

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 324 of 1996

BEATRICE E.J. YAGAN..... PLAINTIFF

VERSUS

JOSEPH YATOR.....DEFENDANT

RULING

This is an application made under **Order XLIV Rule 1 of the Civil Procedure Rules** by the plaintiff seeking the order of the court to review its order issued on the 21st of September 2000 dismissing the plaintiff's suit. The plaintiff is praying that the said order of dismissal be set aside and the plaintiff's suit be restored to hearing. The application is supported by the annexed affidavit of Beatrice Yagan and the grounds stated on the face of the application. The application is opposed. The defendant, Joseph Yator filed grounds of opposition and a replying affidavit in opposition to the application.

At the hearing of the application Mr Kahiga learned Counsel for the plaintiff submitted that when the plaintiff's suit was dismissed by Ondeyo J both Counsels for the plaintiff and the defendant were present. The plaintiff was absent. Her son was however present. The learned Judge ordered the case to proceed to hearing the afternoon of the said date that the hearing had been scheduled. Learned Counsel submitted that the plaintiff was however not able to attend court due to the fact she was suffering from acute tonsillitis. The Learned Judge formed an opinion that the plaintiff had refused to testify and duly dismissed the plaintiff's suit for lack of evidence. It was contended on behalf of the plaintiff that the learned Judge ought not to have dismissed the plaintiff's suit because the said suit had been listed for hearing for the first time when the same was dismissed. It was further argued that the plaintiff did not feign illness when she failed to attend court.

It was further submitted that although the plaintiff did not produce any medical documents at the time to establish that she was sick, the true facts were that the plaintiff was not in a position to address the court due to her illness. Learned Counsel submitted that this court should give the plaintiff an opportunity to enable her ventilate her case on merit. He further argued that the plaintiff had made the proper application before court for review as this court had discretion to grant an application for review if there were sufficient reasons. The plaintiff argued that no prejudice would be occasioned to the defendant due to the fact the defendant, who had filed a counterclaim, had not prosecuted the said counterclaim. Learned Counsel further argued that this court had unfettered discretion to review its orders.

Mr Kimatta, learned Counsel for the defendant opposed the application. He submitted that the application amounted to an appeal against the decision of Ondeyo J. Learned Counsel submitted that the plaintiff was in effect arguing that the learned Judge had erred in dismissing her suit in the circumstances. It was contended that the plaintiff had been given a chance to tender evidence in support of her case but she had spurned the opportunity. It was argued that the learned Judge had no option but to dismiss the case when faced with a situation where the plaintiff had refused to offer any evidence in support of her case. Learned Counsel submitted that the plaintiff did not have any documents to prove that she was sick on the day the hearing of the case was scheduled. The issue of the plaintiff's illness did not arise on the day the plaintiff was required to testify before court.

It was submitted that the medical report that the plaintiff had sought to rely in the application was not place before learned Judge at the time the plaintiff's suit was dismissed. The learned Judge could not

therefore have been aware that the plaintiff was ill. As the registered owner of the suit land, the defendant submitted that he would be prejudiced if the application was allowed. The defendant submitted that his counterclaim had not been listed for hearing due to the fact that the plaintiff's application for review was pending hearing and determination. He submitted that it was the plaintiff's application that had caused the said counterclaim to be delayed from being heard and disposed of. The defendant urged the court to dismiss the application.

In response, the plaintiff submitted that her application for review was proper since the medical report in question had now been placed before the court to enable it make a determination whether or not the plaintiff was prevented by her illness from attending the hearing of her case when the said suit was dismissed by the court.

I have carefully considered the submissions made in this application. I have also perused the affidavits filed in support and in opposition of this application. The issue for determination by this court is whether the Plaintiff has established sufficient grounds that would enable this court grant her application to review the orders of this court dismissing the Plaintiff's suit and order that the said suit be reinstated to hearing. This court is aware that it has unfettered discretion to review any of its orders granted provided that it is established that the order sought to be reviewed falls within the ambit of orders that may be reviewed by this court as provided by orders **XLIV rule I of the Civil Procedure Rules**.

The order that the Plaintiff is seeking to review is the order issued by Ondeyo J on the 21st of September, 2000. According to the record of this court, the Plaintiff appeared before the court, was put on the witness stand, but refused to testify inspite of the fact that she had been ordered to do so by the court. The Plaintiff failed to give her testimony inspite of the fact that the said court had refused to grant her application for adjournment and had ordered her to proceed with the case. The Plaintiff did not mention that she was sick. Neither did she give the court her reasons for refusing to offer her testimony. Her counsel then on record was constrained to make a feeble attempt to seek an adjournment. The application was disallowed. The Court ordered the Plaintiff's suit to be dismissed since the Plaintiff did not offer any evidence in her case.

Now the Plaintiff states that she was unable to testify since she was suffering from chronic tonsillitis which prevented her from communicate to the court. She says she could not speak. The Plaintiff did not however present the evidence of her illness to the court. I have perused the medical report that the Plaintiff has sought to rely on in support of her application. The said medical report prepared by one Charles Mose Nyambaye is dated 20th of September, 2000. The Plaintiff's suit was dismissed on the 21st of September, 2000. If the Plaintiff was sick as she claims she was on the day the case was scheduled for hearing, nothing would have been easier than for the Plaintiff to present the said medical report to the court. The Plaintiff's counsel did not mention to the court that the Plaintiff was sick. For all intents and purposes, the finding of Ondeyo J that the Plaintiff had deliberately refused to offer any evidence when so required by the court cannot be faulted. The medical report was prepared subsequent to the dismissal of the suit to bolster the Plaintiff's quest to have the said suit reinstated to hearing. The Plaintiff did not offer any reason why she took more than seven months before she brought the application to review the said ruling of the court. Instead of making an application for review immediately after the said order was issued, the Plaintiff sought to stay proceedings because she indicated that she intended to appeal against the said ruling of the court. The plaintiff was more interested in frustrating the hearing of the suit than in setting aside the said order of the court dismissing her case.

Having evaluated the submission made and the facts of this case as placed before me in the affidavits sworn by the parties to this case, and also having read the record of this court, it is the finding of this court that the Plaintiff has failed to establish a case to enable this court grant the orders of review sought. The evidence on record points to the conclusion that the Plaintiff was not at all anxious to have her case heard due to the fact that she had obtained interim orders of injunction which she sought to have continue indefinitely. The Plaintiff had no interest in having her case heard. She spurned the opportunity given to her by the court to proceed with her case. The Plaintiff entered the witness stand and completely refused to testify. No reason was given to the court why the Plaintiff remained mum when she was put on the witness stand. The reason advanced by the plaintiff that she was suffering from a disease that prevented

her from communicating to the court is an afterthought. The plaintiff did not inform the court of this fact when she was put on the witness stand.

In the circumstances of this case, I find no merit whatsoever with the application for review filed by the plaintiff. No grounds have been established to enable this court exercise its jurisdiction to review its orders. The said application is dismissed with costs to the defendant.

DATED at NAKURU this 3rd day of August 2005.

L. KIMARU

JUDGE