



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 389 of 2004**

JOSEPH KANGUCHU MWANGI ..... PLAINTIFF

VERSUS

OLD MUTUAL LIFE ASSURANCE  
COMPANY LTD. .... DEFENDANT

**R U L I N G**

The application before the Court is brought by a notice of motion dated 18<sup>th</sup> March, 2010, and is made under **Sections 3A and 80** of the **Civil Procedure Act; Order XLIV Rule 1** and **Order L Rule 1** of the **Civil Procedure Rules**. The Applicant seeks from the Court orders that –

1. ***This Honourable Court be pleased to reveal and/or set aside the order made on 9<sup>th</sup> November, 2009, and reinstate the suit forthwith.***
2. ***By virtue of reinstatement of the suit, the injunction order made by this Honourable Court on 15<sup>th</sup> April, 2005, be deemed to be in force until the hearing and determination of this suit.***
3. ***Costs of this application be provided for.***

The application is supported by the annexed affidavit of Paul Chege, Advocate, who has the conduct of this suit on behalf of the Plaintiff and also by the affidavit of Salmon Achola, a court clerk in the firm of Amolo & Gacoka, Advocates who have the conduct of this case on behalf of the Plaintiff. It is based on the grounds that –

- (a) ***On 9<sup>th</sup> November, 2009, this suit was fixed for hearing of Chamber Summons dated 16<sup>th</sup> July, 2004 and not the hearing of the main suit.***
- (b) ***As at the date of dismissal of the suit, the Plaintiff's Advocates had secured 10<sup>th</sup> March, 2010 as the hearing date for the main case.***
- (c) ***In light of the foregoing, there exists an error apparent on the face of the record and/or sufficient reason to grant the review sought.***
- (d) ***The suit was not due for dismissal on 9<sup>th</sup> November, 2009.***

In opposition to the application, Grace Wambugu, an Advocate in the firm of Nyiha, Mukoma & Co., Advocates swore a replying affidavit on 28<sup>th</sup> April, 2010 and the same was filed in Court on 29<sup>th</sup> April, 2010.

According to the supporting affidavit of Paul Chege, on 30<sup>th</sup> September, 2009, their firm of Amolo & Gacoka, Advocates invited the Plaintiff's Advocate to attend the Registry on 14<sup>th</sup> October, 2009 and fix the Plaintiff's Chamber Summons dated 16<sup>th</sup> July, 2004 for hearing. On 14<sup>th</sup> October, 2009, the said Chamber Summons was fixed for hearing on 9<sup>th</sup> November, 2009, by consent of the parties. When their court clerk, one Salmon Achola had fixed the Chamber Summons dated 16<sup>th</sup> July, 2004, Mr. Chege brought to the clerk's attention the fact the said application had been finalized and that it was the main suit which was to be fixed for hearing. On 3<sup>rd</sup> November, 2009 the said

clerk fixed the main suit for hearing on 10<sup>th</sup> March, 2010. On the said 10<sup>th</sup> day of March, 2010, the suit did not appear on the cause list thereby prompting Mr. Chege to peruse the Court file and enquire at the Registry when he was advised that the suit had been dismissed on 9<sup>th</sup> November, 2009 and could not therefore be listed for hearing.

Upon perusal of the Court file, he established that on 9<sup>th</sup> November, 2009 the matter came for hearing on the Plaintiff's Chamber Summons dated 16<sup>th</sup> July, 2004 which had been finalized way back on April 15<sup>th</sup>, 2005, and that the Honourable Judge proceeded to dismiss the suit for want of prosecution yet it had a hearing date for 10<sup>th</sup> March, 2010. Counsel avers that it was an error on the face of the record to dismiss the suit while the record speaks for itself.

In her replying affidavit, Ms. Wambugu for the Respondent concedes that firm of Amolo & Gacoka did invite the representative from Wambugu's firm to fix a hearing date for the Chamber Summons dated 16<sup>th</sup> July, 2004. The date was duly fixed by consent for hearing on 9<sup>th</sup> November, 2009. A perusal of the file established that the Chamber Summons dated 16<sup>th</sup> July, 2004 had been argued before Justice Azangalala and a ruling delivered and thus the Chamber Summons had been wrongly fixed for hearing. On 9<sup>th</sup> November, 2009, she appeared before Justice Khaminwa in the absence of attendance by the Plaintiff's Advocates wherein the matter had been listed in the days cause list as an application. The anomaly was brought to the attention of the Court and the Court noted the same. The learned Judge also noted that the matter had previously come up for hearing on various occasions without taking of on account of the parties and proceeded to dismiss the suit for want of prosecution.

Subsequently, Wambugu's firm was served with a hearing notice dated 25<sup>th</sup> November, 2009 indicating that the said suit had been fixed for hearing on 16<sup>th</sup> March, 2010. However, the matter was not listed for hearing on that date. Her firm did not receive a hearing notice to attend Court on 10<sup>th</sup> March, 2010 for the hearing of the main suit. She avers that the Court has discretion to dismiss a suit for want of prosecution and for this reason, opposes the application to set aside the order of 9<sup>th</sup> November, 2009.

At the oral hearing of the application, Mr. Chege appeared for the Applicant and Ms. Wangui appeared for the Respondent. After considering the pleadings and hearing both Counsel, I note that **Order XLIV Rule 1** of the **Civil Procedure Rules** under which this application is brought reads as follows –

***“Any person considering himself aggrieved ... and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of the judgment to the Court which passed the decree or made the order without unreasonable delay.”***

The facts of this matter are not in dispute. The suit herein was fixed for hearing on 10<sup>th</sup> March, 2010. Before that date, an interlocutory application by Chamber Summons dated 16<sup>th</sup> July, 2004 was fixed for hearing on 9<sup>th</sup> November, 2009. This was erroneous since that application had already been heard and disposed of. It should not have been set down for hearing on any date as there was nothing else to be heard. When the matter came for hearing, Ms. Wambugu appeared for the Respondent but there was no attendance by the Plaintiff/Applicant. The Court noted that that was the third time when the matter had been stood over generally, and that the Plaintiff had not appeared on that day. In the exercise of the Court's inherent powers, the learned Judge dismissed the suit with costs.

The suit was not coming for hearing on that date. What was coming for hearing was an application by Chamber Summons dated 16<sup>th</sup> July, 2004. That application had already been heard and determined. The suit itself was not coming for dismissal on that day. The Plaintiffs did not attend Court as their Counsel had already warned their court clerk that the interlocutory application by Chamber Summons dated 16<sup>th</sup> July, 2004, had already been dealt with. Even if they had seen the cause list for that day, they had a good reason for not expecting the case to be listed either for hearing of the substantive suit or an interlocutory application. In my view, there is an error on the face of the record and, even if there was no such error, there is a sufficient reason why the suit should not have been dismissed, and an equally sufficient reason why this matter should be reviewed.

In the circumstances, I direct that the order made on 9<sup>th</sup> November, 2009 be and is hereby set aside and the suit herein reinstated forthwith as prayed. By virtue of reinstatement of the suit, the injunction order made by this Court on 15<sup>th</sup> April, 2005 shall henceforth be deemed to be in force until the hearing and determination of this suit. In fairness to both parties, each party shall bear its own costs of this application.

It is so ordered.

**Dated and delivered at Nairobi** this 10<sup>th</sup> day of June, 2010.

**L. NJAGI**  
**JUDGE**