

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 195 of 2004

SAMSON K. OLE NAMPASO.....APPLICANT/DEFENDANT

VERSUS

KAANA KA ARUME CO.LTD.....RESPONDENT/PLAINTIFF

RULING

The applicant's application dated 18th November, 2008, for setting aside an *ex parte* judgment and stay of execution was dismissed on 25th February, 2009 for non-attendance. He has now moved this court by his application dated 22nd October, 2009 to set aside the dismissal orders and also to stay execution of the *ex parte* decree. There being no reply or grounds of opposition from the respondent despite service of the hearing notice, the matter proceeded *ex parte*. It is the applicant's contention that the application in question was dismissed because his advocate failed to be in court when it was called out in the morning; that his advocate was of the opinion that the matter would be heard at 2.30p.m. which was the normal practice in Nakuru High Court, where hearing of application *inter partes* would be in the afternoon.

That counsel who was holding brief for the applicant's advocate had no instructions to proceed when he was given upto 11.30a.m. and the latter was also not able to travel from Nairobi to be in time to argue the application at 11.30a.m; that the subject of the dispute being land, the applicant deserves to be heard in his defence and the respondent can be compensated in costs.

I have considered these grounds on the basis of the proceedings of 25th February, 2009 and hold the following view of the matter. It would appear that the matter was called out in the morning when counsel for the applicant was represented by Mr. Githiru, who sought that the matter be placed aside until 2.30a.m. explaining that counsel was in Nairobi. The court directed that the same to proceed at 11.30a.m.

At 11.30a.m., naturally, counsel for the applicant had not arrived from Nairobi considering the distance and the fact that he was held up in a matter before the High Court at Nairobi. At 11.30a.m. Mr. Mbiyu for the respondent asked the court to dismiss the application for non-attendance as the applicant's advocate or Mr. Githiru was not present. The application was therefore dismissed.

Whether or not to set aside an order or judgment obtained in default of attendance at the hearing of the suit is a matter of unfettered judicial discretion, the primary consideration by the court is to do justice between the parties. The discretion will be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. It is however, not exercised to assist those who have deliberately sought to obstruct or delay the course of justice.

See **Shah Vs. Mbogo** (1967) EA 116 and **Patel Vs. East African Cargo Handling Services Ltd.** (1974) EA 75. The Court of Appeal in **Municipal Council of Meru Vs. National Housing Corporation & Amina Yusuf and 53 others** Civil Appeal No.161 of 2006 laid down further factors to be considered in an application to set aside an *ex parte* order or judgment, namely, the reason, if any, given for the default and the merits or otherwise of the case of the party against whom the judgment was entered. The mischief being addressed by **Order IXB rule 4(1)** of the **Civil Procedure Rules** is to dismiss matters in which the parties or a party appears to have lost interest.

This was not the case in this matter. First, it has been averred without being contradicted that the practice at Nakuru High Court was to hear applications at 2.30p.m. I can confirm that that has been the case until recently. Matters would be mentioned in the morning to confirm those that would be proceeding in the afternoon. Secondly counsel for the applicant had asked another advocate to hold his brief and to seek adjournment upto 2.30p.m. as he was held up in the High Court in Nairobi. This is a normal practice to indulge counsel who for one reason or the other are not able to attend at a particular time. It was also a clear demonstration that counsel was keen to prosecute the dismissed application.

But more importantly is the emerging philosophy recently enacted under **section 1A & 1B** of the **Civil Procedure Rules** which enjoin the court to deal with the cases justly and to ensure, among other things, that it is guided by a broad sense of justice and fairness. That is the principle of overriding objective of litigation.

See **Deepak Chamanlal Kamani & Another Vs. Kenya Anti Corruption Commission & 3 others**, Civil Appeal (Application) No.152/09 (UR) and **John Gakure & 148 others Vs. Dawa Pharmaceutical Co. Ltd. & 7 others**, Civil Application No.299/2007. Both

cases are based on the provisions of **sections 3A and 3B** of the **Appellate Jurisdiction Act (Cap.9)** which are in similar terms as **sections 1A and 1B** of the **Civil Procedure Rules**.

For these reasons, the application is allowed and the orders of 25th February, 2009 set aside. The applicant's application dated 18th November, 2008 is reinstated. The subject matter in dispute being land, the applicant stand to suffer irreparable loss not capable of being compensated in damages. This application was brought timeously hence there will be a stay in terms of prayer 2 of the Notice of Motion dated 22nd October, 2009 pending the hearing of the application dated 18th November, 2008.

I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 16th day of April, 2010.

W. OUKO
JUDGE