



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CIVIL SUIT 39 OF 2001

JOTHAM SIMIYU MAKOKHA PLAINTIFF.

VERSUS

ZABETH N. MAKOKHA DEFENDANT.

R U L I N G.

By a Notice of Motion, pursuant to the provisions of section 3A of the Civil Procedure Act, the applicant seeks orders.

- (1) **THAT**, an undated order dismissing this suit and all consequential proceedings and orders if any, be set aside.
- (2) **THAT**, the plaintiff's suit dated 5th march, 2001 be re-instated for hearing and determination on merit.
- (3) **THAT**, costs be in the cause.

The application is made on the grounds:-

- (1) **THAT**, the suit was dismissed for want of prosecution by the court acting on its own motion.
- (2) **THAT**, the notice to show cause why the suit should not be dismissed was never served upon the plaintiff's counsels.
- (3) **THAT**, the court was deprived of an opportunity to evaluate reasons why the suit ought not to have been dismissed.
- (4) **THAT**, the suit is part heard before **HONOURABLE JUSTICE W. KARANJA** who was transferred to another station.
- (5) **THAT**, the case was pending for further defence hearing.
- (6) **THAT**, the delay in fixing a date for further hearing was due to the transfer of the said trial judge to another station.

The application is predicated upon the annexed affidavit of David Nyakango Onyancha sworn in the 14th day of January, 2009.

On behalf of the applicant, I was urged to set aside the ex-parte dismissal orders of the suit on 4th November, 2009.

The application is premised on the point of law that the suit was dismissed for want of prosecution. However, the Notice to Show Cause was not served upon the plaintiffs advocate in terms of the provisions of order V of the civil Procedure Rules with the consequence that this applicant was deprived of a fair hearing. That had the court heard the applicant, the result would have been different. Last but not least, that the suit is part-heard before W. Karanja – J. who was transferred to another station before she could finalize the same.

I have scanned through the entire file and have failed to locate the relevant affidavit of service. In the foregoing circumstances, I order that the dismissal order of 4th November, 2008 be and is hereby set aside. The parties to comply with the provisions of order X Rule 11A and the suit be set down for hearing within the next 60 days failing which the suit stands dismissed. It is so ordered.

Dated and delivered at Kitale this 2nd day of June, 2009.

N.R.O. OMBIJA.

JUDGE.

N/A for Plaintiff.

Mr. Arunga for defendant.