

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

Civil Suit 329 of 2003

AWO SHARIFF MOHAMEDPLAINTIFF/DECREE HOLDER

VERSUS

ABDULKADIR SHARIFF ABDIRAHIM.....DEFENDANT/JD

AND

DAHIR SHARIFF ABDULKADIR

TIMESCOM ENTERPRISES

SASA GENERAL INVESTMENTS LTD.OBJECTORS

R U L I N G

This is a Chamber Summons application dated 30th April 2009. It is brought under Order IXB rule 8 of the Civil Procedure Rules and seeks to have the application dated 6th February, 2009 and the consequential orders there under reinstated to hearing. In the earlier application of 6th February, 2009 the Applicant was seeking a stay of the sale of suit properties pending the hearing and determination of the objection proceedings.

The application is opposed. The Plaintiff who is the Respondent to the application has filed a replying affidavit opposing the reinstatement of the application of 6th February, 2009. The Plaintiff cites grounds that the Applicant's advocate chose to appear before the Deputy Registrar, who was a junior officer, to the Judge who was to hear the dismissed application.

Mr. Oriaro for the Applicant has urged the court to allow the application and reinstate the dismissed application of 6th February, 2009. Counsel has urged that the reason for the dismissal was the non-appearance of the Applicant's Advocate who had gone before the Deputy Registrar, and that at the time the case was called out by the Judge his client went for him from the Deputy Registrar's court and found him on his feet. Mr. Oriaro has submitted that the dismissal was due to mistake of counsel and that that mistake is causing hardship to the Applicant. Mr. Oriaro also urged the court to find that due to the dismissal of the application, the Objector who is the Applicant stands to lose his property and suffer loss yet it is not the Debtor in this case, nor responsible for the satisfaction of the decree. Mr. Oriaro has urged the court to find that damages would not be an adequate remedy for any loss that may follow if the suit properties are sold.

Mr. Wamalwa for the Respondent/Decree Holder has urged that the 1st Objector who is also a director of the 2nd and 3rd Objector companies was present in court at the day of the hearing. Mr. Wamalwa urged that by implication, all Objectors were present in court and therefore order IXB does not apply to this case, and that the same renders the application incompetent. Order IXB rule 8 provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such terms as are just.”

Mr. Wamalwa also challenges the application on grounds that the affidavit sworn in support of the application was defective because it does not state the place of swearing, as provided under section 5 of the Oaths and Statutory Declarations Act.

Having considered the submissions by the counsels and the technical point raised by Mr. Wamwala for the Respondent, I find no merit in this argument that order IXB rule 8 does not apply. Order IXB applies to all situations where on the date of the hearing of an application or a case only some of either the Plaintiff(s) or the Defendant(s) have attended. Consequently under rule 8 of that order, any judgment or dismissal resulting under such circumstances may be set aside or varied, upon such terms as the court may deem fit.

The question of the jurat not complying with section 5 of the Oaths Act, in that there was an omission to state the place of swearing, cannot be visited upon the deponent of the affidavit. It was the duty of the Advocate or party who commissioned the affidavit to state the place of swearing. That ground cannot therefore be used to challenge the supporting affidavit or to impugn it.

Regarding the application itself, the Advocate for the Applicant has shown that he had been waiting for the matter to be called out, but at the time it was called out he was on his feet before the Deputy Registrar. While I castigate the Applicant's Advocate for failing to exercise due etiquette, decorum and courtesy, and to follow protocol, by waiting to be heard at the time allocated by the judge, the misconduct cannot be visited upon the Applicant. As was held in the case of **Shah v Mbogo(1967) EA 116**, slips by counsel will always be committed. However the court should exercise its discretion in order to ensure that no unnecessary hardship is suffered by innocent litigants.

I will allow the application before the court dated 30th April 2009, and reinstate the Chamber Summons application dated 6th February 2009, together with all consequential orders made thereunder. The Applicant will pay thrown away costs to the Respondent which I assess at Kshs.10,000. The same should be paid within fourteen (14) days from today's date.

Dated at Nairobi this 29th day of May 2009.

LESIIT, J.

JUDGE