



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 15 of 1994**

**GITUTHO ASSOCIATES AND 3 OTHERS.....PLAINTIFFS**

**- Versus -**

**ARTHUR K. MAGUGUINN OF INNS LIMITED.....DEFENDANTS**

**RULING**

The Plaintiff's suit was dismissed on 24.5.1999 when it was due for hearing and the Plaintiffs nor their Advocate were absent when it was called out inside and outside the court. Only the defendants' Advocate was present in court but did not admit any part of the claim on behalf of the defendants. The defendants however had a counterclaim but offered no evidence thereon. Their suit was also dismissed.

It is the plaintiffs however who soon thereafter made a frantic effort to have the suit reinstated. In the process, whether by design or ignorance, they filed a Miscellaneous Civil Application on 26.5.99 (two days later) seeking to set aside the dismissal and obtained temporary relief ex parte. That miscellaneous Application was struck out when it came up for inter parte hearing on 17.6.99 as it was totally misconceived. The Application ought to have been filed in this same matter.

And it was the following day on 18.6.99, that is the application argued on 12.10.99 and the subject matter of his Ruling,<sup>2</sup>

The explanation for non-attendance at the hearing is given by the plaintiff's Advocate Gikandi Ngibuini who swore the supporting Affidavit and made submissions in court on their behalf. He was aware of the hearing date, having taken it by consent and had informed his clients to meet him at his chambers on the morning of the hearing so that they can all troop together to court. Despite all those arrangements. Some traumatic events took place the preceding week necessitating the departure of Mr. Gikandi from Mombasa to his home area. His brother who was doing business in Angola was kidnapped in that country and was later found murdered. He travelled for a family meeting on Saturday 21.5.99 intending to return on Sunday 23.5.99 ready for the hearing on 24.5.99. He swore that before his departure he had made provisional arrangements with one of his assistants to attend court on the 24.5.99 in the event that it was not possible to make the return journey on time. But the Assistant, unknown to Mr. Gikandi was also attending the wedding of another Advocate in Nairobi and intended to be back by Monday. As fate would have it however both of them met in their office on Monday morning at 9.15 a.m., minutes after the suit had... been, called out in court and dismissed. They both arrived in court at 9.30 a.m.

Mr. Gikandi's<sup>1</sup> explanation was that he drove back at night and arrived in the early hours of Monday. He arrived in his chambers at 9.15 a.m. and found his clients waiting. He thought his assistant was already in court and would alert the court about his predicament. But the Assistant soon arrived in chambers to

tell about his own woes that the bus he was travelling in broke down at Athi River. In those circumstances Mr. Gikandi pleaded profusely that those were human errors which were unintended and caused no prejudice. He related the history of the matter from inception in 1994, to the Court of Appeal and back to the High Court to show that the plaintiffs have always been interested in pursuing their claim and were ready to prove it on any early date set by the court. The clients had nothing to do with the failure to attend court on 24.5.99 since they were only following their Advocate's advice that they should call at the Advocate's chambers and wait to accompany the Advocate to show them the proper court-room. He was ready to personally bear all costs thrown away.

A further order is prayed for to reinstate a guarantee put in place with the consent of the parties when the matter went on Appeal to the Court of Appeal. There was an attempt to have it discharged and the money released after dismissal of the suit but the status quo was preserved until after the decision in this matter.

Counsel for the defendants Mr. Musinga saw no merit at all in the factual explanations given or the exhortation made to reinstate the suit and the guarantee. He saw contradictions in the Affidavits sworn and the submissions made in court. In one breath it would appear Mr. Gikandi was in his chambers as early as 9 a.m. when he saw the cause list but presumed that the hearing of the case would come up at 9.30 a.m. In another breath he came at 9.15 a.m. and met his Assistant who was supposed to have been in court already. He swore that in private discussions after Mr. Gikandi came to court at 9.30 a.m. and met him, Mr. Gikandi informed him that his clients were not in his chambers but in their own offices. Either way they should have been in court and not in Advocates chambers or their offices. Such contradictions, he submitted, smacked of untruths being presented before the court, Mr. Musinga did not dispute the matter of death of Mr. Gikandi's brother but thought it was being raised to merely whip up sympathy since the Advocate was in his office in the morning of the hearing date. He also has more than one other legal Assistants who could have been instructed to attend court on time. He attributed the filing of the earlier Miscellaneous Application to bad faith since it was not served on his firm soon after it was filed although ex parte orders were obtained, finally he was of the view that the plaintiffs have no interest in pursuing their claim and there was no useful purpose in reinstating the guarantee. That guarantee in any event was given by consent of the parties and the court has no jurisdiction to reinstate it, he submitted.

I have considered the Application fully and the submissions of Counsel. It is common ground that this court has a perfectly free discretion to set aside its order of dismissal of suit for non-attendance of a party on the hearing date. That discretion however is for exercise judicially and is intended in the words of Shah -v-Mbogo (1967) EA 116

*"... 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 cause of justice",*

I must therefore not only consider the explanation for the immediate cause of dismissal but also the antecedents of the party applying to see if he has exhibited traits of obstruction, evasion or delay of the cause of justice in this matter,

The Applicants' Counsel swore that he was in a state of confusion following the traumatic events surrounding his late brother at the same time this matter came up for hearing. The Respondents' Advocate's Counsel thought that was irrelevant and did not amount to accident, inadvertence, excusable error or mistake which may afford a party favourable treatment. That may well be a callous approach to the issue as it is not entirely irrelevant, but I agree that it offers no full absolution to Counsel. On the facts it was possible for the Applicants' Counsel to make alternative arrangements to ensure that the court is apprised of his difficulties in good time. I accept the explanation given that the clients themselves were not to blame for accepting the advice that they shall wait to accompany the Advocate to court. It would have been more prudent nevertheless to advise them to be in court as there is no difficulty in locating court rooms which are daily displayed on the cause list,

I have examined the entire record since the suit was filed in January 1994. There is no doubt that plenty of water has gone under the bridge and it would appear, for explicable reasons, none of which expose any

obvious, deliberate and contumacious conduct on the part of the plaintiffs. There would otherwise have been applications made for dismissal of the suit for want of prosecution or the defendants would have sought to have the matter heard as it involves a counterclaim which presumably had parity of importance to the defendants. I say presumably because although the counterclaim should have been heard on the same day as the plaintiffs' case, the defendants' witnesses were not present either and no evidence was offered. After dismissal no application was made to reinstate it. I would have upheld that order as final if I was not inclined to reinstate the plaintiffs' suit.

In all the circumstances however I am inclined to exercise my discretion in favour of the plaintiffs/applicants, I set aside the orders of dismissal of the main suit and of the counterclaim and reinstate the status quo ante. That includes the validity of the guarantee which was put in place by consent of the parties and was made an order of the court. It can only be set aside on application satisfying the same grounds that would suffice in impeaching a contract.

As I find, despite the compassion warranted by the traumatic circumstances put forward by Mr. Gikandi, that he was not entirely blameless, I order that he will personally bear all the costs thrown away including the costs of this application which, if not agreed, shall be taxed. I further order that the suit shall be fixed for hearing for three days and be finalized before the end of the current session on 21.12.99. It is one of the oldest cases in the Registry.

Orders accordingly.

Dated at Mombasa this 21st day of October, 1999.

**P.N. WAKI**

**JUDGE**

**21/10/99**

Coram: Waki, J.

Gikandi for *Applicant*

Musinga for Respondent court clerk - Mutua Ruling delivered dated and signed in open court