

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 1945 of 2000

PETER MUGO KIBUCHI.....
PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA.....DEFENDANT

R U L I N G

The Notice of Motion dated 12th March, 2009 has been brought under section 3A of the Civil Procedure Act and Order L rule 1 of the Civil Procedure Rules. It seeks to set aside an order made by this court on 5th March, 2009 dismissing the Defendant/Applicant's Notice of Motion application dated 21st October, 2008. The main ground given in support of the application is that the Defendant's Advocate's clerk failed to diarise the hearing date for the application dated 5th March, 2009, in the advocates diary and thus the Advocate's failure to attend the court.

The application dated 21st October, 2008 sought a review of an order made by this court on 16th October, 2008. That application was dismissed by court due to non-attendance of the Defendant/Applicant's Advocate. The reason given for the Advocate's failure to attend court on 16th October, 2008 was the omission by the Advocate's clerk to diarize the hearing of the application in the advocate's diary.

I have considered the application and submissions by both counsels. The reasons given for failure by the Defendant's advocate to come to court when adverse orders were made on the 5th March, 2009 clearly demonstrates the failure by the Defendant's Advocate to handle this matter with the care, diligence and attention it deserves. It clearly demonstrates that the advocate has over delegated his role to his clerk leading to rather careless slips. Having said so, the errors or mistakes which have occurred in this case can squarely be blamed on the Defendant's advocate. The duty of the court in such circumstances was stated in the now celebrated case of SHAH -vs- MBOGO & ANOTHER (1967) EA 116 as follows:

“The discretion of the Court to set aside an ex-parte judgment is wide and flexible and is exercised upon terms that are just. The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct the course of justice.”

I find that the slips of counsel in this case should be excused in order to prevent hardship to the Defendant. I am satisfied that prejudice suffered by the Plaintiff can adequately be compensated by an award of costs.

- 1. I will therefore allow the Defendant's application dated 12th March, 2009 subject to the Defendant paying to the Plaintiff within 30 (thirty) days from date herein thrown away costs assessed at Kshs.10,000/-.**
- 2. This Court's order of 5th March, 2009 dismissing the Defendant's application of 21st October, 2008 is set aside.**

3. Defendant should set down application for hearing in any event within 30 days of today.

Dated at Nairobi this 30th day of April 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Kivindyoo for Applicant

Miss Telewa for Respondent

LESIIT, J.

JUDGE