



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 10 OF 2005

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

FELIX OLE NKARU.....RESPONDENT

R U L I N G

The Application under consideration is by the Plaintiff and is brought under **Order IXB Rule 8 of Civil Procedure Rules** and **Section 3A of Civil Procedure Act**. It seeks to have the Plaintiff's suit reinstated and that the Plaintiff be granted unconditional leave to prosecute its claim.

The application is unopposed.

The simple facts, which form the basis of this application, are that the Plaintiff's Advocate sent a Counsel to seek adjournment of the suit when it came up for hearing on 21st February, 2008. The reason given for the adjournment was that the Plaintiff's Advocate was attending a Continuous Legal Education Seminar. The Court was not satisfied with reason given and the lack of instructions as to the whereabouts of the Plaintiff's witnesses and therefore dismissed the suit.

Mr. Kenyariri for the Applicant relies on the decision of **Hancox, JA, Chesoni and Nyarangi, Ag. JJA** in **Mugachia vs. Mwakibundu [1984] KLR 572** to urge the court not to visit the Advocate's mistakes on the Plaintiff. The Justices of Appeal held:

"In exercising the discretion to refuse an adjournment, the judge had failed to take into account a consideration which he ought to have taken into account, namely, that by visiting the error of the advocate on the appellant, he denied the appellant the right of having his case heard at all, which should be the last resort of any court".

As pointed out to the counsel, that argument that this Court wrongly exercised its discretion, could best be argued in the Court of Appeal and not before this court. However, I agree with the general principle by the Justices of Appeal that mistakes of counsel ought not to be visited on the parties especially where the party will be denied the right to be heard. It is however debatable in this case whether the mistake which occurred was that of counsel or a general laxity of both counsel and the Plaintiff to prosecute the suit.

In exercise of the unfettered inherent jurisdiction of this court, I will allow the application and reinstate the suit on condition that the Applicant sets it down for hearing within 30 days from date herein and in default it will stand dismissed with costs.

Dated at Nairobi this 12th day of March, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Kenyariri for the Applicant

LESIIT, J.

JUDGE

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