



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 608 of 2009**

**STEPHEN MAINA GICHUHI     )**  
**STEMA ALLOYS ENTERPRISES) ..... PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....DEFENDANT**

**RULING**

Coram: Mwera J.

Mr Gichuhi for defendant/applicant

Mr Ngala for plaintiff/respondent

On 18/01/10 the court was poised to hear an application dated 15.12.09 by the present defendant/applicant bank. It was mainly for setting aside an interlocutory judgement entered on 11.12.09. The application was set down for hearing on 18/1/10. Come that day and the plaintiff demonstrated that the applicant knew of the hearing of the application on that day but had not appeared to prosecute it. Accordingly, the court dismissed that application. That provoked the present notice of motion dated 21.01.10 brought under Section 1(A), (B), 3A, 63 (e) and 44 of the Civil Procedure Act and Order 21 Rule 6 Civil Procedure Rules. The prayers Mr. Gichuhi presented were that the warrants of attachment and sale issued on 19.1.10 be set aside in the interest of justice because prior to their issuance, the plaintiff had not first issued to the defendant the ten-day notice under Order 21 Rule 6 Civil Procedure Rules. It was added that the orders of dismissal of 18.1.10 also ought to be set aside because they were given when the defendant/applicant lawyer (application dated 15.12.09) did not appear on 18/1/10 due to an innocent error. The counsel who appeared in court on the day the date of 18/1/10 was given, inadvertently indicated in the diary that the hearing was on 21.1.10. And with that the copies of the diary were exhibited and without mistake, Mr Gichuhi did not appear in court on 18/1/10 to prosecute the application dated 15.12.09. That the applicant had put forth a strong case as to why the interlocutory judgement was to be set aside and thus it was all the time keen to prosecute its application except for the error in the diary. Mr Gichuhi relied on the affidavits of his colleague Mr. Paul Ogunde on this issue of the diary and that of Irene Wamakau on the aspect of proclaiming the goods.

On the aspect of proclamation the court heard that there were seven branches of the defendant in Nairobi and no proclamation was made at all on them in order to set the stage for attachment.

On his part Mr. Ngala opposed the motion urging the court to find that the defendant/Applicant knew of the existence of the judgement on 4.12.09. It did not have to be given a notice of it. He did not have much to say whether the property of all the seven (7) branches of the defendant bank were in fact proclaimed but he maintained that the applicant had not demonstrated to the court well enough why its counsel failed to appear on 18/1/10 to prosecute its application dated 15.12.09.

The short determination of the application is that the applicant has satisfactorily explained to this court why its counsel did not

come to court on 18/1/10: there had been an error in the dates entered in his diary. Instead of 18/1/10, the entry was on 21.1.10. That is an excusable error or mistake on the part of counsel which can and is hereby forgiven. That error/mistake is said not to have been intended to subvert justice and the plaintiff did not demonstrate that that was the case.

In sum prayers 2, 3 and 4 are granted. The application dated 15.12.09 to be set down for hearing in the next 28 days.

Costs will however go for the respondents.

Orders delivered on 10/2/10.

**J. W. MWERA**

**JUDGE**