

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 111 of 1995

JACOB MUNDIA MACHARIA.....PLAINTIFF

VERSUS

JOHN WAITHAKA KIMUNDU.....DEFENDANT

RULING

The Application has been brought through Chamber Summons under Order IXB Rule 8 of the Civil Procedure Rules and Section 3 (A) of the Civil Procedure Act. The application prays for the following:

(1) That the Orders made on 3rd June, 2002 dismissing this Suit for want of prosecution be set aside.

(2) That this Honourable Court be pleased to reinstate this Suit for hearing and determination on merit.

In support of the application, the Applicant has relied on his affidavit in which he states that on the material day, he was indisposed. Besides the above, the Applicant has also disposed that immediately after the disposal of the case, he attended Court. In addition to the above, The Applicant has also deposed that on 31st May, 2002 he had attended Timboroa Health Centre for treatment following attack of pneumonia. Subsequently, the Applicant went for review on 5th June, 2002. In support of the application, Ms Abuga quoted the case of Ngome Vs Plantex Company Ltd – Civil Appeal No. 91 of 1983 in which the Court stated that where a Suit has been dismissed for non-attendance, then it has a duty to hear the Applicant.

On the other hand, Mr. Mwangi has opposed the application on the ground that the same lacks any merit. Besides the above, Mr. Mwangi submitted that the application was filed four months after the dismissal of the Suit. He further urged me not to grant the equitable remedy due to the indolence of the Applicant. Apart from the above, Mr. Mwangi has also pointed out that the treatment card has been altered as an afterthought.

This Court has carefully perused the submissions by both Counsels. Apart from the above, I have also perused the case of **Ngome Vs Plantex Company Ltd. KLR [1984]** where the Hon. Judges of Appeal quoted Order IXB Rule 8 which states as follows:

“Where judgment has been entered under this Order, the Court on application by summons, may set aside or vary such judgment and any consequential decree or Order upon such terms as are just.”

In addition to the above, the Court has noted the alterations of the date of the Medical notes. However, such mistakes cannot be overruled in hospitals – especially where the operations are conducted manually.

I wish to grant the Applicant the benefit of doubt so that this matter may be decided on its own merits. This Court is alive to the fact that one person died due to the road accident on 2nd February, 1991. It is therefore crucial that the matter be decided conclusively after all the parties have been granted a chance to be heard.

The upshot is that I hereby set aside the Order dated 3rd June, 2002 dismissing the Suit and all other consequential orders. Lastly, I hereby reinstate the Suit for hearing and determination on merit.

Costs to the Respondent in any event.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open Court in the presence of Mrs. Simiyu for Respondent. Mr. Kimatta for Gekong'a for Applicant.

MUGA APONDI

JUDGE

28TH SEPTEMBER, 2005