

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 47 of 1997

PETER KINYA.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

RULING

The Plaintiff's suit was listed for hearing on 23/6/2004 but on that day his advocate, Mr. Lawrence Mwangi was bereaved and he sent another advocate, Mr. Makori to hold his brief and apply for an adjournment. The application was granted and the hearing was stood over to the following day. On 24/6/2004 neither the Plaintiff nor his advocate attended court and since the Defendant's representative was present in court and did not admit any part of the Plaintiff's claim, the Defendant's advocate prayed that the Plaintiff's suit be dismissed with costs for want of prosecution and the court granted the application.

The Plaintiff has now filed an application by way of a Chamber Summons urging the court to set aside the orders of dismissal of the suit made on 24/6/2004. In his affidavit in support of the application, he deposed that on 23/6/2004 he was in the law courts building but was not in court No.2 when this matter was called out. He met his advocate's court clerk who informed him that Mr. Mwangi had been bereaved and had sent another advocate to hold his brief for purposes of seeking an adjournment. He then left the court without knowing that the matter had been adjourned to the following day.

Meanwhile, Mr. Mwangi Advocate was informed in the evening of 23rd June, 2004 that the matter had been stood over to the 24th of June, 2004. He tried to reach his client by telephone but he was unable and so on the morning of 24th June he went to the Plaintiff's home in the outskirts of Nakuru Town and by the time they arrived in court, the suit had been dismissed for want of prosecution in their absence.

The Defendant filed grounds of opposition to the Plaintiff's application and stated that the application was unmeritorious. It further contended that the Plaintiff had not been keen on prosecuting his case.

It is not in dispute that this court has discretion to set aside its own order dismissing the suit for want of prosecution. As was stated by Harris J. in SHAH VS MBOGO [1967] E. A. 116 at 123:-

“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”.

I am satisfied that the plaintiff has advanced sufficient reasons to justify the setting aside of the dismissal orders. The offence which he committed of failing to wait in court to know the date which the matter had been adjourned to is excusable.

On the other hand, the record does not show that the plaintiff has in any way deliberately obstructed or delayed the course of justice. He had taken the hearing date way back on 20/1/2004 and served upon the Defendant a hearing notice. I therefore allow the Plaintiff's application but he will bear the costs thereof.

DATED, SIGNED & DELIVERED at Nakuru this 13th day of July, 2005.

DANIEL MUSINGA

JUDGE

13/7/2005