

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 87 of 2002

JONATHAN NZANGI MUTUNGA PLAINTIFF

VERSUS

ANTHONY MUINDE MUTISO DEFENDANT

R U L I N G

This is an application to set aside a dismissal order. The case was fixed for a hearing by Mr Musili's clerk on behalf of the plaintiff in the presence of the defendant. On the hearing day which was on 19/1/05, Mr Musili, and his client failed to turn up in court and the court dismissed the plaintiff's case. The reason given for Mr Musili's failure to turn up in court is that his clerk who had fixed the case for a hearing had failed to inform him of the fixture. As a result, Mr Musili, deponed in a supporting affidavit, he did not know nor attend to prosecute the case. He also argued that even if the court found it was his or his office's mistake, and being the first time, it should not punish the plaintiff who was innocent.

On the other hand, the defendant saw no reason to excuse the plaintiff or his lawyer. He sought for dismissal of the application.

I have considered the application. Accepting the facts as they are, I am of the view and it is my decision that the mistake lies at the office of Mr Musili, and not his client. I believe that for this occasion the plaintiff should not be punished. He should be given one more chance to prosecute his case. The court is aware that the defendant also suffered in coming to court then but such can be compensated in costs.

For the above reasons, this application is allowed. The orders of 19/1/05 dismissing the case are set aside. Costs are to defendant. Because the mistake is that of the advocate, Mr Musili, shall personally pay the costs assessed at Kshs.2,000/= , payable before the next date. A hearing should be taken without delay. Orders accordingly.

Dated and delivered at Machakos this 16th day of November 2005.

D.A. ONYANCHA

JUDGE