

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 87 OF 2003

PETER NJOROGE NGAHU *t/a Ngahu Associates*

.....PLAINTIFFS

VERSUS

TETU HOUSING CO-OP SOCIETY

DEFENDANT

RULING

Pursuant to section 3A of the Civil Procedure Act and Order IXB rule 8 of the Civil Procedure Rules, Cooperative Bank of Kenya Ltd, Nyeri Branch, the garnishee herein, took out the summons dated 23rd October 2009 in which it sought for the following orders:

- 1. *That this application be heard ex-parte in the first instance owing to it's urgency.***
- 2. *That the order made on 21/10/2009 dismissing the application dated 14/10/2009 be set aside or varied and the application be reinstated for hearing.***
- 3. *That the cost of this application be in the cause.***

The application is supported by the affidavit of Patrick M. Wainaina sworn on 23rd October 2009 and a further affidavit of Koin Lompo. Peter Njoroje Ngahu, the decree holder herein filed a replying affidavit he swore on 12th January 2010 to oppose the Summons.

In his affidavit, Patrick M. Wainaina, averred that Mr. Koin Lompo, an advocate who held his brief on 19th October 2009, forgot to indicate in his diary that the application dated 14th October 2009 had been listed for hearing on 21st October 2009 hence the application was dismissed for want of attendance. The learned further averred that he was informed by Mr. Lompo in the morning of the same date that the application had been fixed for hearing on 21st October 2009. He said he travelled to court only to find that his application has been dismissed. He beseeched this court to find that his failure to attend court was not deliberate. He urged this court to set aside the dismissal order and to reinstate the application for stay of execution Mr. Lompo corroborated what Mr. Wainaina had deponed in his further affidavit. Both Messrs Wainaina and Lompo urged this court not to punish the garnishee for the mistake of their advocates. Peter Njoroje Ngahu, the decree holder, implored upon this court to dismiss the application because no plausible reasons or explanation has been given to justify the reinstatement of the dismissed application. The decree holder complained that the garnishee is hell bent to frustrate his effort to recover what is due to him from the funds held by the garnishee on behalf of Tetu Housing Cooperative Society, the Judgment debtor herein.

I have considered the rival submissions. It is not denied that the garnishee's application dated 14th October 2009 was dismissed on 21st October 2009 for want of attendance on the part of the garnishee's advocate. The garnishee's learned advocate has stated that he was not aware that the application was fixed for hearing on 21st October 2009. He said he only came to learn of the hearing date in the morning of the same day. The record shows that Mr. Lompo, learned advocate appeared before me on 19th October 2009

in which he sought to have the motion dated 14th October 2009 to be certified urgent and heard immediately. I certified the motion urgent and had it fixed for interpartes hearing before the Hon. Mr. Justice Makhandia on 21st October 2009. On that date the applicant's counsel did not attend court thus prompting the Honourable judge to dismiss the motion. The decree holder has complained that the dismissed application had not been served upon him hence there is no need to reinstate the same. What I gather from the replying affidavit of the decree holder is that the garnishee's application is calculated to frustrate him from executing the decree. He does not attack the veracity of the averments made on oath by learned advocates. The applicants are beseeching this court to exercise its discretionary power. After a careful consideration of the application I am convinced the garnishee's learned advocate made a genuine mistake which occasionally occurs in our daily lives. He simply did not note in his diary the date when the application was scheduled for hearing. The client should not be punished for a genuine mistake of learned advocate. I will exercise my discretion in favour of the garnishee save that the decree holder should be paid costs of the application. Consequently the summons dated 23rd October 2009 is allowed as prayed save that costs is awarded to the decree holder.

Dated and delivered this 20th day of June 2011

J.K. SERGON
JUDGE

In open court in the absence of parties with notice.