Case Number:	Civil Suit 497 of 2004
Date Delivered:	27 Apr 2006
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	-
Judge:	Alnashir Ramazanali Magan Visram
Citation:	Assumption Sisters Of Nairobi Registered Trustee v Stanley Kebathi, Arbitrator & another [2006] eKLR
Advocates:	Mr.Wambugu for the applicant; Ms. Kamau for the first respondent
Case Summary:	**[RULING] Civil Practice and Procedure-suits**-reinstatement of suits-principles the court will consider-Civil Procedure Rules, Order IXB, rule 8
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 497 of 2004

ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEE …….. APPLICANT

VERSUS

STANLEY KEBATHI, ARBITRATOR ……..…….. 1ST RESPONDENT

DAVID KUNGU GICHUKI T/A COMPLAN CONSULTING ARCHITECTS ….. 2ND RESPONDENT

RULING

This application dated 22nd March, 2006 brought under Order IXB Rule 8 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act, seeks to set aside the order of 21st March, 2006 dismissing the suit, and to reinstate the same for hearing on a date to be fixed by the parties.

The background facts of the case are that a dispute arose between the applicant and the 2nd Respondent, for services that the 2nd Respondent rendered to the applicant. The 2nd Respondent referred the matter to the 1st Respondent for arbitration, as provided for under Cap 525 of the Laws of Kenya. The applicant opposed the arbitration process, citing lack of jurisdiction and privity of contract, and thus on 14th May, 2004 moved the court by way of an originating summons, seeking that the said arbitration be deemed lacking in merit and further seeking a stay of arbitration, pending the hearing and determination of the suit. The said stay was granted for 21 days by Hon. Nyamu J on 26th May, 2004. The inter-parties was set down for hearing on 16th June, 2004.

This is the point where the Respondents' problems with the applicant begin. On 16th June, 2004, the applicant's advocate, Mrs Wambugu, did not attend the court for the inter-partes hearing but sent another Counsel to hold her brief. Interim orders granted earlier were extended as per the Applicant's request, to 30th June, 2004. On 25th June, 2004, the 1st Respondent raised a preliminary objection that he was wrongly enjoined to the suit contrary to Sections 10 and 17 of The Arbitration Act. Hon. Aluoch J, delivered her ruling on the matter on 17th September, 2004 whereby she declined to uphold the preliminary objection on the grounds that it touched on matters that should be determined in the main suit. She further ordered that directions should be taken and the Originating Summons be set down for hearing and determination. On this basis, the applicant issued a hearing notice dated 27th September, 2004, inviting the Respondents to fix a hearing date on 1st October, 2004 at the Registry. For the second time, Counsel for the Applicant did not show up, or send a representative. The Applicant sent out another invitation to fix a date on 15th October, 2004, and by consent the hearing of the Originating Summons was set down for hearing on 18th and 19th January, 2005. On the said day, there was no appearance by the applicant for the third time nor any representative sent to hold her brief or otherwise. This prompted the 2nd Respondent to write a letter dated 24th January, 2005, asking the applicant to fix another date for hearing.

On 9th February, 2005 the Applicant asked the Respondents to meet at the High Court Registry on 15th February, 2005 to fix a date for the hearing. The hearing was fixed for 27th and 28th July, 2005. On 30th

June, 2005, the 2nd Respondent moved the court seeking that the matter be certified as urgent. He stated that the arbitration proceedings had been halted and the applicant had not shown any keenness in prosecuting the matter. Hon Ojwang J certified the matter urgent and directed that the Originating Summons dated 14th May, 2004 be listed for hearing on 27th September, 2005 and hearing notices to issue in 14 days. On 1st July, 2005 hearing notices were served on the applicant and the 1st Respondent and service was duly acknowledged.

On the said day, the court decided that the hearing of the Originating Summons was to proceed on the basis of viva voce evidence and a hearing date was to be taken at the registry.

On 28th September, 2005 the Applicant's Counsel sent out hearing notices to the parties, and the matter was set down for hearing on 21st March, 2006. On the said date, Counsel for the applicant for the fourth time did not attend, despite being served with the addendum to the cause list and the Court proceeded to dismiss the suit with costs, for want of prosecution. The application before this court, thus arises from the aforesaid dismissal.

During submissions, Mrs Wambugu for the applicant relied on her affidavit and submitted that the court has discretion to reinstate the suit. She further submitted that failure to attend Court was not deliberate as the case had not been confirmed at the call over. Mrs Wambugu stated that the applicant had been vigilant in prosecuting the case, and that they were ready to be heard. Ms Kamau, Counsel for the 1st Respondent also relying wholly on her affidavit, asked the court to look at the conduct of the applicant in deciding this application. She argued that this matter having come under a certificate of urgency, the applicant was expected to be more vigilant. The 2nd Respondent, Mr Gichuki, relying on his affidavit stated that there had been four occasions of non-attendance by the applicant. The 2nd Respondent further submitted that he had given the applicant a copy of the addendum and despite this the applicant had failed to show up in court on 21st March, 2006. Mr Gichuki stated that he was being prejudiced, since the Arbitration proceedings were stopped by the applicant and he was thus uncertain whether he would receive the balance of his fees. He further stated that he needed the arbitration to proceed. The respondents asked the court to dismiss the application dated 22nd March, 2006.

Before I embark on my ruling let me state that the Applicant has clearly been tardy in prosecuting this matter. Having had the matter certified as urgent, the applicant should have taken all steps to ensure that the application and the Originating Summon were set down for hearing expeditiously. Secondly, the Applicant's Counsel having sent out all the hearing notices it was very careless for her not to appear or send any representative to any of the court sessions. Of even more gravity is the fact that the applicant despite this conduct has been enjoying a stay of arbitration from May 2004, to date, almost two years, and this has been very prejudicial to the respondents.

I have looked at all the submissions, affidavits and considered the conduct of the applicant and come to the conclusion that, despite the Applicant's tardiness, the principles on setting aside judgment are very clear. Duffus P in ***Patel vs E A Cargo Handling Services Ltd 1974 E A 75*** stated;

"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 to it by the rules".

On the face of it, the only just thing, it would appear in this case would be to disallow the application, as the applicant has clearly shown and demonstrated lack of will to prosecute having already obtained a stay. But we have to look at the second principle which was used by Harris J in ***Shah vs Mbogo (1967)***

E A 116.

"This discretion is intended so to be exercised so as 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".

Counsel for the applicant, has repeatedly failed to attend the court, even after taking out the dates and this has greatly prejudiced the other parties. But the question is whether the conduct of the advocate should be visited upon the applicant, who is innocent and probably unaware of the present developments. It is a general rule that the mistakes of an advocate should not be visited upon his client and this was emphasized by Briggs JA (1955) in ***Shabir Din vs Ram Parkash Anand 22 EACA 48*** when he said,

"… in particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised".

This therefore requires the application of the third principle which entails looking at the facts of the particular case. In this case the matter involves an Originating Summons, whereby the applicant is challenging the jurisdiction of the arbitration, privity of contract between the applicant and the 2nd Respondent, and the authority of one Prisca M Wagura to represent the applicant in any matter.

In my view, these are matters that should be decided before the trial court, and it would be very prejudicial to lock the applicant out of the court process. As Aintey J said in the case of ***Jamnadas vs Sodha vs Gordandas Hemraj (1952) ULR 7***,

"The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of a court".

And further, in the case of ***Chemwolo and Another vs Kubende (1986) KLR 492*** Harris J states,

"… On the other hand, where a regular judgment had been entered, the Court would not usually set aside the judgment, unless it was satisfied that there were triable issues … which should go for trial".

Based on these principles, therefore, I am satisfied that the applicant has outlined triable issues in its Originating Summons, that should be heard and determined before the trial court and in that respect I exercise my discretion in favour of the applicant and allow the application dated 22nd March, 2006. However, let me send a loud and clear warning to the applicant, that no more indolence and negligence will be tolerated by this court especially when they have been sitting on an interim order for close to two years, much to the detriment of the Respondents. I further order that the Applicant takes steps to obtain a hearing date within the next 14 days.

The Respondents shall have the costs of this application.

Dated and delivered at Nairobi this 27th day of April, 2006.

ALNASHIR VISRAM

JUDGE