

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.434 OF 1996

JOHN GAITA.....PLAINTIFF

=V E R S U S=

SEAFORTH SHIPPING KENYA LTD.....FIRST DEFENDANT

KENYA PORTS AUTHORITY.....SECOND DEFENDANT

R U L I N G

The applicant is the Plaintiff herein. He seeks that this court do set aside or vary the orders of this court dated 17th October, 2000. He comes under IXB rule 8 of the Civil Procedure Rules and under S.3A of the Civil Procedure Act.

By an application dated 28th July, 2000 the Plaintiff had applied to this court to strike out the 2nd Defendant's defence and the application was fixed for a hearing on 17th October, 2000. In the meantime the 1st Defendant had also filed an application dated 14th July, 1999 seeking orders to dismiss the suit for want of prosecution. Apparently this application was also fixed for a hearing on the same date, on 17th October, 2000. When the 1st application dated 28th July, 2000 was called, the Plaintiff or his advocate were absent. The advocate for the 1st Defendant was present. The court dismissed the Plaintiff's said application and proceeded to allow the 1st Defendant's application. The upshot was that this suit No.434 of 1996 was dismissed for want of prosecution. This Plaintiff's application is seeking to set aside or vary the order dismissing the suit.

When this application came up for prosecution this court sought to know whether service upon the Defendants had been done and the answer was positive. I have examined the record and find that there is an affidavit of service properly filed by one Joseph Mutinda a court process-server. I was however unable to see the hearing notices purportedly signed by the Defendants upon service. I am accordingly proceeding to make this ruling on the assumption that service of the hearing Notice was truly and properly done. The Applicant seeks that his suit dismissed in his or his advocate's absence be reinstated. He supports the application with an affidavit sworn by one Mulwa Nduya, an advocate of this court who is having the conduct of this matter currently and who was the one who caused the application to be dismissed for his non-attendance. He explains that he was present in the court earlier before court adjourned at 10.30 a.m. for a tea break. He then requested another advocate Benjamin Njoroge to hold his brief to record a consent order under which both applications would be adjourned to enable the advocate to the 1st Defendant to serve his application upon the Plaintiff's advocate. According to the Applicant Mr. Njoroge who was holding the brief returned late to court and found the case and the application dismissed. This application is not opposed in two ways. No replying affidavit was filed. Secondly, the Defendants did not attend court to defend despite being served with the hearing notice. I am satisfied that the Plaintiff's counsel failure to attend court at the right time was not deliberate.

He had relied on his colleague Mr. Njoroge who returned to court late and the supporting affidavit has adequately explained how the default occurred. This application was filed only about eight days after the dismissal. It is my view that sufficient cause for failure to be present at court at the right time has been shown and as I have stated hereinabove this application is really not opposed. I hold that this court has the inherent power to restore a suit that has been dismissed, such as this. The jurisdiction is so wide that this court may find cause to exercise it even where no sufficient cause for the default is shown. It can be

exercised at any time, even after there is a long delay to seek the remedy provided the court is genuinely of the view that such exercise is in the best interest of justice. This is not, however, laying any new rule. Every case will be considered on its own facts and circumstances. In this case I note that the advocate for the 1st Defendant had agreed with the Plaintiff's advocate that the two applications would by consent be adjourned. He seems to have changed his stance after noticing that the Plaintiff's advocate was absent. He should, in good faith, have drawn the attention of the court of the agreement between him and the Plaintiff's advocate. He did not but proceeded to undercut his colleague.

Be that as it may, having warned myself that the court's wide discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable error but is not designed to assist a person who deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice, I am satisfied that this is a case where the discretion should be exercised in favour of the Applicant herein.

ORDER

1. The dismissed suit HCCC No.434 of 1996, Mombasa, is hereby reinstated.
2. The Plaintiff to obtain a hearing date at the Court Registry without further delay.
3. No order as to costs.

Dated and delivered at Mombasa on the 19th day of March, 2002.

D. A. ONYANCHA

J U D G E