



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

Civil Case 646 of 2004

MKULIMA CREAMERIES LIMITED.....PLAINTIFF

VERSUS

BROOKSIDE DAIRY LIMITED.....RESPONDENT

R U L I N G

The Plaintiff in this sought has approached the court vide a Chamber Summons dated 28th March 2008 brought under Order 1X B rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Rules . It seeks three orders.

- (a) That the Order made by this court on 7th May, 2007 dismissing the Plaintiff's application dated 19th October 2006 be vacated and set aside.
- (b) That this court be pleased to hear the said application and the Plaintiff's suit be reinstated for hearing.
- (c) That the costs of this application be awarded to the Defendant.

The application is founded on the following grounds:

1. On 4th May 2007, the court clerk of the Plaintiff's advocates checked the daily cause list of Monday 7th May 2007 but through oversight, he failed to see the Plaintiff's application was appearing in the cause list for hearing.
2. The Plaintiff's Advocate was accordingly misled by his clerk to believe that the matter was not in the cause list and consequently, the application was on 7th May 2007 dismissed for non attendance.
3. Unaware that the application had already been dismissed, the Plaintiff's Advocate did the following things between May 2007 and 29th February, 2008;
 - a) On 18th May 2007, he fixed the application for hearing on 20th September 2007;
 - b) When the court file went missing in September 2007, he spoke to the Executive Officer several times and exchanged letters with the court to request the court's assistance to trace the missing file;
 - c) He even prepared an application to reconstruct a new court file on being advised to do so by the court, and

d) When the court file was found, he invited the Defendant's advocate to the court on 29th February 2008 to fix the plaintiff's application for hearing.

4. The Plaintiff's advocate did all the above in the genuine but mistaken belief that the application had been omitted from the cause list of 7th May 2007 through inadvertence.

5. The failure by the Plaintiff's court clerk to see that the application was in the case list occurred through oversight and inadvertence.

6. The Defendant will not suffer any loss or prejudice if this application is allowed.

There is also a supporting affidavit sworn by the Plaintiff's Advocate dated 27th March, 2008 with annexures thereto.

The application is opposed.

Dated at Nairobi this 23rd day of May, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Murage for Applicant

Mr. Kabaiku for Respondent

LESIIT, J.

JUDGE