



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO.166 OF 2004

SILAS OKIBO MOSETI.....1ST PLAINTIFF

RICHARD MAGAKI MOSETI.....2ND PLAINTIFF

• VERSUS -

KENNEDY OMBUI ONTERE.....DEFENDANT

RULING

1. The application before me is dated 17th October 2012. It was brought by the plaintiffs in an attempt to set aside the orders which the court made on 10th November 2011, dismissing the plaintiffs' case.
2. It is the request of the plaintiffs that their suit be reinstated, so that it can thereafter be heard on merits.
3. The record shows that the suit was instituted on 29th March 2004. In answer to the plaint, the defendant filed his Defence on 23rd April 2004. Thereafter, the plaintiffs filed an Amended Plaint on 17th May 2004.
4. The suit was fixed for hearing on 4th October 2004. On that date the plaintiffs were ready to proceed with the trial. However, the defendant's lawyer sought an adjournment because his son had been taken ill.
5. After giving consideration to the rival contentions, Kasango J. adjourned the case, because the parties had not yet formulated the issues which the trial court would be expected to determine.
6. After that adjournment, the plaintiffs changed their lawyers. They changed from Akhaabi & Company Advocates to Mose & Mose Advocates.
7. On 31st January 2005, the plaintiffs filed an application for leave to amend the plaint. There was considerable delay in hearing and determining the application. However, on 15th August 2007, Waweru J. granted leave to the plaintiffs to further Amend the Plaint.
8. The Further Amended Plaint was filed in court on 31st August 2007. A Defence to that Further Amended Plaint was filed on 11th September 2007.
9. The case was then fixed for Hearing on 18th May 2010. However, on the scheduled date, the parties informed the court that they were holding negotiations. As a result of that information, the court adjourned the case.
10. On that date (18th May 2010) there was a consent order, pursuant to which the plaintiffs were to pay Court Adjournment Fees, together with the Defendant's costs of Kshs. 2,000/-.

11. On 10th December 2010, the plaintiffs advocates wrote to the advocates for the defendant, inviting them to attend at the Court Registry on 17th December 2010, for the purposes of fixing a mutually convenient date for Hearings. The record shows that both parties were represented at the Registry, and that they fixed the case for Hearing on 10th November 2011.
12. On the 10th of November 2011, Ms Omwenga, the learned advocate for the plaintiffs, sought an adjournment. Her reason for seeking an adjournment was that;

“My client, Silas Okibo is out of the country”.

13. Mr. Nyakiangana, the learned advocate for the Defendant, opposed the application for an adjournment.
14. He pointed out that the case was an old one, and also that there was no indication of the whereabouts of the other plaintiff.
15. In his Ruling, Kimondo J. noted;

“The plaintiff says one witness is away but no reasons are given for non-attendance of the other witness.

.....

As the plaintiffs took the present date, the reasons given are not sufficient”.

16. Consequently, the court rejected the application for an adjournment. It was ordered that the trial proceeds at 10.30 a.m.
17. However, the plaintiffs were still absent from court by 10.35 a.m. Their lawyer told the court that she had been unable to make contact with her clients.
18. At that point the court made the following orders;

“The dictates of justice in this matter, and the order that commends itself to me is thus to order, which I hereby do, that in the absence of the plaintiffs or their witnesses or any evidence in support of the suit, and considering that the defendant does not admit any part of the claim, that the plaintiffs’ suit be and is hereby dismissed with costs to the defendant”.

19. It is that order that the plaintiffs wish to have set aside.
20. The application is supported with the affidavit of the first plaintiff, **SILAS OKIBO MOSETI**. The said plaintiff has deponed that he was authorized by the second plaintiff, **RICHARD MAGAKI MOSETI**, to swear the supporting affidavit.
21. According to Silas, he lives and works in Minnesota, in the United States of America. The second plaintiff, Richard, is also resident in the United States of America.
22. Silas said that he came back to Kenya on 3rd May 2011 and then went back to the USA on 12th June 2011.
23. Meanwhile, Richard came back to Kenya on 5th May 2009 and then left the country on 18th June 2009.
24. As the plaintiffs were unable to secure permission from their places of work, they were both unable to attend court on 10th November 2011. That is what Silas has said in his affidavit.
25. Mr. Arusei, the learned advocate for the plaintiffs, submitted that the jurisdiction of the court is only one, which is to do justice. Therefore, his request to this court was to let justice be done, by restoring the suit which had been dismissed.
26. To my mind, there is no doubt whatsoever that the court has the requisite jurisdiction to reinstate or to restore a suit which had been dismissed for default.
27. However, I do not share the plaintiffs’ view that the court’s inherent power to restore or to reinstate a suit can be exercised *“even if no sufficient cause has been shown”*.
28. If the court purported to exercise its discretion, by restoring a suit when the plaintiff had not shown sufficient cause to warrant the reinstatement of the suit, that would be tantamount to an

irregular exercise of discretion. Justice cuts both ways, therefore a court of law must balance the rights of the plaintiff against the rights of the defendant.

29. In **EVANS VS BARTLAM [1937] 2 ALL ER 646**, at page 650, Lord Atkin said;

“... the principle obviously is that unless and until the court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure...”

30. In this case, the court dismissed the case because the plaintiffs and their witnesses were not in court to lead evidence during the trial. Therefore, the case was not determined on merits.

31. However, the failure by the plaintiffs and their witnesses to attend court cannot be described as a failure to follow any rules of procedure.

32. Mr. Arusei advocate submitted that the right to be given a hearing is enshrined in the Constitution, and is the cornerstone of the rule of law. For that reason, contended the plaintiffs;

“... even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the courts from abuse that would amount to injustice, and that at the end of the day there should be proportionality”.

33. I find that that proposition is an accurate statement of the law. Any abuse of the process of the court, which would amount to an injustice should be frowned upon.

34. But is also noteworthy that the plaintiffs readily conceded thus;

“In the instant case, the plaintiffs are not saying that they were denied a chance to be heard, no, far from it”.

35. If that be the case, my understanding is that the plaintiffs did not and cannot have called to their aid, the contention that they were not accorded an opportunity to be heard.

36. In the case of **PATEL VS. E.A. CARGO HANDLING SERVICES LIMITED [1974] E.A 75**, at page 76, Duffus P. discussed the extent of court’s discretion when called upon to either set aside or to vary orders which had been made when one party had failed to attend court. This is what the Learned Judge said;

“There are no limits or restrictions on the Judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules”.

37. On his part, Harris J. explained the reasons why the scope of the discretion was so expansive. This is what the Learned Judge said in **SHAH VS MBOGO [1967] E.A 116**, at page 123;

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice”.

38. The accident, inadvertence or mistake need not be limited to the actions or omissions of the party. Even the mistakes of the advocates may be reason enough to warrant the positive exercise of the court’s said discretion.

39. The Court of Appeal made it clear that when a court was called upon to exercise its discretion;

“That discretion must be exercised upon reasons and must be exercised judiciously”.

40. Those words were uttered by the Court of Appeal in **CMC HOLDINGS LIMITED VS NZIOKI [2004] 1 KLR 173**.

41. The need to do so was clearly demonstrated in the case of **COMMISSIONER OF INCOME TAX VS KENCELL COMMUNICATIONS LIMITED CIVIL APPEAL NO. 84 OF 2007**. In that case, the learned advocate for the appellant had arrived late. He was 23 minutes late, and found that the appeal had already been dismissed.
42. Immediately thereafter, he applied to the court for the reinstatement of the appeal. However, the learned Judge of the High Court rejected that application.
43. On an appeal to the Court of Appeal, the appeal was reinstated. When reinstating the appeal the Appeal Court said;

“In our own appreciation of matters before the learned Judge, the reasons advanced by Mr. Ontweka were plausible and in the interest of justice, the appeal should have been reinstated for hearing”.

44. In arriving at that conclusion, the Court of Appeal made it clear that the High Court had misapprehended the reasons which the appellant’s advocate had given for arriving late in court. The said lawyer had made a mistake, which led to his late arrival.
45. When that case is compared to the case before me, it is noted that there are several distinguishing factors. In this case the lawyer was present in court, at all material times. It is the plaintiffs who were absent.
46. It is said that the plaintiffs were absent because both of them were unable to secure authority from their respective employers, in the United States of America, to travel to Nairobi.
47. The Hearing date was the 10th of November 2011. That date was fixed at the High Court Registry, on 17th December 2010.
48. It is the advocates for the plaintiffs who invited the advocates for the defendant, to attend at the Registry on 17th December 2010, for the purposes of fixing a suitable hearing date.
49. Silas traveled to Kenya on 3rd May 2011 and he thereafter left the country on 12th June 2011.
50. As the plaintiffs had known, from 17th December 2010, that the case had been fixed for hearing on 10th November 2011, they ought to have arranged to be available to attend court on that date.
51. The second option that was available to the plaintiffs was to have negotiated with their respective employers, so that they could thereafter alert their lawyers concerning the dates when they would be available to testify in court.
52. The third option, in my respectful view was for the plaintiffs to notify their lawyer, soon after they were notified about the hearing date of 10th November 2011, that they would be unable to travel to Nairobi. If they chose this option, it could have been open to the plaintiffs’ lawyer to then take steps to take out the case from the hearing list for 10th November 2011.
53. But the plaintiffs failed to take up any of those options.
54. Presumably, after the court declined the application for an adjournment, the plaintiffs lawyers relayed the information to the plaintiffs. In effect, the plaintiffs should have become aware of the dismissal of the suit either on 10th November 2011 or soon thereafter.
55. Thereafter, the plaintiffs would have been expected to move swiftly, to try and have the suit reinstated.
56. However, although the suit was dismissed on 10th November 2011, the plaintiffs did not file their application until 18th October 2012. In effect, there was a delay of over eleven months. The said delay has not been explained by either the plaintiffs or by their lawyers.
57. That un-explained delay before the plaintiffs applied for the reinstatement of the suit, coupled with the fact that the cause of action accrued in 1999, means that so much time has lapsed that it may be difficult for witnesses to have a clear reflection of what had transpired. In effect, it may be difficult for there to be a fair hearing, on the part of both parties. Therefore, in my considered view, it would not serve the interests of justice to reinstate the suit.
58. Finally, although I have gone into the merits of the application, I wish to emphasize that the law firm which filed the said application had no right of audience before the court. They have never come on record, to replace the advocates who have been on record for the plaintiffs.
59. If I had not come to the conclusion that the application lacks merit, I would have struck it out.

60. But because it lacks merit, the application is dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 7th day of October 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Arusei for the 1st Plaintiff.

Arusei for the 2nd Plaintiff.

Mutinda for the Defendant.

Mr. C. Odhiambo, Court clerk.