



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

HCC NO. 322 OF 2003

**GRACE WANDIA MWATHE &
ANOTHERPLAINTIFF**

VERSUS

**NATIONAL BANK OF KENYA
LTD.....DEFENDANT**

RULING

1. This matter came up for hearing on 20th April, 2010 but on that day there was no appearance for the plaintiff or her counsel. The defendant was present Mr Milimo learned counsel for the defendant submitted that the date was taken by consent he had his witnesses in court and since there was no representation by the plaintiff he urged the court to dismiss the plaintiff's suit. The court proceeded to dismiss the matter for lack of evidence with costs to the defendant.

2. On 26th April, 2010 the plaintiff filed the Notice of Motion seeking to set aside or review of the orders of 20th April, 2010 in which the plaintiff's suit was dismissed. This application is premised on the grounds that the plaintiff was not aware the suit was coming up for hearing on 20th April, 2010. They were not served with a hearing notice. It is denied that the date was fixed by consent. It is denied that the person indicated on record as having attended the registry to fix the date by the name Evans is not known by the firm of Rombo & Company the advocates for the plaintiffs.

3. Counsel for the plaintiff submitted that the suit was dismissed by mistake the court should thus exercise its discretion to set aside the ex parte orders in the interest of justice. This application was opposed by counsel for the defendant he relied on the replying affidavit by Zeporah Mogaka and Peter Musyoka Kisilu who attended the registry on 4th November, 2009 and fixed the hearing date with one Evans. It is contended that the same Mr. Evans had attended the registry before and fixed dates on behalf of Mr Rombo counsel for the plaintiff.

4. This application invokes the inherent jurisdiction of this court to set aside an ex parte order which is an exercise of this court's discretion. The overarching objective of judicial discretion is to give a Judge flexibility to provide definitions according to the specifics of a particular case so as to ensure ends of justice are met and to prevent an abuse of the court process. (see the persuasive case of **SHAH vs MBOGO & ANOTHER EALR {1967}EA page 116 Harris J held that:**

5. In this case the plaintiff counsel alleged that the person called Evans who purported to fix dates on their behalf is not known to them. On the other hand, the defendants contend that the said Evans had

taken dates on previous occasions on behalf of the firm of Rombo and Company Advocates. As the matter stand, it is not clear who Evans is whether he fraudulently held himself out as representing the firm of Rombo & company or Rombo and Company have found it easier to deny the knowledge of the said Evans. That doubt can only be resolved in favour of the plaintiff because setting aside the order will serve the interest of justice and will not cause prejudice to the defendant apart from cost which they can gain if they are successful in the final outcome of the case.

6. For the above reasons, I allow the application set aside the order of 20th April, 2010 and any other consequential orders and reinstate the suit for hearing and determination. Costs will abide the outcome of the suit.

Ruling signed and submitted for delivery on 9th day of November 2010

MARTHA KOOME

JUDGE

Delivered and countersigned on 12th day of November 2010.

P KIHARA KARIUKI

JUDGE