



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**Civil Appeal 3 of 2002**

**SABELLA KATHIRA KINOTI ..... APPELLANT**

**VERSUS**

**MT. KENYA PETROLEUM**  
**DISTRIBUTORS ..... 1<sup>ST</sup> RESPONDENT**  
**DICKSON KIHARA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

In this ruling, the court is considering the Notice of Motion dated 8<sup>th</sup> December 2008. It is brought under Order XLI Rule 18 of the Civil Procedure Rules. It prays for the following orders:-

- 1. That this Honourable Court be pleased, ex parte in the first instance, to issue an order staying all proceedings in Meru CMCC No. 950 of 1996, including the execution of the decree issued in that case on 4<sup>th</sup> November 2008 pursuant to the judgment entered on 8<sup>th</sup> September 2008 pending the hearing and determination of this appeal.**
- 2. That this Honourable Court be pleased to set aside its ex parte judgment in this appeal entered on 24<sup>th</sup> July 2003 and order that the appeal be re-heard afresh.**
- 3. That consequent to prayer 3 above this Honourable Court be pleased to set aside the consequent proceedings, judgment and decree in Meru CMCC No. 950 of 1996, which were made consequent to its ex parte judgment and orders in this appeal issued on 24<sup>th</sup> July 2003.**

The background of this matter is that these parties begun to litigate under HCC No. 10 of 1993. That suit was transferred to the Chief Magistrate's Court Meru and became CMCC No. 950 of 1996. That suit in the Chief Magistrate's Court was dismissed and an appeal was filed against that dismissal being this appeal. The appeal was heard and judgment was delivered on 24<sup>th</sup> July 2003. The court ordered that the suit be remitted back to the magistrate's court for assessment of damages. It is in that background that this application is brought. The 1<sup>st</sup> respondent who is the applicant through its general manager stated that he was first became aware of this action on

14<sup>th</sup> May 2007. It should however be noted that the 1<sup>st</sup> respondent from the time this suit was first filed was represented by counsel. The said general manager was unfamiliar with the matter when he was served with a hearing notice for CMCC No. 950 of 1996 which notice indicated that the matter was coming for assessment of damages on 19<sup>th</sup> June 2007. Being unfamiliar with the matter, the general manager instructed an advocate Mr. S. Muteithia Kibira to carry out an inquiry over the same. The following paragraphs of the general manager's affidavit in support give the grounds relied upon in the present application.

5. ***That Mr. S. Muteithia Kibira Advocate then advised me that he had obtained the court file in Meru CMCC No. 950 of 1996, made copies there from, and established from his perusal thereof that the matter had been filed against the respondents in 1993 as Meru HCC No. 10 of 1993 and was then transferred to the lower court in 1996 and assigned the number Meru CMCC No. 950 of 1996. The record further showed that the matter had then been heard ex parte in 1997 and ex parte judgment subsequently entered in March 1998, only for it be set aside and the matter reheard.***
6. ***That the record further showed that the ex parte judgment entered in March 1998 was set aside and the matter reheard after it was established that the ex parte proceedings and judgment were as a result of failure by the appellant herein to serve fixing invitations and hearing notices on the respondents and/or their advocate. The history of irregular conduct by the appellant and the subsequent ruling setting aside the ex parte judgment are well elaborated in the proceedings pages 13 to 21 of the typed proceedings in Meru CMCC No. 950 of 1996, which are in pages 21 to 29 of the Record of Appeal.***
7. ***That the record further shows that the matter was then reheard fully in 1998 culminating with its dismissal on 5<sup>th</sup> February 1999.***
8. ***That initially M/S Musyoka Wambua & Company advocates acted for the respondents herein in Meru HCCC No. 10 of 1993 after being appointed by the respondents then insurer, Access Insurance Limited, until the insurer subsequently collapsed and was wound up, leading the respondents to appoint their own advocates, M/S Mbigi Njuguna & Company Advocates, who came to record vide a Notice of Change of Advocates on 25<sup>th</sup> August 1995. A copy of the said Notice of Change of Advocates is annexed hereto and marked, EXH 2.***
9. ***That since then M/S Mbigi Njuguna & Company Advocates appeared for the respondents in the matter until its conclusion on 5<sup>th</sup> February 1999.***
10. ***That the file in Meru CMCC No. 950 of 1996 also contained the judgment of this court dated 24<sup>th</sup> July 2003 which indicated that the appeal had been heard ex parte after non appearance by the respondents and their advocates, with the judge allowing the appeal by setting aside the dismissal of the suit and instead substituting therefore judgment of 70% liability with a contribution of 30% and ordering that the matter proceeds for assessment of damages in the lower court.***
11. ***That on the basis, the current advocates of the respondents, M/S Muteithia Kibira & Company Advocates went ahead with our instructions with the proceedings for assessment of damages in Meru CMCC No. 950 of 1996 in obedience of the order of this honourable court in this appeal as aforesaid culminating in judgment for the appellant herein for Kshs. 478,900.00/= plus interest and costs and a subsequent decree for Kshs. 584,151.00/=Copies of the said judgment and decree are annexed hereto and marked as Exh. 3 and Exh 4 respectively.***

12. *That on 24<sup>th</sup> November 2008, Mr. S. Muteithia Kibira Advocate informs me, and I verily believe it to be true, that acting on a tip off, he obtained the court file for this appeal and upon perusing the same established that the appeal was heard ex partesince neither the respondents herein, nor their advocates then properly on record, M/S Mbigi Njuguna & Company Advocates were ever served with the appeal or any notice of the hearingthereof, with the appellant's advocates instead mischievously serving the Record of Appeal and subsequent notices on their former advocates, M/S Musyoka & Wambua Advocates, who had ceased to be on record since M/S Mbigi Njuguna & CoAdvocates filed the Notice of Change of Advocates annexed hereto and marked exhibit 2 on 25<sup>th</sup> august 1995 as aforesaid.*
13. *That the appellant's advocate also misleadingly indicated in the Record of Appeal and the statement of address that the advocates to be served on behalf of the respondents were the respondents' former advocates, M/S Musyoka & Wambua Advocates, instead of M/S Mbigi Njuguna& Company Advocates who were then properly on record for the respondents.*
14. *That it is therefore now clear that the servcice of Exh. 1 directly on the 1<sup>st</sup> respondent in 2007, eight years later, instead of service on M/S MbigiNjuguna & Company Advocates was in the furtherance of a mischief which became clear when we perused and copied the Record of Appeal herein on 24<sup>th</sup> November 2008.*
15. *That on 25<sup>th</sup> November 2008, I, accompanied by Mr.S. Muteithia Kibira Advocate, saw Mr. Mbigi Advocate at his office in Nairobi who informed me, and I verily believe it to be true, that he last heard of Meru CMCC No. 950 of 1996 when it was dismissed in 1999 and that, just like the respondents, his firm had never been served with anything concerning Meru HC Appeal No. 3 of 2002, including the application for leave to appeal out of time, the Memorandum and Record of appeal and/or any hearing notices thereof.*

The Chief magistrate's Court delivered its judgment in CMCC No. 950 of 1996 on 8<sup>th</sup> September 2008. The application was opposed on the basis that the application was an afterthought. There is indeed a basis for that argument. The 1<sup>st</sup> respondent through its advocate participated in the assessment of damages before the Chief Magistrate's Court. As can be seen from paragraph 10 of that affidavit, the said advocate was aware that this appeal was heard *ex parte*. It is therefore not clear why being aware of the same even as he participated in the assessment of damages he waited until the Chief Magistrates Court delivered judgment, for him to return to this court under this file to file the present application. It is not clear therefore what the counsel for the 1<sup>st</sup> respondent means when he stated that he was acting on a tip off when he discovered that the appeal had been heard *ex parte*. There is certainly a delay in the bringing of the present application which delay was not explained by the 1<sup>st</sup> respondent. Any delay always requires explanation. It was so stated in the Court of Appeal case **Nderitu Gicheru Vs. Cecilia Gathoni Gatere** Civil Application No. 122 of 2008:-

***“It is now Settled Law that whenever there is a delay, the party guilty of the same should offer some explanation for it before an extension of time in his favour can be considered: Kenya Ports Authority Vs. Silas Obengele – Civil Application No. 297 of 2004 (unreported).”***

*In the case of **Reliance Bank Limited (inliquidation) & 2 others Vs. Southern Credit Bank Corporation** – Civil Application No. 118 of 2007 (UR78/2007) R.S.C. Omolo J.A. had this to say:-*

***“Then there is the delay of 64 days to which I have referred and in my view that delay remains unexplained, and as I have stated, any amount of delay, even if it be one day ought to be explained in some way”*** (Emphasis provided).

The 1<sup>st</sup> respondent was served with a hearing notice of the chief magistrate court case for assessment of damages on 14<sup>th</sup> May 2007. That hearing notice indicated that the matter was coming for assessment of damages on 19<sup>th</sup> June 2007. The 1<sup>st</sup> respondent did not file the present application until 8<sup>th</sup> December 2008 a date which was after the judgment of the Chief Magistrate’s Court. The 1<sup>st</sup> respondent from the 2<sup>nd</sup> prayer in the Notice of Motion seeks to set aside the judgment of this appeal of 24<sup>th</sup> July 2003. In seeking to set aside that judgment, the judgment of the Chief Magistrate’s Court of 8<sup>th</sup> September 2008 would still remain intact. However, when you consider the subsequent prayer in the present application, the 1<sup>st</sup> respondent does also seem to want to set aside the judgment of the Chief Magistrate’s Court. That cannot be done by way of a Notice of Motion. Such an application should have first been made before the Chief Magistrate’s Court. The 1<sup>st</sup> respondent would have only been entitled to come to this court on an appeal if the chief magistrate’s court refused to set aside that judgment. It is clear that the 1<sup>st</sup> respondent’s application is without merit, firstly because of failure to seek to set aside judgment within reasonable time after the 1<sup>st</sup> respondent became aware of this appeal. Secondly, setting aside the judgment of this court would have no effect because the Chief Magistrate’s Court judgment would still remain. For that reason, the Notice of Motion dated 8<sup>th</sup> December 2008 is hereby dismissed with costs being awarded to the respondent.

Dated and delivered at Meru this 2<sup>nd</sup> day of July 2010.

**MARY KASANGO**  
**JUDGE**