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

Civil Case 923 of 2004

1. ADAM A. JILLO

2. JUST ABOUT TRAVEL LIMITED .....PLAINTIFFS

V E R S U S

1. GEORGE MWANGI

2. JUST TRAVEL & TOURS LIMITED .....DEFENDANTS

R U L I N G

The outstanding prayers in the chamber summons dated 4th December, 2007 are Nos. 4, 5 and 6. They seek orders to set aside the orders of the court of **9th October, 2006** (together with all incidental and consequential orders), to grant the Defendants leave to defend the suit, to reinstate the Defendants' statement of defence and to provide for costs of the application. By the said order of 9th October, 2006 the court (Mugo, J) allowed the Plaintiffs' application by chamber summons dated 12th November, 2004, struck out the Defendants' defence and entered judgment for the Plaintiffs as prayed in the plaint. Mugo, J heard the application *ex parte* after refusing the Defendants' learned counsel audience upon the ground that no papers had been filed in response to the application which had been served in the year 2004.

The application is stated to be brought under section 3A of the Civil Procedure Act, Cap. 21 and also under Order 1XB, rule 8 of the Civil Procedure Rules (the Rules). The grounds of the application appearing on the face thereof are, in effect:-

1. That the orders were made in breach of the rules of natural justice in that the Defendants' learned counsel was denied audience and the Defendants thereby denied representation.

2. That the mistakes or inactions of the Defendants' advocates then on record were unjustly and oppressively meted out to the Defendants.

3. That the Defendants' defence raised triable issues.

There is a supporting affidavit sworn by the 1st Defendant. I have read the same.

The Plaintiffs have opposed the application (grounds of opposition dated 11th December, 2007) upon the grounds:-

1. That the application is not properly before the court.

2. That the application is *mala fides*.

3. That the application has not been brought within reasonable time.

4. That the affidavit supporting the application does not disclose sources of information as required by law.

5. That the application is an abuse of the process of the court.

6. That the application is bad in law and totally defective.

I have considered the submissions of the learned counsels appearing, including the cases cited. In refusing the Defendants' learned counsel audience and in hearing the chamber summons dated 12th November, 2004 *ex parte*, Mugo, J exercised the court's discretion under Order 50, rule 16 (3) of the Rules. Being dissatisfied with the learned Judge's exercise of that discretion, the Defendants should have appealed or applied for review. The first ground of the application, which is in essence a ground of appeal against Mugo J's exercise of the court's discretion as aforesaid, can thus not be entertained in the present application. To do so would be to sit in appeal, or review without appropriate application, over the decision of a judge of co-ordinate jurisdiction. Even the learned judge herself cannot sit in appeal over her own decision, or review it without an application for review.

The second ground of the application is closely related to the first. It is, in effect, that the Defendants have been unjustly and oppressively punished for the mistakes or inactions of their advocates. The "**mistakes or inactions"** alluded to was the failure to file any papers in response to the chamber summons dated 12th November, 2004. That was a matter that Mugo, J considered when she decided to hear the application *ex parte*. The learned judge's observation that the application was served way back in the year 2004 makes this clear. It is not a matter I can consider now without appearing to sit in appeal or review over the exercise of discretion by the learned Judge.

The third ground of the application is that the Defendants' defence, which Mugo, J ordered struck out, raised triable issues. This is a matter that Mugo, J considered before she allowed the chamber summons dated 12th November, 2004. She said:-

"**Having heard counsel for the Applicant in the chamber summons dated 12th November, 2004 and studying the affidavit in support and annextures thereto, as well as perusing the defence under challenge, I am persuaded that the same raises no triable issues to warrant the matter going to trial. I agree with counsel for the Applicant that the same contains contradictions which make the same a sham and an abuse of the process of the court. I find the same to be not only scandalous, frivolous and vexatious but also highly argumentative contrary to the rules of pleading....."**

Having thus delivered herself, the learned Judge rendered a considered decision. The only path open to the Defendants was either to appeal or to apply for review of the decision, not to proceed as they have in the present application.

For the above reasons this application is entirely misconceived. It is hereby struck out with costs to the Plaintiffs. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF MAY, 2008

H. P. G. WAWERU

J U D G E