



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL SUIT NO 6 OF 2014

GERISHON MAINA GATEMBURA & 6 OTHERS.....PLAINTIFFS

VERSUS

PHILIP IRUNGU WAGANAH.....DEFENDANT

RULING

1. The plaintiffs pray that the suit be *reinstated*. The suit was dismissed on 19th June 2017 for want of evidence.
2. The plaintiff's counsel had sought an adjournment as she had no witnesses. She said that five of her seven witnesses were elderly. The application for adjournment was opposed by the defendant. The court was not satisfied with the explanation. Nevertheless, the judge granted counsel one hour to get the witnesses. She failed to do so. The suit was dismissed with costs.
3. Learned counsel now concedes that she misled her clients that the hearing was to take place on 29th June 2017. She has presented a notice of motion dated 13th September 2018 praying that the suit be resuscitated. The pith of the motion is that she made an honest mistake. She submitted that the suit relates to defamation; and, that unless it is reinstated, the plaintiffs will face a surcharge by the Commissioner of Cooperatives in related proceedings.
4. Those matters are buttressed in two affidavits sworn by Ms. Kimani and filed on 22nd September 2017 and 2nd July 2018 respectively.
5. The defendant opposes the application. There is a replying affidavit sworn on 6th November 2017.
6. On 17th September 2018, learned counsel for the applicant made brief oral submissions. Learned counsel for the defendant did not attend the session. But I have perused the defendant's list of authorities dated 29th August 2018.
7. The plaintiffs' learned counsel was *not* candid when she sought adjournment on 19th June 2017. She did not disclose that her clients were unaware of the date; or, that she had *misled* them to believe that the suit was slated for 29th June 2017. The court gave counsel time to present witnesses; she defaulted. The court was perfectly entitled to dismiss the suit.
8. But I have taken into consideration the *mistake* of counsel. I have no evidence that the blunder was deliberate or intended to obstruct the course of justice. This court has wide and *unfettered* discretion in such matters. See *Shah v Mbogo (No. 1)* [1967] E.A 116, *Mbogo and another v Shah* [1968] E.A 93.
9. There is also the overriding objective to do justice to the parties. See *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Stephen Boro Gitihia v Family Finance Bank & 3 others*. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR.
10. It is evident that failure to present witnesses at the trial resulted from *inadvertence* or *negligence* of counsel. I am prepared to give her the benefit of doubt and not visit her sins upon her clients. But the defendant is obviously *prejudiced* by the lethargy of the plaintiffs. The defendant can however be adequately *compensated* by thrown-away costs.
11. I will exercise my discretion in favour of the plaintiffs. The order made on 19th June 2017 is hereby set aside *but* upon the plaintiffs meeting two *conditions*. The plaintiffs shall pay the defendant *thrown away* costs of Kshs 15,000 within the next *thirty* days. The plaintiffs shall also set down the case for hearing within *one hundred and twenty days* of today's date. If the plaintiffs fail to meet *any* of the two conditions within the set *time*, the suit shall stand dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 17th day of September 2018.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mrs. Kimani for the plaintiffs instructed by Wangui Kathryn Kimani & Company Advocates.

No appearance by counsel for the defendant.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.