

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 760 OF 1993

FRANCIS MUSAU MBILU PLAINTIFF

- VERSUS -

1. SALIM RICHA SAID

2. OMAR DZIWA

3. WACHIRA

4. STEPHEN KIMANI NJOROGE

5. CHARLES KHAMISI

6. MAIN BUILDING CONTRACTORS LTD. DEFENDANT

R U L I N G

The application before the court by chamber Summons dated 26th January, 2001, is brought under the Provisions of Order 1XB rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The applicant who is the plaintiff herein seeks two substantive orders:

- a) That this honourable court be pleased to set aside and discharge the orders of the Court entered on the 23.5.96
- b) That this honourable court be pleased to reinstate this suit.

The suit was dismissed on 23.5.96 for reason of non attendance of all the parties and their Counsels under the provisions of order 1X B rule 2. According to the Court record, apart from an amended statement of defence filed by the 2nd Defendant's Counsel on 3.6.96, there was no further action taken until the 12.1.01 when E.M. Gichana & Co. Advocates filed a Notice of change of Advocates to act for the plaintiff in place of the Firm of L.V. Sereje & Co. Advocates. The current application was then filed on 14.3.01.

The application is supported by an Affidavit sworn by the plaintiff on 6th February, 2000 and he states that after the unfortunate accident that left him crippled he had entrusted the conduct of his case for the recovery of Damages for injuries suffered for his former Counsel, the late L.V. Sereje.

He did not receive any communication on the progress of the case until he had changed Advocates when his current Advocate on perusal of the Court record found out that the suit had been dismissed for non-attendance on 23.5.1996.

Mr. Gichana has submitted, that the applicant who is now crippled as a result of the said accident should not suffer for the mistakes of his former Advocate. He referred to the decision on this issue in HAJI AHMED SHEIKH t/a MOMBASA HAULIERS –VS- HIGHWAY CARRIERS LTD.(1982 – 88)1.1184

– in which Gachuhi JA said:

“It must be clear that the Court is to administer justice through the procedure laid down. It is important in administering justice that the suit in court is between two litigants and the Counsel is merely putting the case for his client forward. The litigant may not be aware of failure of his advocates in complying with rules. He is at the mercy of his advocate. It is the law of agency that the principle is bound by the acts of his agent. Yet in administering justice why should the litigant suffer due to the mistakes and errors of his advocates”.

Counsel for the 2nd Defendant Mr. Ananda opposed the application on the grounds that the applicant took too long to come to Court and that it was his duty to follow up his case. However the record is clear that not even the 2nd Defendant attended court on the material date only that he stands to gain from the Dismissal of the suit. I have considered the reasons given by the plaintiff and it is apparent that he has suffered and will continue to suffer as a result of the injuries suffered in the accident. He has explained that until he changed advocates, he knew nothing of the fate that befell his case. I am satisfied that he is merely a victim of a Counsel and or his officer being lazed and failing in their duty to keep him informed. I will allow the application and reinstate the suit herein. However to ensure the parties do not go to sleep the same is to be listed for hearing before the Expiry of 8 months from today within which period Discoveries and exchange of documents is expected to have been finalized. The costs of the application shall be in the cause.

Dated and Delivered this 17th day of May, 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE