



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

Civil Case 1264 of 2004

DAIRYCOM KENYA LTDPLAINTIFF

V E R S U S

**KENYA DAIRY BOARD1ST DEFENDANT
BARAZA LIMITED**

T/A KENYA TELEVISION NETWORK2ND DEFENDANT

R U L I N G

The plaint was filed on 19th November, 2004 and was supported by a Verifying Affidavit whose drawer did not print his name and address on the face as is required by **section 35 of the Advocates Act**. The Defendant took issue with that and applied by summons dated 30th July, 2008 to strike out the Affidavit together with the plaint. Justice Onyancha heard the application on 8th July, 2009 and indicated Ruling would be on 29th September, 2009 at 9 a.m. It was not delivered but instead it was indicated the delivery would be on notice. The Ruling was eventually delivered on 5th February, 2010 following notice through the cause list "RD1" for the day.

The Plaintiff states that it did not receive the notice and was therefore unaware of the date of delivery. This is why it did not attend.

In the Ruling, the court struck out the Affidavit but allowed the Plaintiff 7 days to salvage the situation by filing a fresh one. Since the Plaintiff was unaware of the delivery of the Ruling, court was informed, it did not know it had been given 7 days to file the affidavit. The order of the court was that the suit would stand dismissed if there was no compliance. The legal position, therefore, is that this suit has been struck out with costs.

Although the Ruling was delivered on 5th February, 2010 the Judge indicated the date as 5th February, 2009. That was certainly an error. An inadvertent error. The Plaintiff acknowledges this error.

On 24th March, 2010 the Plaintiff applied by way of motion under **sections 3A, 80 and 100 of the Civil Procedure Act and Order 44 rule 1(1) of the Civil Procedure Rules** to have the court review, vacate and or set aside the Ruling dated 5th February, 2010; and, in the alternative, for the court to enlarge the time within which the Plaintiff is to file its Verifying Affidavit as stated in the Ruling. The complaint by the Plaintiff is that it had no notice of the Ruling and therefore it could not take benefit of the 7 days to file the Verifying Affidavit. The Plaintiff is not aggrieved by the substance of the Ruling. It is not aggrieved by the wrong date of the Ruling. It was expected that its counsel would see the cause list and know the matter was coming up. However, a cause list is not one of the recognized forms of service or giving notice. If it is complained that there was no notice there can be no answer.

This suit was struck out 7 days after the Ruling. Time can only be enlarged if the suit still subsists. There is no application to reinstate the suit.

In short, the Plaintiff finds itself in unfortunate circumstances. The right to be present at the Ruling certainly existed and he was entitled to notice. However, the provisions of the **Act** and **Rules** relied on in the application do not assist the situation. The jurisdiction of the court has not been properly invoked. The application is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER 2010

**O. MUCHELULE
J U D G E**