



1) Civil Practice & Procedure

2) Application to set aside the dismissal

orders of the court case for non attendance of parties

Order 9b r 8 CPR

**3) Reasons:- The communication to the plaintiff notifying him
of the hearing date never reached her.**

**4) Advocate for the plaintiff was not on record for plaintiff has now regularized
position.**

5) Held:-advocate for defendant failed to file replying affidavit

6) Case law –Nil

7) Advocates:-

F.A. Shitambasi advocate for the applicant

S.N. Nganga advocate for responden

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2424 OF 1992

DAVID BAYA THOYA PLAINTIFF

VERSUS

JOSEPH KIMANI WAINAINA 1ST DEFENDANT

JOHN WAINAINA KIMANI 2ND DEFENDANT

RULING II

The plaintiff herein was originally represented by M/s Kagwana & Lubullellah and Co. Advocates. They filed suit on behalf of the plaintiff on the 6th of May 1992.

The suit had a defence filed by the 1st and 2nd defendants, later amended to read the 1st defendant on 15.10.92.

Parties went for summons for directions before C.K. Njai, deputy registrar (as he then was) on the 21.9.95 ie there years later.

The case was set down of rehearing on the 3.12.96, 11.6.97 and 29.1.98 but no hearing was heard. On the 27.5.98 the case coming before Aganyanya, J was adjourned on the grounds that the plaintiff was not available to give evidence.

On the 4.12.00, the defendant filed a notice of motion seeking that the suit be dismissed for want of prosecution. The parties appeared before Kuloba J. on 21.2.00 and the said application was withdrawn with costs of sh.2,000/- agreed by the parties to be paid to the 1st defendant.

Further dates were taken on 20.7.00 for 4th and 5th December 2000. The case came before Gacheche CA (as she then was) whose stood the case over generally as an application to amend the plaint was to be made. No such amendments was in fact made nor was there an application formerly for leave to amend the plaint.

The dates were taken on an unknown dates for 10th and 11th July 2002 the others for 2.10.02 and 16th July 2003.

On the 15th and 16th July 2003 the advocates for the parties came before me for the first time. It was then that the advocate purporting to represent the plaintiff realized that the 2nd defendant had infact never been served with summons to enter appearance. The advocate for defendant had never been on record for the 2nd defendant.

The advocate purporting to act for the plaintiff applied for an adjournment on grounds that the plaintiff was absent.

“Plaintiff has never given us instructions.

Plaintiffs had no postal address. Not able to reach him

for hearing so matter would not be dismissed.”

In reply the advocate for the 1st defendant stated that there had been no compliance with the intention to amend the plaint.

The court dismissed the case against the 2nd defendant under order V r1(7) CPR as summons to enter appearance had never been served on the said 2nd defendant and he time for doing so had expired.

As the suit against the 1st defendant the same was dismissed under order 9b r 2 CPR.

There was an application filed to set aside the orders under order 9b r 8 CPR. When this application came before me, I ruled on 10.12.03 that the advocate for the plaintiff had no locus before the court. The application was duly struck out.

The advocate for the plaintiff regularize the position of his representation of the plaintiff on the 24.2.04. The plaintiff now brings this application before me dated the 31.10.03 but filed on the 24.2.04.

Seeking prayers to set aside the courts orders. For some unknown reasons the advocates for the defendant filed no replying affidavit. In his submissions in reply to the application he purported to rely on the certain facts not deponed to.

I would note from the advocate for the plaintiffs submissions that infact the plaintiff communication by post was said to be going to his niece. He himself never received the said letters. The advocate should have not confirmed the suit for hearing. Unless he has confirmed from the plaintiff that the plaintiff would be available for his case.

I hereby set aside the dismissal orders against defendant No.1 only, that being on the grounds that plaintiff may have not been aware the suit was coming for hearing.

That the suit against the 2nd defendant remains dismissed under order Vr 1(7) CPR.

I reinstate this suit for hearing with costs to the defendant No1.

Dated this 11th day of December, 2004 at Nairobi.

M. A. ANG'AWA

JUDGE

Lubullelah & Associates for the plaintiff

Mereka & Co. Advocates for the defendant.