



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Case 521 of 1999**

**DAVID LIVINGSTONE OYIEKO.....PLAINTIFF**

**VERSUS**

**SIMON KIPRONO SIELE.....DEFENDANT**

**RULING**

On 18<sup>th</sup> October, 2004 the plaintiff's suit was dismissed because he was late in attending court to prosecute the same. His advocate, Mr. Motende was in court and had sought adjournment of the hearing from 9.00 a.m. to noon because he indicated that his client was travelling from Nairobi and was having transport problems. When the matter was called for hearing at 12.10 p.m. the plaintiff had still not attended court and a further application for adjournment was made but was not granted. The plaintiff thereafter filed an application by way of chamber summons brought under Order IXB Rule 4(1) and 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking reinstatement of the suit.

In his affidavit in support of the said application, the plaintiff deposed that he was travelling from Nairobi and due to transport problems, details of which he did not state, they arrived in Nakuru rather late and he came to court at 12.20 p.m., just about five minutes after his suit had been dismissed. He urged the court to consider that his suit involved a claim over a parcel of land known as **NAKURU**

**OLENGURUONE/KIPTANGICH/1056** for which he had a title deed issued to him on 21<sup>st</sup> November, 1991 but which property was later on acquired fraudulently by the first defendant. Counsel for the plaintiff submitted that his client would suffer serious hardship if this application was not granted as he stood to lose his property.

The first defendant opposed the said application and said that the plaintiff had not given any sufficient cause that could have prevented him from attending court in time. Mr. Karanja Mbugua for the first defendant sought to rely on **SHAMSUDIN JIWAN MITHA VS ABDULAZIZ ALI LADAK** [ 1960] E.A. 1054 where in a similar application, the High Court of Tanganyika at Dar-es-Salaam held that to succeed in setting aside an order which was made in the absence of the defendant, an applicant had to show that he did not appear when the suit was called out because he was prevented from appearing by a sufficient cause. Counsel further submitted that the plaintiff's affidavit was vague because he did not state exactly what had happened on the way to cause his delay in coming to court. He further submitted that the plaintiff should have extracted the order after dismissal of the suit before filing the present application. Lastly, counsel submitted that the plaintiff's affidavit was defective in that it did not show who drew it.

It is *trite law* that this court has inherent power and discretion to set aside the orders that it issued on 18<sup>th</sup> October, 2004 dismissing the plaintiff's suit for want of prosecution. However, that discretion cannot be exercised whimsically, it has to be exercised judiciously. The court has to consider the reasons advanced by the plaintiff to justify his failure to attend court, whether or not the plaintiff filed the application without delay, the injustice, hardship and/or prejudice which the parties are likely to suffer if the application is granted or refused and whether the first defendant can adequately be compensated by an award of costs if the application is granted.

As was stated in **SHAH VS MBOGO & ANOTHER** [1967]E.A. 116, the court's discretion is intended to

be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice. However, each matter has to be decided in the context of its own particular facts and circumstances.

The hearing date of 18<sup>th</sup> October, 2004 was taken by the plaintiff's advocate way back on 3<sup>rd</sup> March, 2004. On the material day, the plaintiff's advocate was punctual in court when the matter was called out and he informed the court that the plaintiff would be arriving in court shortly as he was travelling from Nairobi. The plaintiff arrived in court at about 12.20 p.m., about ten (10) minutes after dismissal of his suit. Although he was travelling by public means, he did not state in details what actually caused the delay. However, it is noteworthy that immediately after he left the court he proceeded to his advocate's office and swore the affidavit in support of his application the same day and the application was filed the following day, that is 19<sup>th</sup> October, 2004 and proceeded to take a date for the hearing for the same on 25<sup>th</sup> October, 2004.

The whole process bespeaks of a party who was very keen on setting aside the dismissal order aforesaid. Despite the fact that he did not explain in his affidavit what actually happened between Nairobi and Nakuru so as to cause the delay in arriving in court, it is common knowledge that public transport in this country is not reliable. Perhaps the plaintiff should have been more prudent and chosen to travel to Nakuru the previous day and incur minimal overnight accommodation expenses but in his own wisdom he chose otherwise.

If the plaintiff's application is not allowed, he will suffer considerable hardship in that he will have no opportunity to challenge the alleged unlawful dispossession from his land by the defendants. On the other hand, the first defendant is in occupation of the suit land and he is utilising the same and while he would suffer some prejudice if the application was granted, he can adequately be compensated by an award of costs. It would be in the interest of justice to have the case heard and determined on its merits.

Mr. Karanja submitted that the plaintiff should have extracted the orders of the court issued on 18<sup>th</sup> October, 2004 before filing the present application. While that may be a sound procedural step, it is not, in my view, a bar to the filing of an application to set aside the said orders.

With regard to the defect in the plaintiff's affidavit for the reason that it did not disclose who had drawn the same, that is an irregularity that is excusable under Order XVIII Rule 7 of the Civil Procedure Rules.

I will exercise my discretion in favour of the plaintiff and set aside the dismissal order made on 18<sup>th</sup> October, 2004 and reinstate the plaintiff's suit to hearing. The plaintiff will however pay thrown away costs of the suit assessed at Kshs.15,000/- before a hearing date is fixed.

DATED, SIGNED & DELIVERED at Nakuru this 13<sup>th</sup> day of July, 2005.

**D. MUSINGA**

JUDGE

**13/7/2005**