



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 575 of 2006**

**LEONARD NGAITHE .....PLAINTIFF**

**V E R S U S**

**1. WANGETHI MWANGI**

**2. NATION MEDIA GROUP LIMITED .....DEFENDANTS**

**R U L I N G**

On 10<sup>th</sup> July, 2008 the Plaintiff's suit herein was dismissed with costs under **Order IXB, rule 4(1)** of the **Civil Procedure Rules** (the **Rules**) for non-attendance.

The Plaintiff has now applied **by chamber summons dated 30<sup>th</sup> June, 2009** for an order to set aside the dismissal and to reinstate the suit for hearing. The application is made under **Order IXB, rule 8** of the Rules. The Defendants have opposed the application.

I have read the supporting and replying affidavits. I have also considered the submissions of the learned counsels appearing, including the authorities cited.

Rule 8 of Order IXB donates to the court an unfettered discretion, subject only to such terms as are just. I am satisfied from the two supporting affidavits that failure of attendance in court by or for the Plaintiff on 10<sup>th</sup> July, 2008 was occasioned by a genuine mistake. That mistake was that the Plaintiff's advocates thought, upon reasonable grounds, that the case had been taken out at the "call-over" for the month of July 2008 upon the ground that there were no lists of documents or a statement of agreed issues on the court record. Also, the symbolism used on the "call-over" list against this particular case was ambiguous.

It is to be noted that it was the Plaintiff's advocates who had fixed the case for hearing, served hearing notice upon the Defendants' advocates and also informed the Plaintiff of the hearing date. They stopped the Plaintiff from attending court, and they themselves did not attend court, only because they genuinely thought that the matter was not confirmed at the "call-over" for hearing.

This is a case in which justice demands that the Plaintiff should not be shut out of court. An award of costs will adequately compensate the Defendants for any inconvenience that they may suffer. They will certainly suffer no

prejudice by allowing the suit to proceed to hearing.

I will in the circumstances allow the Plaintiff's application. The order of 10<sup>th</sup> July, 2008 by which the Plaintiff's suit was dismissed with costs for want of attendance is hereby set aside, and the suit reinstated for hearing. The Defendants shall have the costs of this application, hereby assessed at KShs. 7,000/00. The same must be paid within 14 days of delivery of this ruling. In default the Defendants may execute for the same. Those shall be the orders of the court.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2010**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2010**