



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 889 of 2002

DR. JOHN NJUGUNA MUGO.....PLAINTIFF

-versus-

D T DHOBIE & COMPANY (KENYA) LIMITED.....DEFENDANT

R U L I N G

Hearing of this suit was by consent of counsel on both sides fixed for 3<sup>rd</sup> and 4<sup>th</sup> March 2009. Both counsel were before me when they chose those two days as convenient to both of them and I accepted their suggestion.

On 3<sup>rd</sup> March 2009 when the suit was listed in that day's cause list for hearing before me, there was no appearance for the Plaintiff as neither M/s Ndungu nor the Plaintiff appeared. M/s Ndungu is the advocate for the Plaintiff. The Advocate for the Defendant, M/s Kirimi appeared together with the Defendant. There was no information why there was no appearance for the Plaintiff.

But M/s Kirimi being considerate did not apply for dismissal of the suit on the ground of non appearance. She only applied for that day's costs in favour of the Defendant plus getting up fees and I granted the order adding that Plaintiff also pays that day's court adjournment fees.

The Plaintiff through his advocate has now filed this Chamber Summons dated 31<sup>st</sup> March 2009 praying that I set aside that order for costs, more specifically:

***“THAT the Honourable Court be pleased to set aside its order of 3<sup>rd</sup> March 2009 that the Plaintiff to pay the Defendants getting up fees.”***

My interpretation of that prayer is that the Plaintiff is prepared to pay costs of that day to the Defendant except in so far as the costs extend to “getting up fees”. The Plaintiff is also prepared to pay that day's Court Adjournment Fees. That is because the questioned order is only part of that day's court orders which read as follows:

***“The Defendant be awarded to-day's costs and getting up fees.***

***Plaintiff also to pay to-day's Court Adjournment Fees.***

***Both Defendant's costs and Court Adjournment Fees to be paid before the next hearing date.”***

I note that the Defendant's Counsel opposes the Chamber Summons pointing out, among other things, that the application was brought under no provisions of the law. The Applicant's Counsel's reply is that the application is brought under **Order IXB Rule 8** of the **Civil Procedure Rules**.

But when I look at **Order IXB Rule 8**, I find that it governs the setting aside of a judgment or a dismissal only. As such that Rule does not cover this Chamber Summons which is for setting aside a limb of a court order which is neither a judgment nor a dismissal of a suit.

In the circumstances are we left in the air? There may be better provisions but for the time being, let me say that I do appreciate the reason given by M/s Ndungu in support of the Chamber Summons, and while reminding the learned counsel that it is normal for courts to award costs of the day to an attending party against an absent party or even when both parties are present but the case is adjourned upon instigation by the party to pay costs, I am nevertheless prepared to revert to **Section 3A** of the **Civil Procedure Act** to set aside the limb of the questioned court orders that awards “*getting up fees*” to the Defendant because, as I have said, I appreciate the reason given by the learned counsel for the Applicant and should add I am also impressed by her sincerity.

Accordingly, the Plaintiff will pay costs to the Defendant as ordered on 3<sup>rd</sup> March 2009 minus “*getting up fees*”. As that meets the Plaintiff’s prayer number 1 in his Chamber Summons dated 31<sup>st</sup> March 2009, the said Chamber Summons is hereby marked settled in the terms herein spelled out above.

Dated this 3<sup>rd</sup> day of August 2009.

**J. M. KHAMONI**

**JUDGE**

Present:

M/s Ndungu for the Plaintiff/Applicant

M/s Baabu for the Defendant/Respondent