REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 323 of 2006

PATRICK KARIMI WAIRAGU…….. PLAINTIFF

T/A THIGI GENERAL STORES

VERSUS

BARCLAYS BANK OF KENYA ……..... DEFENDANT

R U L I N G

This Application dated the 27th February, 2008 is brought under Order L. Rule 17 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law praying that the court do set aside its orders made on 12th February, 2008 dismissing the application dated 20th June, 2006 for want of prosecution and that the costs of the Application be provided for. It is based on the grounds, inter alia, the Advocate seized of the matter was held up in the Court of Appeal on a different matter and his representative arrived in this court late to find the application dismissed and that it is fair and just that the application be reinstated as it will not prejudice the

Defendant/Respondent.

In support thereto is filed an Affidavit sworn by Patrick Karimi Wairagu the plaintiff in the case. It gives part of the history of the commencement of the suit and repeats that the suit was dismissed for non attendance at court by counsel and this should not be visited on the Plaintiff/Applicant. It is also supported by the Affidavit of Noah Kiptoo Byegon an Advocate of the High Court of Kenya who depones that he was the one who had the conduct of the case on behalf of the Applicant. He explains his reason for not being in this court on 12.02.2008 as that he was before the Court of Appeal and his representative got to court late due to traffic jam.

The Application is opposed and grounds of opposition filed on 5th May, 2008. These are that;-

1. The said application is misconceived, mischievous, unmeritorious, brought in bad faith, frivolous and vexatious.

2. The said application is an abuse of the court process.

3. The said application is incompetent and improperly before this court.

4. The said application is fatally defective and should be dismissed with costs.

5. Affidavits sworn in support are insufficient and/or fatally defective.

6. There is material non disclosure on the part of the applicant.

7. The said application should be dismissed with costs.

At the oral hearing of the Application learned counsel for the Applicant submitted that the application dated 20/06/06 and which was dismissed for non-attendance (counsel called it non-prosecution) was seeking to restrain the Defendant from exercising its power of sale and if not reinstated the Applicant was likely to suffer irreparable loss. He explained his absence from this court as above and that of his representative. Counsel then put reliance on various authorities touching on the discretion of the court and urged the court to exercise the same in favour of the Applicant. He said that the application that was dismissed was a strong one and his failure to attend court was excusable.

Learned counsel for the Respondent in his time submitted that the application as filed was defective and fatally incompetent. The name of the representative of the applicant's counsel who was sent to court was not disclosed and counsel submitted that in the absence of an affidavit by the said representative the court had no material upon which to exercise its discretion. Further more the affidavit sworn by the advocate for the Applicant was unprocedural and depones on facts and should be struck out.

I have considered this application and all pleadings field herein. Authorities have settled this area of the law. For the applicant to succeed he must show that he has a defence to the claim, that he will suffer prejudice if application is disallowed and that he has an explanation for his absence from court and the delay. The suit herein was filed on 20th June, 2006 simultaneously with the chamber summons that is the subject of the dismissal herein sought to be set aside. The defence was filed on 21st July, 2006 and thereafter on 04th August 2006 the Reply to Defence. The chamber summons dated 20th June, 2006 has come up for hearing variously on 21/06/06, 21/07/06, 22/09/06 and 19/10/06 and was always taken out for a number of reasons one of which was that the parties were negotiating. There was an undertaking that while negotiations were on going the charged properties would not be sold. This order was extended from time to time. It is not clear from the file what became of the negotiations but on the 7/08/07 a date, being 7/12/2007 was fixed for the said application to be heard. On that date again the matter was adjourned upto 18/01/2008 when again it was adjourned to 12/02/2008. And on this latter date the application was dismissed for non attendance of the Applicant and his counsel.

This absence is the reason the advocate for the applicant has filed his affidavit, undated but filed in court on 27th February, 2008. He admitted in his submissions that the said affidavit deponed to matters of fact but said those were matters in his personal knowledge. That however does not cure the defect as counsel has opened himself to being cross examined on those matters of fact. That affidavit must be struck out. It was necessary to have an affidavit sworn by the representative who was sent to adjourn the application on the 12.02.2008. That way the court would have been given material to further explain the absence of counsel from court. This application as already stated has not been prosecuted since it was filed. One does not know whether 12.02.2008 was not yet another day when the same was not to be prosecuted, hence the absence of both counsel or any other advocate to hold his brief or indeed the applicant himself to emphasize that his advocate was before the Court of Appeal. This court finds that there is not excusable explanation for the absence of counsel or his representative from court on 12.02.2008.

The application was brought under the right Order of the Civil Procedure Rules and the attack on this one must fail.

From the plaint filed and the Affidavit in support of the application under consideration it is quite evident that the indebtedness by the applicant to the Respondent is not denied, what is disputed is the amount due. Now the disagreement on what is properly due does not entitle a party seeking an injunction to the grant of the same. That then deals a bad blow to the application dated 20th June, 2006 even if the same were to have been heard. And in my considered view the party to suffer prejudice in this matter is the Respondent who is kept away from the amount of money due to it, what amount it may be. The upshot of the above considerations is that the application dated 27th February, 2008 is without merit and the same is for dismissal and it is do dismissed with costs.

DATED AT ELDORET THIS 18TH DAY OF FEBRUARY, 2009.

P.M. MWILU

JUDGE

DELIVERED IN OPEN COURT IN NAIROBI THIS 6TH DAY OF MARCH 2009.

J.W. LESIIT

JUDGE

IN THE PRESENCE OF;

…….. C.C.

…….. Advocate for the Applicant

…… Advocate for the Respondent