REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL CASE NO. 42 OF 2010

MARTIN MAURICE ODHIAMBO…….....……PLAINTIFF

VERSUS

KIPSIGIS TRADERS CO-OPERATIVE SOCIETY LTD.....1ST DEFENDANT
DIRECT O. SERVICES …….....……2ND DEFENDANT

RULING

On 8th July, 2010, the application dated 16th June, 2010 by Martin Maurice Odhiambo, **the Plaintiff**, came up for inter partes hearing before me. In the application, **the Plaintiff** sought *inter alia*, orders to restrain **the Defendants**, Kipsigis Traders Co-operative Society Ltd and Direct "O" Services **"from Levying distress on alleged proclaimed properties of the Plaintiff".**

The application was heard in the morning on 8th July, 2010 although it was listed for hearing at 2.30p.m in the daily cause list. The Plaintiff was not present in court when the application was called out in the morning on 8th July, 2010. Mr. Kiprono, learned counsel for the Respondent/Defendant urged the court to dismiss the Plaintiff's application as the latter was absent. The court, noting that the Plaintiff had taken the hearing date and was absent dismissed the said application with costs to the Defendant.

It is this dismissal order that the Plaintiff now seeks to have set aside in his Chamber Summons application dated 8th July, 2010. He advances the ground that he was misled by the cause list of the day which indicated that the application would be heard at 2.30p.m on 8th July, 2010.

On 28th July, 2010, when the application for setting aside came up for hearing before me, the Plaintiff relied on the grounds in the application and on his affidavit in support thereof. He told the Court that he thought that the application dated 16th June, 2010 would be heard at 2.30p.m on 8th July, 2010 as the court normally hears applications at that time. He further said that he had come to court early and that at 11.00a.m on that day he noticed that the application had been heard and dismissed. He wasted no time. He swung into action and filed on the same day the application for setting aside the dismissal orders.

Mr. W.R. Kiprono, learned counsel for the Defendant opposed the application and relied on the replying affidavit. He submitted that the Plaintiff's affidavit in support of the application was defective as it did not comply with **Order XVIII Rules 4 and 7** of the Civil Procedure Rules not least because the Plaintiff did not show the source of the information as to who misled him about the cause list of 8th July, 2010. He submitted further that the Plaintiff's affidavit was also defective on account of the fact that it did not show by whom it was drawn as required by the provisions of **Section 34** as read with **Section 35** of the **Advocates Act, Cap 16.** Moreover, he said, the application was premised on the wrong order. He cited authorities to buttress his submissions and urged the Court to dismiss the application. I have perused the said authorities which are;

(1)Johann Distelberge –vs- Joshua Kivinda Mwindi & Another- Nairobi HC. Misc. Application No. 1587 of 2003. (2)Bare & 13 others –vs- Maendeleo ya Wanawake Organization (2004) 2 KLR 455. (3) Barclays Bank of Kenya Limited –vs- Dr. Solomon Otieno Orero – Nairobi Milimani Commercial Courts HCCC No. 1736 of 2001.(4)National Bank of Kenya Limited –vs- James Kinyanjui – Nairobi Milimani Commercial Courts HCCC No. 201 of 2001.(5)Miben (K) Limited –vs- Pamela N. Wandera & 2 others – Kisumu HCCC No. 234 of 2001.(6)Kamunyi –vs- Macharia & Another – HC Nairobi Civil Case No. 1926 of 1990.(7)The Civil Procedure Rules- Order XVIII Rules 4 and 7.(8) The Advocates Act Section 34(1) and 35(1) & (2).(9)The Interpretation and General Provisions Act – Section 3 and 72.

I have duly perused the application by the Plaintiff and the replying affidavit and the submissions made by the Plaintiff and the learned counsel for the Defendant including the authorities. The gravamen of the application is whether the Plaintiff has made out a case for the setting aside the dismissal order made on 8th July, 2010.

This court has unlimited original jurisdiction in Civil and Criminal matters under **Section 165(3) (a)** of the Constitution as well as power to make any order or to give any direction it considers appropriate to ensure the fair administration of justice **(see Section 165 (7)),** including jurisdiction both original and appellate that may be conferred on it by legislation.

Under **order 1XB Rule 8** of the Civil Procedure Rules, this court has discretionary power to set aside or vary an ex parte judgment or order upon such terms as are just where a party has failed to attend court during a hearing. It was said in **MBOGO V. SHAH[1967] EA 116** that the principles to be applied by the court in exercising its discretionary power under this order are intended to obviate hardship resulting from accident, inadvertence, or excusable mistake or error. The policy of the Court is never to shut out a litigant unheard where it would be far from consonant with justice not to hear a case on merit if reasonable grounds or sufficient reason is advanced as to why a litigant failed to be in court when the matter proceeded in his absence.

In this application, the issue is whether the Plaintiff has shown how it came about that he was absent from the court in the morning when his application was dismissed. It must be borne in mind always that there is no error that cannot be compensated by way of costs. I think that the reason given by the Plaintiff is not unreasonable and it seems to me that it amounts to and constitutes a sufficient cause why he failed to be in court in the morning when the application proceeded in his absence. The daily cause list clearly showed that the application would be heard at 2pm. It was not communicated to all the litigants who had applications at 2pm that the court would hear their applications in the morning instead. The submission by the Plaintiff that this court normally hears applications at 2pm was true. It was not the Plaintiff's fault that the matter proceeded in his absence. It has been observed that mistakes or even negligence of an advocate may amount to a sufficient reason. In the circumstances of this case, I am satisfied that the Plaintiff genuinely thought the hearing was in the afternoon at 2pm on 8th July, 2010 as listed in the Daily Cause list of that day.

The Plaintiff wasted no time when he discovered what had happened and on the same day filed the application for setting aside. Once a court of law is satisfied, as I am, that the dismissal order was made due to the absence of the Applicant in circumstances in which the Applicant cannot be blamed, then it behoves the court to grant the Applicant the right to be heard on the matter. The argument that the Applicant must also show that his case has merit does not hold good in such circumstances. The assertion that an Applicant must show that he has a good case on merit so as to get the dismissal order set aside is not correct in all circumstances. The proper place for the Applicant to show that he has a good case is not in the application to set aside but rather in the matter sought to be heard on merit if the dismissal order is set aside. The right of a party to be heard is paramount and it supercedes any inconvenience caused to the court or other litigants who can be compensated by costs.

In the circumstances, I allow the application and set aside the dismissal order dated 8th July, 2010. I further order that the application dated 16th June, 2010 be heard on merit. Pending the inter partes hearing , I further order that pursuant to **Section 63 (e)** of the Civil Procedure **Act, Cap 21**, there shall be an

interim stay of execution in respect of the properties of the Plaintiff proclaimed on 14th June, 2010 until the said application is determined. The costs of this application shall be in the cause.

DATED at **KERICHO** this 10th day of November, 2010

G.B.M. KARIUKI, SC

RESIDENT JUDGE

COUNSEL APPEARING

Plaintiff in person
Mr. W.R. Kiprono Advocate for the Defendants