



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NUMBER 689 OF 1996

**NATIONAL BANK OF KENYA
LIMITED.....PLAINTIFF/RESPONDENT**

VERSUS

**TIMOTHY ASOMBA
MALOBA.....DEFENDANT/APPLICANT**

R U L I N G

Before me is a Chamber Summons dated 9th June 2010 filed on behalf of the defendant. The application was filed under Order 1XB Rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap 21). The application was filed as an ex-parte application, but counsel for both parties filed written submissions.

The prayers in the application are 4, one of which has been spent as follows: -

1. *(spent)*
2. *The honourable court be pleased to issue an order setting aside its orders of 19th March 2010 dismissing the defendant's application dated 15th July 2009 for non-attendance on the part of the defendant's advocates.*
3. *The honourable court upon grant of the orders sought in paragraph (2) above be pleased to grant leave to the defendant to amend the application dated 15th July 2009.*
4. *The costs hereof be in the cause.*

The application has grounds on the face of the Chamber Summons. The grounds are that the failure of the advocate for the defendant to attend court was inadvertent; that the defendant was not informed to attend court; and that an innocent litigant should not be punished; and further that the application dated 15th July 2009 required amendment to bring in positive and substantive prayers.

The application was filed with a supporting affidavit sworn on 9th June 2010 by Timothy Asomba Maloba the defendant, as well as and another affidavit sworn on the same date by Francis Etole advocate who previously acted for the defendant. The two affidavits explain the circumstances under which the application dated 15th July 2009 was dismissed for non-attendance of the advocate for the defendant.

The defendant, through his counsel Namada & Company advocates filed written submissions on 31st May 2011. It was contended that the advocate's mistake should not be visited on the litigant/defendant.

The application is opposed. A replying affidavit sworn on 2nd July 2010 by Damaris Wanjiku Gitonga, an advocated and Legal Manager of the plaintiff, was filed. It was deponed, inter alia, that the present application was an abuse of court process. The affidavit gives an account of events that the deponent claims had delayed execution of the decree herein.

The plaintiff also, through their advocates M/s Rachuonyo & Rachuonyo advocates, filed written submissions on 8th June, 2011. It was argued that lack of proper action by counsel was no longer a justifiable excuse which would not be visited on a litigant. Reliance was placed on **Civil Application Number 267 of 2002 – Gichana Gathuru –vs- David Komu and others.**

It was also contended that since it was admitted that the previous advocates of the defendant were negligent, the discretion of this court should be exercised in favour of the plaintiff. Reliance was placed on **Civil Application Nai 49 of 2005 – Three Ways Shipping Services Ltd –vs- Mitchell Cotts Freighters (K) Ltd.**

I have considered the application the documents filed, the submissions and the law.

This application will not succeed. The reason is a technicality on jurisdiction. The application was brought under Order IXB rule 8 of the Civil Procedure Rules. Rule 8 provides: -

“8 Where under this Order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such terms as are just.”

In my view, the discretion of the court to set aside a decision under Order IXB only applies to the final decision of the court which determines a case or the rights of parties to proceedings. It only applies to entry of judgment or dismissal of suits. It does not apply to dismissal of interlocutory application for non-attendance of parties or their advocate. In my view, this court does not have jurisdiction under Order IXB of the Civil Procedure Rules to set aside the decision dismissing the interlocutory application for non-attendance of counsel. In my view, the only option open to the defendant is to file a fresh application as the previous application was dismissed on technicalities, not on the merits. The applicant should not have come to court seeking setting aside of the orders of court dismissing the application.

The cases cited by the plaintiff herein relate to decisions determining the case or appeal or the rights of parties. They did not relate to dismissal of interlocutory applications. They are not applicable. For the above reason, I find no merits in the application. I dismiss the same.

Costs to the plaintiff.

Dated and delivered at Nairobi this 21st day of July, 2011.

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GEORGE DULU

JUDGE

In the presence of

Mr. Okemwa holding brief for Mr. Rachuonyo for plaintiff/respondent

No appearance for the defendant/applicant

C Muendo – court clerk