



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

**Civil Case 696 of 2008**

**CITY HOPPER LIMITED T/A CITI HOPPA.....PLAINTIFF**

**- VERSUS-**

**SAMUEL KAMAU NJOROGE T/A CITI SHUTTLE.....DEFENDANT**

**RULING**

The plaintiff filed an application seeking to restrain the defendant from inter alia, using its trade mark. The application dated 26<sup>th</sup> November, 2008 was listed for hearing before the court on 27<sup>th</sup> January, 2009 by consent of the counsel for the parties for the 31<sup>st</sup> March, 2008. On that date, neither the plaintiff nor its counsel made an appearance in court. The advocate for the defendant applied for the court to dismiss the said application with costs for want of prosecution. The court duly obliged and dismissed the application. By an application filed on 30<sup>th</sup> June, 2009, made under the provisions of Order IX B Rule 8 of the Civil Procedure Rules, the plaintiff seeks the setting aside of the order of dismissal and the reinstatement to hearing of its application dated 26<sup>th</sup> November, 2008. The application was made by the firm of S. W. Ndegwa & Company who had been instructed to replace the firm of Mogusu Miencha & Company Advocates who were previously on record for the plaintiff. The plaintiff craved for the exercise of discretion by the court to set aside the said order of dismissal on the ground that their previous counsel on record had failed to inform them on the date that the application was fixed for hearing. Further, the said advocates had failed to attend court without any reason which could be attributable to the plaintiff. It urged the court not to punish it for mistake by its former advocates.

The application is opposed. The defendant filed grounds in opposition to the application. The defendant states that, the plaintiff had not placed any credible explanation for its failure to attend court despite its new advocate having been long instructed before the application was dismissed. The defendant was of the view that the plaintiff had been indolent and should not be rewarded for its lackadaisical attitude towards court's proceedings. The defendant contends that there had been inordinate delay from the time the application was dismissed to the time that the plaintiff filed the present application seeking to reinstate the dismissed application. In the premises, the defendant urged the court to dismiss the application with costs.

At the hearing of the application, I heard rival submissions made by Miss Kamende for the plaintiff and Mr. Onger for the defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established sufficient grounds to enable this court exercise its discretion and set aside the order dismissing the plaintiff's said application for non-attendance. The principles to be considered by this court in determining whether or not to set aside the order for dismissal are similar to the principles to be considered by the court whether or not to set aside an *ex parte* judgment. In summary, this court has unfettered discretion to set aside any *ex parte* order provided that the interest of justice would be served and further provided that the opposing party will not suffer undue prejudice that cannot be compensated by an award of damages. The concern of the court in making its decision is to do justice to the parties. (See *Chemwolo & anor v Kubende* [1986] KLR 492.) In the present application, it was evident that the court dismissed the plaintiff's application on account of failure by its advocate to attend court on the date that the application was fixed for hearing. There had been a fall out between the plaintiff and its erstwhile advocates. It was for that reason that the said advocate failed to attend court. I am satisfied with the explanation given by the plaintiff for failure by its then advocate to attend court during the hearing of the application. It was clear from the plea made by the

plaintiff in this application that it is desirous of prosecuting the dismissed application so that this court may render a ruling on the merit of the said application. Although the defendant vehemently oppose the application, having evaluated the facts of this application, I am of the view that the plaintiff should not be punished on account of mistake by its previous counsel on record. It is trite that this court is required, in so far as it is possible, to determine issues before it on merit and not on the technicalities. The defendant will adequately be compensated by an award of costs.

The plaintiff's application is in the premises allowed. The order of this court made on 31<sup>st</sup> March, 2009 dismissing the plaintiff's application dated 26<sup>th</sup> March, 2009 is hereby set aside. The said application is reinstated to hearing. The plaintiff shall be at liberty to list the said application for hearing at the registry. The defendant is awarded thrown away costs which I assess at Kshs.5,000/=. The said amount shall be paid within seven days of today's date or in default thereof the orders granted by this court shall stand vacated and the order of dismissal reinstated. It is so ordered.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY, 2009.**

**L. KIMARU**

**JUDGE**