



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CIVIL CASE 1161 OF 2003**

**REPUBLIC ..... APPLICANT**

**V E R S U S**

**THE CHIEF LAND REGISTRAR..... RESPONDENT**

**R U L I N G**

Before me is a Notice of Motion dated 6<sup>th</sup> October, 2008 filed by E.K. Mutua & Company advocates, and said to have been brought under the inherent jurisdiction of this court. The orders sought are that-

- 1. The Honourable Court be pleased to set aside its orders of 29<sup>th</sup> September, 2008 and reinstate the Chamber Summons dated 25<sup>th</sup> January, 2008.***
- 2. Costs be in the cause.***

The grounds of the application are firstly, that the failure to attend court on 29<sup>th</sup> September, 2008 was not intentional; secondly, that the advocate for the applicant inadvertently made an error in not recording the hearing date in his diary; and thirdly, that a mistake of counsel should not be visited on the client.

The application is supported by the affidavit of **ERIC K. MUTUA** advocate for the applicant **FAITH NDUKU KINYAE**. It was deponed that counsel attended the mention of the matter on 7<sup>th</sup> May, 2008 when the Chamber Summons was set for hearing on 29<sup>th</sup> September, 2008; and that counsel inadvertently failed to record the said hearing date in his diary.

The application was opposed by a 3<sup>rd</sup> party named as **NELSON KIRUINGI**, who swore and filed a replying affidavit on 30<sup>th</sup> January, 2009. It is deponed in the said affidavit, inter alia, that the application is defective as it did not cite the legal provisions under which it was brought, that the hearing date was taken by consent, that there is no tangible evidence that the counsel for applicant did not diarise the hearing, that the applicant's counsel has not complied with court's directives given on 7<sup>th</sup> May, 2008 in that they never filed submissions, that in certain cases mistakes of counsel are not excusable – that's why there is now a requirement for professional indemnity insurance cover, these days.

The respondents did not file opposition to the application. At the hearing Mr. Mutua appeared for the applicant. Mr. Kipkosgei appeared for the respondent, while Ms. Kamende appeared for **NELSON MURIUNGI**. Mr. Mutua addressed me in support of the application. Mr. Kipkosgei left the matter for decision of the court. Ms. Kamende opposed the application.

Having considered the documents filed and submissions of counsel, I am of the view that these are proceedings in the nature of judicial review proceedings. The Civil Procedure Rules, except Order 53 do not apply. Therefore the applicant is correct to come under inherent jurisdiction of the court.

The application sought to be reinstated was dismissed for non attendance, not on merits after hearing. The mistake was obviously on counsel. Be that as it may, in judicial review proceedings its is preferable to hear the parties and determine matters on merits. It needs not be emphasized that one of the protections in judicial review proceedings is ensuring compliance with principles of natural justice, by affording parties a chance to be heard. That does not mean that parties or their counsel should dilly dally and avoid hearing of the case. The court cannot condone unjustified delays caused by parties or their counsel.

In the circumstances of this case, which appears to relate to land matters, I will grant the orders sought and allow the applicant a chance to be heard.

Consequently, I order as follows-

- 1. I allow the application and set aside my orders of 29<sup>th</sup> September, 2008 and reinstate the Chamber Summons dated 25<sup>th</sup> January, 2008.***
- 2. Counsel for the applicant will personally pay costs of the other two counsel of Kshs.2000/= each, with regard to this application to set aside, before the mention date hereunder, otherwise my above orders will automatically lapse.***
- 3. The matter will be mentioned on 22<sup>nd</sup> July, 2009 for fixing a hearing date for the Chamber Summons above reinstated.***

Dated and delivered at Nairobi this 24<sup>th</sup> day of June, 2009.

**George Dulu**

**Judge.**

**In the presence of-**

Mr. Kilonzo Jr. holding brief for Ms. Kamende for interested party.

Kevin Court Clerk.