



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

Civil Suit 319 of 1999

ATHMAN ALI MASHAPLAINTIFF

VERSUS

IDI OBRAHIM NDEGWA

INDUSTRIAL & COMMERCIAL DEV. CORPORATION

JOEL TITUS MUSYA T/A MAKURI ENTERPRISES..... DEFENDANTS

R U L I N G

By Notice of Motion dated 15/4/05 the applicant seeks orders to set aside order made on 7/10/04 dismissing the suit and reinstate the same. The grounds are set out on the body of application and there is a supporting affidavit.

It is alleged that the application for dismissal dated 8/1/2001 has never been served on the advocate on record and that on the hearing date thereof the application had been overtaken by events. Furthermore that Counsel had failed to attend court because of inadvertence. The supporting affidavit shows that the hearing notice for the application dated 8/1/2001 was served on the plaintiffs advocate. This is supported by the letter of Respondents marked AAM2 dated 11/11/04 and that the advocates failed to attend court because no application dated 8/1/2001 was in existence in their records.

The orders sought to be set aside was obtained for non-appearance by Counsel. The only reason given was inadvertence of counsel. But as shown on the counsel's letter dated 11/11/04, after dismissal order on 7/10/04, it is said "Our record does not show the existence of any such application and we did not see the need of appearing in court to handle an application which does not exist.

It is to be observed that the alleged inadvertence was a deliberate act not to attend court.

I therefore do not find this ground with any merit.

Furthermore as on 8/1/2001 it shows the Applicant had not perused the suit file for a period of 17 months and from 8/1/2001 they had taken no action to peruse or to act on the file until 23/2/2004 when they filed a document dated 20/2/04 and 7/9/2004 when they filed an application dated 6.8.2004.

And on 5/7/2004 the advocates for applicants were served with a hearing notice for application dated 8/1/2001 scheduled for hearing on 7/10/2007.

Notice is dated 5/6/2004. The advocate's stamp is affixed on the back of notice, which is confirmed by Affidavit of Service dated 6/10/2004 on the ground that the application had been overtaken by events. By

the time of hearing application the application to amend had not been heard to date. Also the applicant obtained an order to stop sale which he has been holding all this time.

Finally at the time the order for dismissal was made the court (J. Mwera) was satisfied that application was served. And there was no replying affidavit or grounds of opposition filed and no appearance. Let it be noted that the Applicant has never changed his advocates who filed the plaint except the technical change of his advocate's change of name.

I have considered all these matters. I am satisfied that the applicant was served with application dated 8/1/01 and was served with hearing notice well in time to check on the same in court file and to file any opposition he wished to do so but did not do so.

I find that failure to attend court on 7/10/04 was deliberate and not caused by any inadvertence or mistake on the part of the counsel. I also find that the step to amend the plaint was not in good faith as the cause of action should have, was in existence when the plaint was filed in 1999.

I therefore find no merit in this application and the same is dismissed with costs.

Delivered and dated at Mombasa this 29th day of September 2005.

J.N. KHAMINWA

J U D G E

29/9/05:

Khaminwa, J

Jason – Court Clerk

Ms. Osili

Mr. Njiru – h/b

Ruling read.

Ms. Osili:

I apply for certified copies of ruling and proceedings.

Court:

Let the same be supplied on payment of coping charges.

Ms. Osili:

A mention date to apply for leave to appeal.

Court:

Mention on 12/10/05.

KHAMINWA, J