



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Suit 1022 of 2007**

**KILIMANJARO SAFARI CLUB LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KENYA WILDLIFE SERVICES.....DEFENDANT**

**RULING**

On 10<sup>th</sup> March, 2009 Sitati J. dismissed the respondent's application because the advocate for the respondent was absent. The said application was seeking an order that the arbitrator's award dated 27<sup>th</sup> April, 2007 be set aside and or be reviewed or varied. Following the said dismissal the respondent brought this application by way of Notice of Motion under Sections 63e and 3A of the Civil Procedure Act for orders that the court do set aside its orders of 10<sup>th</sup> March, 2009 and the application dated 20<sup>th</sup> June, 2008 be reinstated.

The application is based on the grounds;

- 1. That the applicant's advocate had made several steps to have the application heard and determined.**
- 2. That the mistake of an advocate should not be visited upon an innocent litigant.**
- 3. That the application was dismissed due to inadvertence on the part of the applicant's advocate's office.**
- 4. That no prejudice shall be caused to the respondent.**

In addition, there is an affidavit sworn by Mr. Rustam Hira who is an advocate of this court in support of the application.

Both counsel have filed submissions in respect of the said application and cited some authorities. These I have read. There are no limits or restriction on the judge's discretion in such cases except that it should be based on such terms as may be just because, the main concern of the court is to do justice on the parties.

The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought, whether by envious or otherwise, to obstruct or delay the cause of justice. *See Maina – vs \_ Mugiria (1983) KLR page 78.*

The learned counsel for the respondent/applicant has taken full responsibility for non-attendance on that day and from my assessment of the reasons given, he is honest. Going by the principle that the mistake of counsel should be visited on the litigant, I believe the respondent should be given a chance to prosecute its application. It is instructive to note that the spirit in the cited case above has been captured in Section 1A of the Civil Procedure Act introduced by Act No.6 of 2009 into our law.

Accordingly, I allow the Notice of Motion dated 4<sup>th</sup> July, and filed on 17<sup>th</sup> July, 2009 but the respondent/applicant shall pay all the

costs occasioned by this application.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 29<sup>th</sup> day of September, 2010.*

**A. MBOGHOLI MSAGHA**  
**JUDGE**