

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 153 of 2006

HARON FRANCIS CHEGE MAINA.....PLAINTIFF

VERSUS

KAMAU KIBUKU T/A DAVID KIBUKU SAW MILLS.....DEFENDANT

RULING

This suit was fixed for hearing by consent of both plaintiff and defendant on 4th June 2008. When the matter came up for hearing on 30th July 2008, counsel for the plaintiff or even the plaintiff did not attend court, thus the suit was dismissed for want of prosecution. The plaintiff/applicant has now filed a notice of motion under Order 44 of the Civil Procedure Rules seeking for the orders of 30th July 2008 be set aside and the suit be reinstated. This application is opposed by Mr. Kiburi counsel for the respondent.

I have taken into account the submissions by both counsel for the applicant and respondent. An application for setting aside should be filed under the provisions of Order 9B(8) of the Civil Procedure Rules which provides that such an application be by way of chamber summons. The applicant's notice of motion which is brought under Order 44 of the Civil Procedure Rules is manifestly defective. Although counsel urges this court to exercise discretion under the provisions of Section 3A of the Civil Procedure Act, I do not think that discretion is exercised to cure a defect of such nature. On the merit of the application, counsel states that he entered the date on the diary wrongly, and that the respondent will not suffer prejudice. The respondent does not run the firm of the applicant's advocates and he too should not be prejudiced by the applicant's choice of advocates. Moreover counsel for the respondent did not annex an extract copy of the diary for 30th July 2008 and this application was also not filed within a reasonable time so that the applicant can demonstrate good faith and diligence on his part.

I need not say more on this application which I find lacking in merit and bad in law. It is dismissed with costs.

Ruling read and signed on 12th day of May, 2009

M. KOOME

JUDGE