

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NARIOBI

CIVIL CASE NO. 543 OF 2000

MAINA GACHERU PLAINTIFF

VERSUS

HANNAH WANGUI MWANGI DEFENDANT

RULING

The originating summons dated 05. 04. 2000 came up for hearing on 04. 02. 202 but was dismissed for non-attendance by the Plaintiff. It seeks adverse possession of some piece of land. The Plaintiff then applied on 14. 02. 22 to have the dismissal set aside. That application was subsequently amended and was argued before me.

I have the discretion under order 9B rule 8 Civil Procedure Rules (although order 9A rule 10 is erroneously relied on) to set aside such dismissal. The discretion is in terms unfettered but it has to be exercised judicially.

Learned Counsel for the Plaintiff Mr. Kinuthia swears that he did attend court and noticed that the matter was listed before me in the cause list. But he did not see his clients and so he went looking for them outside some other chambers where he found them. But on returning he found the matter had been dismissed. He pleaded an unintentional mistake by counsel and prayed for leniency.

Learned counsel for the defendant does not accept that story. That is because he was also outside the court's chambers the same morning but did not see the Plaintiff's counsel. The matter was called out twice but there was no appearance. Ms Wangari who argued the application wondered why an Advocate would go looking for his clients shortly before a matter was called out. In all probability counsel did not attend court and the Plaintiffs were not present. She submitted that the delay has prejudiced a related Succession matter.

I think the defendants Advocate may be excused for being skeptical about the conduct of the Plaintiff's counsel. Assuming that he was present outside the chambers as stated and saw the defendants counsel, his conduct shortly before the case was called out was strange if not careless. Prudence demanded that he should alert the other counsel or any other counsel in the event the mater was called out in his absence. It would also have been prudent to have an Affidavit sworn by his clients to confirm that they were lost in the court corridors. There should I think be a marked difference between the Advocate and his client because one advises the other and is better versed in court procedures. In this case the difference is difficult to discern. My sympathies are with the defendants who have been waiting for more than 2 years for this matter and were present with witnesses.

However, there was no demand for cross-examination of the Advocate to demolish his story. As it was given on oath I will reluctantly accept the explanation and allow the Application on terms:

- (1). That the Plaintiffs Advocate do personally pay all costs thrown away together with the costs of this application assessed at Shs.10,000.
- (2). That the originating summons shall be set down for hearing in the next 60 days.
- (3). In default of compliance with 1 & 2 above the application shall stand dismissed without further application.

Dated this 29th day of October, 2002.

P. N. WAKI

JUDGE