



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

**Civil Case 677 of 2005**

**JOHN KURIA MATHENGE T/A**

**ABERDARE FILLING STATION ..... 1<sup>ST</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**CALTEX OIL (KENYA) LIMITED ..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SAMUEL GITONGA KANJA ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The chamber summons dated 6<sup>th</sup> August 2009, is brought under the provisions of order 9B rule 8 of the Civil Procedure Rules and section 3A and 63B of the civil procedure Act. The applicant seeks for an order reinstating an interim order of injunction issued on 26<sup>th</sup> February 2008 restraining the defendants from transferring or dealing with a property known as LR NO. Laikipia/Ngobit/Supuko/Block2/2769, pending the hearing of the application. Secondly the order made on 16<sup>th</sup> June 2009, dismissing the plaintiff's suit be set aside varied and the plaintiff's suit be reinstated together with the interim injunction for hearing.

The facts in support of this application are stipulated in the body thereto, and the supporting affidavit of the plaintiff. Briefly stated, the suit was dismissed principally because on 16<sup>th</sup> June 2009 when the matter was listed for hearing the plaintiff was absent. There was no evidence adduced in support of the case thus the matter was dismissed for lack of evidence. The plaintiff contends that his lawyer on record Mr. Mathenge Gitonga did not inform him of the hearing date. The plaintiff only knew of the dismissal order on 31<sup>st</sup> July 2009 when he visited the firm of his advocate and he was given a letter informing him the case was dismissed for lack of evidence. Prior to that date, the plaintiff claims that he had enquired from his advocate whether the case was fixed for hearing and was informed sometimes in February 2009, that the court diary was closed and therefore he should wait.

The plaintiff on his own motion had also visited the court and was also aware that the court diary was closed as from 5<sup>th</sup> February 2009 therefore he was confident that his case had no hearing date. The plaintiff contends that he was surprised to learn that his case was dismissed for lack of evidence. He contends that failure to attend court was not intentional. He also visited the court registry and found that the hearing was fixed in April 2009, when the court diary had been closed. The hearing notice was serviced upon his advocate on 7<sup>th</sup> April 2009. The hearing date was also fixed *ex parte* and it is in the interest of justice that the suit be reinstated as well as interim orders of injunction.

This application was opposed. The second defendant relied on the affidavit of **Margret Kabuthi**, an advocate for the 2<sup>nd</sup> defendant. It is submitted that the plaintiffs counsel was present in court on 16<sup>th</sup> June 2009, the day the matter came up for hearing. The plaintiff's advocate did not complain about the manner in which the dates were fixed. He only sought an adjournment on the grounds that he wrote to his client informing him of the hearing date, and all his efforts to reach his client were unfruitful. The court declined to grant the adjournment on those grounds and ordered the matter to proceed, and because there was no evidence, the suit was dismissed for lack of evidence. Counsel urged the court find that this is not an appropriate application under order 9B of the civil procedure rules because the plaintiff was fully represented by his advocate on the date of the hearing.

Secondly, the plaintiff is seeking to have the orders of injunction issued on 26<sup>th</sup> February 2008 reinstated despite the fact that the plaintiff did not comply with the conditions upon which the order was extended. Due to directions which were given by the judge, defendant counsel was able to fix the hearing date because the file had a history of disappearing and when the file was found, the matter was fixed for hearing a hearing notice was sent to the plaintiffs advocate on 7<sup>th</sup> April 2009. The matter was listed for call over before the deputy registrar and there are no reasons to enable this court exercise its discretion to grant the orders sought.

This application was also opposed by the counsel for the 1<sup>st</sup> defendant who associated themselves with the submissions by the counsel for the 2<sup>nd</sup> defendant. The issues brought out in this application is whether this court should review and set aside the order of 16<sup>th</sup> June 2009 in which the plaintiffs suit was dismissed for lack of evidence. There is no dispute that the plaintiff was represented by his advocate Mr. Mathenge Gitonga during the hearing who had un successfully applied for an adjournment. The reasons which were advanced by the plaintiffs advocate when he sought for the adjournment are completely at variance with the reasons now provided to the court by the plaintiff. The plaintiff claims that he was unaware of the hearing date and in deed he wrote to his advocate sometimes in February seeking to know when the matter would be coming for hearing. The plaintiff further states that he was vigilant about his case because he even visited the court registry and found a notice confirming that the court diary was full and therefore he is taking issue with the way the hearing date was fixed.

This court is invited to exercise its discretion to review its order and set it aside. I must point out that this application has not invoked the provisions under Order XLIV of the Civil Procedure Rules which deal with review. In any event an application for review could only by way of notice of motion and not a chamber summons.

This application is brought under order 9B rule 8 which deals with a situation where the plaintiff does not appear on the day of the hearing. In this case the plaintiff was represented by his advocate who applied for an adjournment and gave reasons that he had lost communication with his client. Mr. Mathenge Gitonga told the court that he had written to the plaintiff informing him of the hearing date, but the plaintiff did not attended court.

This matter bothers the court because the plaintiff and his advocate are playing games with the court. At the same time the court is called upon to exercise its discretion in favor of the plaintiff. As in all matters involving the exercise of discretion, it must be done judiciously for ends of justice and not to aid a party who is deliberately abusing the court process by using delaying tactics. What does the record review? The matter has been to court on several occasions in particular on 11<sup>th</sup> December 2007; Justice Warsame gave very elaborate directions on how the matter should proceed. It shows that on 12<sup>th</sup> June 2009 the matter was fixed for hearing *ex parte*. A hearing notice was sent to the plaintiffs advocate and although the plaintiff took issue with the fixing of this matter, the matter was not raised by his advocate as a complaint that the matter was fixed *ex parte*. Moreover, nothing in law stops a party from fixing a matter *ex parte*, as long as the other parties are notified in good time about the hearing date.

The next issue is whether the plaintiff failed to attend court because he was not informed by his advocate about the hearing date. This is purely a matter between Mr. Mathenge Gitonga and the plaintiff. The court cannot assume the running of the advocates firm to correct the mistakes by an advocate who claims he could not reach the plaintiff because he wrote to him letters which were not responded to. On the part of the plaintiff he claims that he was never informed by his advocate despite writing to the advocate enquiring about the hearing date. It is the plaintiff who chose his own advocate and the advocate has a professional duty of care and serve his client, failure to do so I believe there are remedies for the plaintiff.

For the broader interest of justice, and so as to allow the plaintiff ventilate his claim against the defendants, I reluctantly exercise my discretion and allow the application and set aside the order dismissing the suit and reinstate the interim order of injunction but I do so on conditions. As stated above, I find this application was necessitated due to the mistakes of the plaintiff and his appointed advocate. The application is granted on condition that the plaintiff should pay thrown away costs assessed

at ksh 20,000/= each to the 1<sup>st</sup> and 2<sup>nd</sup> defendant within 14 days of this ruling.

The plaintiff will take steps to fix this matter for hearing within 3 months of this ruling and failure to do so; the order of injunction shall lapse.

RULING READ AND SIGNED ON 20<sup>TH</sup> NOVEMBER 2009 AT NAIROBI.

**M.K. KOOME**

**JUDGE**