



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

**Environmental & Land Case 613 of 2011**

**SILAS SAMMY KARANJA ..... PLAINTIFF**

**- VERSUS -**

**ABIGAEL WANGARI MUNYINGI..... DEFENDANT**

**RULING**

1. By a notice of motion dated 22<sup>nd</sup> February 2012, the plaintiff prays that the order made on 20<sup>th</sup> February 2012 be set aside. That order dismissed the plaintiff's application dated 4<sup>th</sup> November 2011. The plaintiff also prays that his earlier application dated 4<sup>th</sup> November 2011 and the interim orders obtained therein be reinstated. The application is supported by an affidavit sworn by Anthony Kimani on 22<sup>nd</sup> February 2012. The motion is stated to be under order 12 rule 7 of the Civil Procedure Rules 2010 as well as sections 3A and 63 of the Civil Procedure Act.
2. The plaintiff had presented to court the notice of motion dated 4<sup>th</sup> November 2011 seeking injunctive reliefs. On 10<sup>th</sup> November 2011, he was granted an interlocutory relief. On 8<sup>th</sup> December 2011, the matter was fixed for hearing inter parties for 20<sup>th</sup> February 2012. The plaintiff or his counsel did not attend court. The defendant applied for dismissal which prayer was granted by the court. The plaintiff now says that his counsel inadvertently and wrongly diarized the matter for 28<sup>th</sup> February 2012. The plaintiff avers that his goods are now at the peril of attachment. The plaintiff submitted that since he has a good case, he should be reinstated to the seat of justice.
3. The motion is contested. There are grounds of opposition dated 28<sup>th</sup> February 2012. The principal objection is that there are no sufficient grounds put forward to warrant setting aside of the impugned order. The application is also attacked for being an abuse of process and incompetent. In addition, the defendant has filed a replying affidavit sworn on 16<sup>th</sup> May 2012. I was implored to find that there is no proper evidence to support the grounds in the motion and to find that the plaintiff has come to court with unclean hands.
4. I have heard the rival arguments. On 7<sup>th</sup> November 2011, the plaintiff filed this suit. Contemporaneously with the suit, the plaintiff presented an interlocutory motion dated 4<sup>th</sup> November

2011 to injunct the defendant from evicting him from the suit premises or removing his proclaimed goods. On 10<sup>th</sup> November 2011, he was granted temporary reprieve in terms of prayer 2 in the motion. The matter was fixed for inter parties hearing on 8<sup>th</sup> December 2011. On the latter date, both parties appeared and the motion was adjourned for hearing on 20<sup>th</sup> February 2012. Of particular note is that counsel for the plaintiff was present when the date was taken. As stated earlier, neither the plaintiff nor his counsel attended court on 20<sup>th</sup> February 2012. The application dated 4<sup>th</sup> November 2011 was then dismissed for non-attendance and want of prosecution.

5. The only material ground to set aside is that the plaintiff's counsel erroneously diarized the matter for 28<sup>th</sup> February 2012. Those averments are made by Anthony Kimani, the advocate who had attended court and taken a date for 20<sup>th</sup> February 2012. He has attached copies of his diary to demonstrate that. I do not think that is an excusable mistake. He was in court. He took the date. He did not get that information from a person holding his brief, a clerk or other party. He is the author of his own misfortune. It is not a simple error but a negligent mistake. I say so because at paragraph 4 of the supporting affidavit, he says he did not have a diary for year 2012. He thus wrote the date on a "piece of paper". He got to his office. He could not trace the paper. He asked his clerk to try and recollect events. He thus assumed it was 28<sup>th</sup> February 2012. Why did he not peruse the court record?

6. The plaintiff has now brought this motion under order 12 rule 7. Order 12 rule 3 allows a court to dismiss a suit for non-attendance. Rule 7 then allows the aggrieved party to set aside that order and reinstate the suit. The decision of *Maina Vs Mugiria* [1983]KLR 78 reaffirms this court's wide and unfettered discretion to set aside an *ex parte* judgment and to do substantial justice to the parties. The case cited with approval the decision in *Shah Vs Mbogo* [1967] E A 116. The latter decision hold that the discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a party who has deliberately sought to obstruct or delay the course of justice.

I am not satisfied that a negligent mistake by counsel as the one here was the kind of mistake contemplated in that decision. True, those sins should not be visited on the plaintiff. But the plaintiff's counsel takes responsibility and his client is not without a remedy.

7. I am fortified further by the following. If it is true that the plaintiff's lawyer entered a date for 28<sup>th</sup> February 2012, he would then have waited until that date. But he presented this application on 22<sup>nd</sup> February 2012, two days after the dismissal. He does not explain how he came to know of the true date or the dismissal order. I have thus come to the inescapable conclusion that he was either negligent or missed court for other reasons. The rendition of events is thus not entirely candid.

8. There is another matter. The deponent to the affidavit in support is an advocate. At paragraphs 7 and 8 he depones as follows;

*7. THAT the Defendant/Respondent's case is based on allegations that the Plaintiff/Applicant has not been paying rent to the Defendant/Respondent who had sublet the Plaintiff/Applicant the suit premises while the Plaintiff/Applicant's position is that he has been paying the rent to MASTERWAYS PROPERTIES LTD the Agent of the proprietors of the business premises since August 2009 when the subtenancy was deemed to be illegal and the Plaintiff issued with a direct lease by the property Agents (Annexed and marked AGK 2 is a letter from Masterways Properties Ltd confirming to the Defendant's Advocates of the facts stated herein above and that they were not in any arrears of rent).*

*8. THAT unless the Plaintiff/Applicant's application is reinstated, the Plaintiff/Applicant stands to suffer as Auctioneers have been to his business premises and have threatened to attach the Plaintiff/Applicant's goods for rent arrears of which the Plaintiff has already paid. (Annexed and marked 'AGK 3' is the proclamation by Kiamagia Enterprises Auctioneers).*

9. In my view, those are the kind of matters best left to the plaintiff. His counsel is ill placed to depone to them conclusively. True, counsel depones at paragraph 2 that he is "conversant with the facts giving rise

to the application”. I also appreciate that in interlocutory proceedings such averments may as well pass under order 19 rule 3 of the Civil Procedure Rules. But that is an exception to the general rule. In particular, counsel must desist from deponing to contentious matters such as the ones at play in this application. See *M’kiara M’mbijiwe Vs Frankline Mugambi and others* [2007] e KLR, *Small Enterprises Finance Company Limited Vs George Gikubu Mbutia* Nairobi High Court case 3088 of 1994 (unreported) *Salim Alhamed Ali and another Vs Emag Ag* Nairobi, High Court case 1806 of 2000 (unreported).

10. For all the above reasons, I find that the plaintiff’s notice of motion dated 22<sup>nd</sup> February 2012 lacks merit. For the reasons I have given, it is also clearly an abuse of court process.

I order that it be dismissed with costs to the defendant.

It is so ordered.

**DATED and DELIVERED at NAIROBI** this 3<sup>rd</sup> day of July 2012.

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

Mr. Maina for the Plaintiff.

Mrs. Muhoho for P.N. Njuguna for the Defendant.