

REPUBLIC OF KENYA

HIGH COURT AT NAKURU

CIVIL SUIT 179 OF 2007

OMBIMAH MOTOR DEALERS LTD.....1ST PLAINTIFF/APPLICANT

JACKONIA OMBIMAH.....2ND PLAINTIFF/APPLICANT

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT/RESPONDENT

RULING

The applicant's application for the extension of the validity of summons issued on 28th August, 2007 was dismissed on 7th July, 2009 when the cause was called out and neither the applicant nor his counsel was present. The dismissal was clearly under Order IXB rule 4(1) of the Civil Procedure Rules which provides that if on the hearing day only the defendant attends and does not admit any part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

The court (Mugo, J) having dismissed suit pursuant to those clear provisions, the applicant now comes to this court with a motion dated 13th November, 2009 for orders that the dismissal be set aside and application for extension of validity of summons be reinstated.

The application is premised on two grounds namely; that the advocate who took the date of 7th July, 2009 failed to diarize it and secondly, that the firm of advocates then representing the applicant was dissolved. The respondent has filed grounds of opposition and several authorities. It is submitted in the grounds of opposition that the application is unmerited, frivolous and vexatious. That there was no mistake or error on the part of the applicant's counsel upon which the court can exercise its discretion to set aside the orders in question; that the application has been presented after inordinate delay; that the application is an abuse of the court process as it intends to preempt the respondent's application seeking dismissal of the suit. I have considered the applicant's grounds and the respondent's opposition as well as authorities in support of the latter's case. All those authorities are unanimous that where a court has dismissed a suit (which is defined in section 2 of the Civil Procedure Act to include application) for non-appearance, the dismissal order may, on application, be set aside upon terms that are just. The authorities are also in agreement that that power is therefore discretionary. In all those authorities, the court disallowed the application to set aside. Because counsel for the applicant did not rely on any authority in support of his application, the false impression portrayed is that the courts have always declined to exercise that discretion in favour of the applicants. That impression is not correct as there are authorities to the contrary. That is because Order IXB rule 8 of the Civil Procedure Rules which counsel for the applicant has also failed to cite, donates a discretion. A discretion must be exercised judicially and the court must consider the merits and the unique circumstances of each case. The court's overriding concern is to do justice between the parties and avoid hardship that may result from its decision.

At the registry on 24th March, 2009, was Mr. Kurgat for Mr. Kiplenge advocate for the applicant. Mr. Ngugi who also argued this application for the respondent took the date on behalf of Mr. Mohammed. Both agreed and settled for 7th July, 2009 as the date for the hearing of the applicant's application dated 27th November, 2008.

It is therefore common ground that the date was known by counsel for both parties, yet the applicant's counsel failed to attend to argue their application. It is the applicant's contention that their erstwhile advocate failed to diarize the hearing date. That is an averment from the 2nd applicant herself and not Mr. Kurgat, advocate, who took the date at the registry, who ought to have deponed to that failure.

The second ground is that the firm of Kiplenge and Ogola Advocates was dissolved on 15th April, 2009 and the file relating to this matter remained with the resultant Kiplenge, Kurgat and Company Advocates. The present advocate, who was in the form of Kiplenge and Ogola advocates received the file after the dismissal of their application. Is that a sufficient ground to warrant the setting aside the orders of dismissal?

I believe the applicant is not suggesting that when a firm of advocates is dissolved, courts stop working and the advocate's existing clients also stop receiving legal services.

It would also suggest that all the cases from that firm which were scheduled for hearing during the period immediately after the dissolution of the firm were not argued. None has been shown to me and the whole thing would be an absurdity. It is not a policy of this court to assist those who have failed to exercise diligence and vigilance.

It is indeed, with the enactment of sections 1A and 1B of the Civil Procedure Act, the policy of the court to uphold the overriding objective of the Act and the rules made under it to facilitate the just, expeditious and proportionate resolution of disputes under that Act. The parties and their counsel are similarly enjoined to assist the court in the realization of that objective. That objective will not be realized when the court or the parties are dragged back by those who are not alert. The wheels of justice must, except in very exceptional circumstances, always move forward.

See Waki, JA's exposition of new philosophy introduced in the Court of Appeal Rules similar to provisions of sections 1A and 1B of the Civil Procedure Rules in the case of John Gakure & 148 others Vs. Dawa Pharmaceutical Company Limited & 7 others, Civil Application No.299 of 2007.

For the reasons stated, I decline to exercise my discretion in favour of the applicant with the obvious result that the application is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 26th day of February, 2010.

W. OUKO

JUDGE