REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 472 of 2010

MADZAYO MRIMA & CO. ADVOCATES…….....…..DECREE HOLDER

VERSUS

KENITAL (K) LIMITED…….....……...JUDGEMENT DEBTOR

AND

KENITAL SOLAR LIMITED……...…OBJECTOR

RULING

On 25th October 2011 when the application dated 24th March 2011 filed by the objector herein was called out for haring, there was no representation for the said objector and the application was thus dismissed.The present application is dated 13th December, 2011 and it seeks to set aside the said orders of dismissal and the reinstatement of the dismissed application.The application is supported by an affidavit sworn by **David Njeru Nyaga**, the objector's advocate on 13th December 2011. According to him, on that day he had a mention in ELC No. 113 of 2003 before Lady Justice Koome which he decided to dispose of first and that when his clerk came into court he found the matter in the course of being dismissed and the clerk's efforts to get an advocate to hold forte were unsuccessful hence his failure to attend court was due to mistake of counsel.The application was opposed by an affidavit sworn by **George Kithi**, the decree holder's advocate on 23rd February 2012. According to the deponent, as there was no counsel in court when the matter was called out the court had no option but to dismiss the application. According to counsel, the attached goods have already been sold which sale did not realise the outstanding amount hence they have applied for fresh warrants for the balance.

In prosecuting the application, both counsel relied on written submissions. In its submissions, the objector contends that the failure to attend Court was out of a *bona fide* excuse and not a deliberate move to frustrate the court of justice and reliance is placed on the celebrated authority on setting aside *ex parte* judgement of the case of **Shah vs. Mbogo [1967] EA 116.**On their part the decree holders submit that under Order 12 rule 1 of the Civil Procedure Rules the Court was entitled to make the orders it did. It is their submission that the reasons adduced by the objector cannot be excused since the discretion will not be exercised to aid an indolent litigant or one who has set out by commission or omission to obstruct the course of justice. The advocate, it is submitted, ought to have organised his diaries so that he would not be required to be in two places at the same time and reliance is placed on the cases of **Peter G N**

Ng'ang'a vs. Standard Chartered Bank (K) & Another [2004] eKLR and **Waweru Kamau vs. Joseph Mucheru & Another [2006] eKLR**.The decree holder submits that the provisions of Order 12 rule 1 of the Civil Procedure Rules were the applicable provisions. That provision states follows: ***"If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit".***

It is therefore clear that even in cases where the rule applies, it is not a mandatory requirement that the suit must be dismissed. The decision whether or not to dismiss the suit under that rule is discretionary. However, can it be said that an application is a suit for the purposes of that provision in order to justify its invocation? In **John Musili Mwandia vs. Mohamed Sharif Chaudhry Nairobi (Milimani) HCCC No. 788 of 1995** Hewett, J held that an application for setting aside an order dismissing an application for non-attendance should be brought under Order 50 rule 17 and not under Order 9B rule 8 which deals with suits.

Implicit in that decision, in my view, is that a dismissal of an application for non-attendance does not fall under Order 12 rule 1 but such a dismissal is undertaken under the inherent powers of the court. Accordingly the applicant was correct in basing the present application on Order 51 rule 15 of the Civil Procedure Rules.

The court, no doubt has powers to make such orders as may be necessary for the ends of justice. In this case it is not disputed that counsel for the objector was before another court at the time the application sought to be reinstated was dismissed. The decree holder's argument that the objector's advocate's diary should have been organized in such a way as to avoid appearance in two courts at the same time is not realistic. Advocates do not choose before which Judge their matters are to be fixed so that they can arrange to be before a particular judge in respect of all their matters. It is true that where an advocate finds himself in a situation where his matters are fixed before different courts he should get a colleague to hold his brief and inform the court of the fact. However, the mere fact that this was not done, and especially where a reasonable explanation has been offered, should not justify the court in visiting the advocate's sins on the client.

In this case the decree holder's position is that the attached goods have been sold, a fact not supported by the documents annexed to the replying affidavit. However, if that were to be the position, then no prejudice is likely to be suffered by the decree holder by allowing this application. I have looked at the decisions cited and, in my view, the circumstances in those decisions are different from the circumstances in this matter.

Accordingly, I find that the application dated 13th December 2011 has merit and the same is allowed. The objector will however bear the costs of the application.

Ruling read, signed and delivered in Court this 4th day of May 2012

G.V. ODUNGA
JUDGE
In the presence of:

Mr. McOlwal for Mr. Nyaga for the applicant

Ms. Kingi for respondent