

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 218 of 2003

PROF. WALTER GITAU.....PLAIANTIFF

VERUS

EAST AFRICAN BUILDING SOCIETY.....DEFENDANT

RULING

This is an application to set aside an Order dismissing the Plaintiff's application dated 2nd April 2003. The Plaintiff's Counsel did not appear in court on 28th June, 2004 to prosecute the said Application. The date had been taken or fixed by consent on 21st May, 2004 before me.

The reason given by the counsel Mr. Njoroge for his non-attendance was because he had gone before another court in the High Court for the hearing of a partly-heard case. He requested another lawyer to hold his brief and apply for adjournment.

The application was opposed by the defendant through its counsel Miss Dar. The Defendant argued that the hearing date was taken by consent and it is the Defendant which initiated the taking of the hearing dates. The Defendant also states that the dismissal of the application is not the end of the matter since the suit is still pending and can be heard on its merits.

I have considered this application and are of the view that, strictly, the Plaintiff's counsel ought to have organized his diary so that he is not required to be in 2 places at the same time. He has control of his diary and the clashing of his clients' cases could have been avoided.

Be that as it may, Legal Practice can be very trying and tedious and it is not uncommon that lawyers in Kenya find themselves with several matters on a particular day. It is ideal and desirable that counsel avoid or reduce the frequency of mixing their diaries or allowing to fix hearing dates for their cases on the same day or accepting briefs which already have hearing dates yet they are committed on the said dates.

I have been asked to look at the history of this case and to consider whether the Plaintiff's application has any merits or even whether there is bona fides on his part. I have studied the file but I would not wish to pre-empt the question of the merits. I dismissed the case for non-attendance and the Applicant still has a right to file a fresh one.

Secondly I notice that at the time the Plaintiff's application was dismissed, there was an Interim order in his favour, granted by Justice Mbiti (as he then was). The court must have deemed that the application was serious enough for it to grant such ex parte order. Unless I were to hear the matter fully, it would be inappropriate for me to make any comments on the merits of the application.

In the end, I am inclined to exercise the court's discretion and set aside the order of dismissal. The non-attendance was not deliberate or calculated to delay the hearing of the matter on the part of the Plaintiff. It was due to his advocate's failure to manage his diary. I think that it would serve the ends and interest of justice, if the Plaintiff is given an opportunity to be heard on the application. It is also my view that the hearing of the said application may in itself dispose of the entire suit as the only question that the Plaintiff is raising is that of accounts and he is not challenging the Statutory Power of Sale.

I hereby allow the application in terms of Prayers 1 and 2. The Applicant shall pay the costs of the application to the Respondent.

Dated and delivered at Nairobi on this 27th day of September, 2005.

MOHAMMED K. IBRAHIM

JUDGE