The application is supported by the affidavit of Nancy Kilonzo sworn on 16.03.05.

When the application came up for hearing before me on 15.05.05 the plaintiffs/applicants were represented by learned counsel, Mr. N.O. Sumba while the defendant/respondent was represented by learned counsel, Mr. G.M. Kiugu.

Plaintiffs'/applicants' counsel acknowledged that this is a very old matter and that advocates have a

duty to expedite its hearing. He said he came on record in this case on 22.06.04. That in January, 2005 he asked Nancy Kilonzo to hold brief for him at the call-over and that the brief he later got was to the effect that Nancy Kilonzo went to court when call-over had started and noted that the Judge was insisting on lists of agreed issues before confirming cases for hearing. That as Nancy Kilonzo could not trace a list of agreed issues in plaintiffs'/applicants' counsel's file and since no reference was made to this case during the time Nancy Kilonzo was at the call-over, she assumed that the case was not confirmed for hearing. That upon getting the above brief, plaintiffs'/applicants' counsel prepared a list of agreed issued and invited defendant's/respondent's counsel to attend at the registry on 02.03.05 for taking a hearing date, only to discover that the suit had been dismissed on 08.02.05. Plaintiffs'/applicants' counsel informed court that since taking over this matter in June, 2004, he has been keen to have it heard and determined expeditiously; that his firm was instructed by the plaintiffs/applicants to take over the case from previous advocates as the plaintiffs/applicants felt the previous advocates were not conducting the case satisfactorily.

Plaintiffs'/applicants' counsel ascribed his non-attendance in court on 08.02.05 to his not having been aware of the hearing on that date and urged reinstatement of the case.

Defendant's/respondent's counsel opposed the application on two grounds. Firstly, on the central ground that no step was taken to avail the call-over list to show when the matter came up for call-over plus the Judge's notes to the effect that the case was not confirmed for hearing on 08.02.05. Defendant's/respondent's counsel faulted plaintiffs'/applicants' counsel for relying on the affidavit of Nancy Kilonzo whom he had sent to hold his brief at the call-over, noting that Nancy Kilonzo went to the call-over late. It was defendant's/respondent's counsel's contention that the case could not have been listed for hearing on 08.02.05 if it had not been confirmed at the call-over. In this regard, defendant's/respondent's counsel referred to his grounds of opposition. I pause here to observe that the grounds of opposition alluded to are not in the court file. I have come across cases of documents missing from court files previously and called on the registry to improve on its record keeping but the phenomenon seems to persist. The registry is once again asked to take remedial measures. The second point raised by defendant's/respondent's counsel was that on 01.11.04 this case went before Kihara, J for the hearing of the defendant's notice of motion application dated 29.04.04 and filed on 30.04.04 seeking dismissal of the suit for want of prosecution and that the Judge persuaded defendant's counsel not to press on with his dismissal application since the case had been fixed by consent of the parties for hearing on either 08.02.05 or 09.02.05. Defendant's/respondent's counsel submitted that there was no excuse for non-attendance in court by plaintiffs/applicants or their counsel on 08.02.05; that there must be an end to litigation; and that the application for reinstatement of the suit be dismissed with costs.

I reply, plaintiffs'/applicants' counsel reiterated his earlier submissions.

I have given due consideration to the rival submissions of counsel for the parties.

This case has caused me great anxiety. Earlier on the current plaintiff's counsel swore an affidavit on 21.10.04 in which he, inter alia, deponed that his firm had been instructed by the plaintiffs to take over the conduct of this case because the plaintiffs had been unable to locate their previous advocate, Mr. Roy Ouma and that the said advocate had closed his offices at Arrow House without leaving a forwarding address. The present plaintiff's counsel submitted that if no action had been taken for over a year, that was due to the negligence of the plaintiffs' previous advocate and that from the time he, present plaintiff's counsel took the case over in June, 2004, he has taken steps to have the matter listed for hearing. Then, as fate would have it, in January, 2005 he sent Nancy Kilonzo to hold brief for him at the call-over.

In her affidavit sworn on 16.03.05, Nancy Kilonzo acknowledges that she went for the call-over late; that no reference was made to this case while she was there; and that as the Judge was insisting on lists of agreed issues before confirming cases and since there was no list of agreed issues in the case file she had, she assumed the case was not confirmed. She also says the present plaintiffs' advocate's clerk, Mr. Mark Orinda informed her that he had checked with the Judge's clerk who said the case had not been confirmed for hearing, after which the present plaintiffs' advocate took steps to file a list of agreed issues and attempted to take a hearing date when he discovered that the case had been dismissed with costs for non-

attendance when it came up for hearing on 08.02.05. There is no evidence from either the plaintiffs' advocate's clerk or the Judge's clerk on the matter.

I find that Nancy Kilonzo was casual in her approach to this matter and that she let the current plaintiffs'/applicants' counsel down. I note that upon getting Nancy Kilonzo's brief on what purportedly transpired in court, plaintiffs'/applicants' counsel embarked on taking steps to file a list of agreed issues and to take a hearing date, only to learn that the case had been dismissed for his non attendance when it came up for hearing on 08.02.05.

I stated earlier on that this case has caused me great anxiety. The anxiety springs from the fact that the plaintiffs have been let down by advocates twice and they are now faced with the ugly prospect of not being able to have their case heard and determined on merit through no fault of their own. Such eventuality sounds unconscionable in the circumstances of this case and may succeed only in denting the image of the legal profession. A similar situation arose in the Kenya Court of Appeal in Civil Appeal No. 270 of 2001, Lt. Colonel Joseph Mweteri Igweta –vs- Mukira M' Ethare & Attorney – General. The appeal was heard by a single Judge of Appeal (Shah, J.A. – as he then was) who, after surveying the authorities, came to the conclusion that the case warranted to be decided on the basis of substantive justice and that procedural omissions ought to take a back seat. He was persuaded, inter alia, by the dissenting judgment of Apaloo, J.A. (as he then was) in Wachira –vs- Ndanjeru [1982 – 88] I KAR 1062 where Apaloo, J.A. stated at page 1065:

“At all events it seems to me that the appellant is merely standing on bare technicalities. Nobody has a vested right in procedure and a court, must, at least at the present day, strive to do substantial justice to the parties, undeterred by technical procedure rules.”

Having taken Apaloo, J.A.'s line of thinking, Shah, J.A. followed it up in the following formulation:

“If I were to dismiss this application there would be one bona fide litigant who will blame the system for relying on procedural technicalities to deny him justice. Whilst I do not condone errors on part of counsel I must consider the interest of a Kenyan seeking justice in our courts. He is bewildered at the twists and turns the hearing of appeals take”

I am of the same persuasion as the above two Judges of Appeal. This is not to say that procedural errors or omissions should always enjoy clemency, far from it Court Procedure's are made for a purpose, i.e. to ensure orderly, effective and predictable management of cases. But there will from time to time be cases where substantive justice demands priority over technicalities of procedure. I hold that the present case provides one such instance.

Prayer 1 in the chamber summons application dated 16.03.05 and filed on 18.03.05 seeking reinstatement of the suit dismissed on 08.02.05 is hereby granted. The plaintiffs/applicants shall, however, bear the defendant's/respondent's costs of the application as a wake – up call for them and their counsel to exercise greater prudence in pursuing cases they bring before court.

Orders accordingly.

Delivered at Nairobi this 18th day of July, 2005.

B.P. KUBO

JUDGE