

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 68 of 2006

CARNATION PLANTS LIMITED APPELLANT

VERSUS

VIRGINIA MBITHE NYAMAI RESPONDENT

RULING

Pursuant to an application dated 30th July, 2007 and filed 1st August, 2007, this Court dismissed the Appeal herein for want of prosecution. In doing so, the Court noted that that Application was not opposed as no Replying Affidavit had been filed, despite the same having been served upon the Appellant some six months prior to the hearing date. In any event, the Ruling was made on merit after hearing both Counsels.

Now, the Appellant is before this Court, with an application made under Section 3A of the Civil Procedure Act, to “set aside” the Orders of this Court dismissing the Appeal. Mr Kaka, Counsel for the Respondent has argued that the application is incompetently before this Court, as Section 3A cannot be invoked where the Civil Procedure Act and Rules provide for other remedies, such as Review (under Order 44) and appeal against the Ruling to the Court of Appeal. He submitted that here the Order was made by the Court after hearing both the parties, and the same cannot be set aside under Section 3A.

I agree with Mr Kaka that it is inappropriate to invoke Section 3A of the Civil Procedure Act where other remedies are available. As Dalton, J said in *Saldanha vs Bhailal & Company (1968) E A 28* that there is no rule of law that inherent powers cannot be invoked where another remedy is available or a specific rule exists covering a particular procedure. The position is that the courts will not normally exercise their inherent powers where a specific remedy is available and will rarely, if ever, do so where a specific remedy existed, but, for some reason, such as limitation, is no longer available.

Order 9A Rule 10 provides for **setting aside** of Judgments **for non-appearance**, while Order 9B Rule 8 provides for **setting aside** of Judgments **for non-attendance**.

I am, therefore, of the view that this application is incompetently before the Court, and the same is struck out with costs to the Respondent.

Dated and delivered at Nairobi this 27th day of May, 2008.

ALNASHIR VISRAM

JUDGE