REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE Civil Suit 50 of 2002

NIMROD WANGUHU …….. PLAINTIFF.

VERSUS

A.F.C.
MT. ELGON ORCHARDS LTD. ……. DEFENDANTS.

R U L I N G.

By a Chamber Summons dated 7th July, 2009 pursuant to the provisions of order 1X B rule 8 of the Civil Procedure rules, the applicant seeks orders:

1. **THAT**, the court be pleased to set aside the dismissal order made on 17th June, 2009.
2. Costs of this application be provided for.

The application is based on the grounds that:-

i. There was a just cause that prevented the Advocate for the plaintiff not to attend the hearing on 17th June, 2009.
ii. This honourable court has power to exercise its discretion upon such terms that are just to set aside the dismissal order herein.
iii. The mistake or inadvertence on the part of the Advocates for the plaintiff ought not to be visited upon the plaintiff.
iv. The plaintiff was unable to pay the costs to the defendants within the period ordered by the court.

The application is predicated upon the annexed affidavit of Simon Ndege advocate sworn on the 7th day of July, 2009.

On the 19th day of April, before the hearing, the plaintiff, Nimrode Wanguhu, filed a notice to act in person dated 9th April, 2010.

At the hearing the applicant relied on the affidavit in support of the application. The applicant's case is captured in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 thereof. The main thrust of the applicant's case is that the court granted adjournment to the applicant on condition that he pays the previous unpaid adjournment costs. That the applicant unsuccessfully looked for the money to meet the adjournment costs. When the matter came up for hearing at 12.15 p.m. the applicant was present but Mr. Njoroge advocate, who was holding Mr. Ndege's brief, was absent. The applicant then intimidated to court that he was unable to get the money sought. That the advocate for the 1st, 2nd and 3rd respondents insisted that the hearing do continue. After hearing all the parties the court invoked the provisions of order 1XB Rule 4 (1) of the Civil Procedure rules and dismissed the suit with costs to the 1st, 2nd and 3rd respondent. On the above grounds the applicant sought the discretion of the court to set-aside the dismissal order made on 17th June, 2009.

Firstly, Mr. Alwanga for 1st and 3rd respondent urged me to find that the application has been made under the wrong provision of the law. In this connexion counsel called in aid the binding authority of **NJAGI KANYANGUTI alias KARINGA KANYANGUTI & 4 OTHERS VS. DAVID NJERU NJOGU (C.A. 181 OF 1994)**

Secondly, counsel urged me to find that since the dismissal there has been a deliberate attempt to delay the disposal of this case. That in any case there has been several adjournments at the instance of the applicant and his counsel.

Thirdly, that the applicant and his counsel failed to obey a court order regarding payment of costs on three previous occasions. That discretion should not be exercised in favour of a person who has failed to obey a lawful court order. That the conduct of the applicant and his

counsel has been bent towards delaying the wheels of justice.

Mr. Murugara for the 2nd respondent adopted the submissions of Mr. Alwanga for the 1st and 3rd defendant. In addition thereto he emphasized two issues:

(i) The conduct of the applicant on 28th May, 2008 before Hon. Mr. Justice G.B.M. Kariuki and the conduct of the applicant on 17th June, 2009 before this court! On that day the applicant's counsel failed to attend court in the afternoon. That in consonance with the principle emanated in ***SHAH V. MBOGO (1965) E.A. 93*** a court of law should not assist the indolent or a person bent in delaying the cause of justice. That there is a cardinal principle in the administration of justice that there must be an end to litigation.

Last but not least that if any payment was made by Ndege and Co. Advocates to the 2nd and 3rd respondents then it was belated and in violation of the court order and cannot be a ground for exercising of the court's discretion.

I am grateful to the both counsel for their input on law and to the applicant for his in put on facts. Having done so I take the liberty to make the following observations.

One, a judgment entered pursuant to an ex parte hearing of a suit is donated by order XB rule 8 of the Civil Procedure Code.

In this case the proceedings were not ex-parte as counsel representing Mr. Ndege was in court in the morning but deliberately failed to attend the afternoon sessions. In this connection I call in aid the binding authority of **DIN MOHAMMED VS. WALJI (1937) 4. EACA 1.**

In the premises, it is therefore obvious that the application is brought under an incorrect provisions of the law.

Two, the record of proceedings disclose a chequered history of this case. It is characterized by myriad adjournments at the instance of the applicant and/or his counsel. Its trite law that a discretion should not be exercised at the instance of a litigant bent on delaying the cause of justice.

Three, that the court granted the applicant and his counsel adjournment on the 18th day of November, 2009. The applicant squandered the opportunity by failing to attend court in the afternoon sessions. Equally, the applicant and his counsel disregarded this court's order by failing to attend the afternoon. That is evidence of bad faith. All in all, there is no evidence of good faith on the part of the applicant and his counsel all this while.

Last but not least, the law has been for a long time that a mistake or inadvertence of an advocate should not be visited on his client. That principle of law has its roots in the jurisprudence from England. Unfortunately, even the English position has changed since 1988. In the words of **KETTERMAN V. HANSEL PROPERTIES LTD. (1988), ALL ER 38 at page 62**:-

> ***"We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be no cases in which justice will better served by allowing the consequences of the negligence of the lawyers to fall on their heads ……."***

I subscribe to those views.

It is time that our courts should take bold steps and tell the advocates who have been contributing to the delay in finalization of cases that enough is enough. I have on my part taken that bold step. I decline to exercise my discretion in setting aside the dismissal order. Accordingly, I dismiss this application with no orders as to costs.

In doing so, I am aware that a litigant has nothing to loose because a licenced advocate is now enjoined by law and/or practice to take an insurance policy cover or to protect himself/herself against occupational hazards including but not limited to negligence.

In the event the litigant in this case sues the advocate, the said advocate shall refer this matter to his/her insurance for settlement.

I have taken this decision in good faith with a view to ensuring that all disposed cases do not find their way back to our courts. If that were to be allowed, no case would be disposed of. There would be "Merry go round" so to speak. We shall not make any meaningful move in disposing of back-log which is currently choking our court system.

Dated and delivered at Kitale this 2nd day of June, 2010.

N.R.O. OMBIJA.
JUDGE.

Nimrod Wanguhu – Plaintiff in person.
N/A for 1st and 3rd Defendant.
N/A for 2nd defendant.