



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 117 of 2008

- 1. PENCLE ENTERPRISES LTD**
2. MARGARET NJERI MANYEKI PLAINTIFFS/RESPONDENTS

VERSUS

- 1. HOUSING FINANCE CO. OF KENYA**
2. JOANNE MUTHONI MWANGI
3. JOHNSON KIMATHI KABURIA
4. THE DISTRICT LAND REGISTRAR, KAJIADODEFENDANTS/APPLICANTS

RULING

1. On 17.12.2008, I dismissed the Plaintiff's Application dated 25.7.2008 for non-attendance. On 19.12.2008, an application under Order IXB Rules 4 and 8 of the Civil procedure Rules was filed and the same seeks orders that the dismissal order be set aside and the application dated 25.7.2008 be reinstated for hearing.
2. From the record, on 17.12.2008, one Mr. Mutia advocate sought an adjournment on behalf of Mr. Mbaluka, advocate for the Plaintiff/Applicant, on the grounds that Mr. Mbaluka needed to comply with an order to file a Supplementary Affidavit. It turned out that there was no such order and since the application for adjournment had no merit, it was denied and at 11.00 a.m when the Application came for hearing, there was no one to prosecute it as Mr. Mutia did not show up. The Application was dismissed and in the Application before me, Mr. Mbaluka states that Mr. Mutia misunderstood his brief passed on by telephone and that the court clerk who had been sent with the file was involved in an accident and could not get to court on time. Further, that Mr. Mbaluka was attending the hearing of a murder case in Nairobi on the material date and was unreachable on phone to clarify his instructions.
3. In spite of the spirited opposition by the advocates for the Defendants, I think that this is a fit case for the orders to be granted. I say so because setting aside orders are a matter of discretion and I agree that the law as set out in **Shah vs Mbogo [1967] E.A. 116** applies squarely to this case. It was held as follows;

“That the discretion to set aside must be exercised fairly and in;

i. ...

ii. ...

iii. ...

iv. ***applying the principle that the court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, ore excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused."***

4. In this case, Mr. Mutia was indeed present on the material day but disappeared when his application for adjournment was denied. However, there was effort to make an appearance and once I dismissed the application, the present one was filed within 48 hours and so it cannot be said that there was deliberate attempt at causing delay.
5. Further, once a reasonable explanation for non-attendance was given, setting aside on terms must be done.
6. I will therefore set aside my orders of 17.12.2008, and reinstate the Application dated 25.7.2008 for hearing but the Plaintiff will pay Kshs. 2,000/= costs to each of the Defendants.
7. Orders accordingly.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this **19th** day of **March 2010**.

H.P.G. WAWERU

JUDGE