



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

**Civil Case 176 of 2006**

**KAIMOSI TEA ESTATE .....PLAINTIFF**

**VERSUS**

**COUNTRY MOTORS LIMITED.....DEFENDANT**

**RULING**

The application for my determination is the chamber summons dated 2<sup>nd</sup> June, 2008 under Section 3A of the Civil Procedure Act, Order IXB rule 8 and Order XLIX Rule 5 seeking the following orders;

2. THAT pending the hearing and determination of this application interpartes there be a stay of execution of the decree arising from the ex-parte judgement entered herein on 24/4/2008.
3. THAT the exparte judgement entered herein on 24.4.2008 and any other subsequent order thereof be set aside
4. THAT the Honourable court be pleased to extend time within which the defendant applicant can be allowed to file its list of documents
5. THAT the order be made for the matter to be set down for hearing in a normal manner.
6. THAT the costs of this application be provided for.

The application is supported by the affidavit of Mr. Stephen Aluoch K'opot Advocate who is also the advocate for the defendant. He states that on 24<sup>th</sup> April, 2008 he was actually down with malaria and went for diagnosis to Dr. Andrew Otieno of St. Andrews Medical Centre who diagnosed him and gave him two days off rest period. And that as a result he sent a message through cell phone number 0722453202 which is one of the numbers indicated in the plaintiff's advocate's letter head requesting them to adjourn the matter. He also contends that the plaintiff obtained judgement exparte while the non-attendance of the defendant's advocate was neither willful nor deliberate. He further contends that the non attendance of the defendant's advocate was indeed excusable as it was an act of nature which was beyond his control.

The other issue raised by the defendant is that, it has substantially complied with the orders of the court relating to discovery and had availed copies of the documents requested for by the plaintiff. The defendant also contends that he was under the mistaken belief that he had filed defendant's list of

documents only to realize that none had been filed. And the failure to file the list of documents in good time is a mistake on the advocate's part which should not be visited upon the defendant. It is also the case of the defendant that it has a good defence against the plaintiff's claim and should be allowed to defend the suit.

The application is opposed by the plaintiff and it is their case that the explanation given by the defendant's advocate for non attendance in court on 24<sup>th</sup> April, 2008 is not satisfactory because

- (1) The defendant's advocate should have got in touch with the many advocates who ordinarily practice in Nairobi to hold his brief.
- (2) The date for the advocate's diagnosis for malaria is given as 23<sup>rd</sup> May, 2008 almost a month after the defendant's application dated 6<sup>th</sup> June, 2007 was heard and allowed. The application was allowed on 24<sup>th</sup> April, 2008. The diagnosis is irrelevant to the matters in issue.

On whether the defendant has a defence to the plaintiff's claim, it is the case of the plaintiff that the defence filed by the defendant has no triable issues because of three reasons;

- (a) The judgement was entered upon an application by the plaintiff to strike out the defendant's defence for failure to give proper particulars and discovery.
- (b) The insurer of the plaintiff is bound by the subrogation rights to step into the shoes of the insured who is the plaintiff in this case and take over or prosecute a claim either its name or in the names of the plaintiff to recover the sum paid out. *Shah versus Mbogo & Another* [1967] EA 116;
- (c) The failure of the plaintiff to give particulars shows lack of a meritorious defence.

I have considered the application in the light of the material supplied by the parties in support and in opposition to the application. I have also taken into consideration the submissions by the advocates who appeared for the parties during the interpartes hearing of the application under my determination. The pertinent issue is whether there is sufficient and plausible explanation for me to exercise my discretion in favour of the applicant. The starting point is whether there is a proper and valid application for determination. It is essential to note that the applicant wants to set aside an *ex parte* judgement entered on 24<sup>th</sup> April, 2008 and the genesis of the defendant's complaint is to set aside an *ex parte* judgement obtained by the plaintiff on 24<sup>th</sup> April, 2008. In my humble view there is no decision that was made by this court on 24<sup>th</sup> April, 2008. The plaintiff's application dated 6<sup>th</sup> June, 2007 was heard on 24<sup>th</sup> April, 2008 *ex parte* and a ruling delivered on 25<sup>th</sup> April, 2008. It therefore means there was no decision made on 24<sup>th</sup> April, 2008. The actual decision which resulted in the decree now executed against the defendant was made on 25<sup>th</sup> April, 2008. It is therefore my decision that there is no proper application to set aside the *ex parte* judgement obtained by the plaintiff on 25<sup>th</sup> April, 2008. In the premises the application dated 2<sup>nd</sup> June, 2008 in so far as it endeavours to set aside an *ex parte* judgement given on 24<sup>th</sup> April, 2008 is misconceived and it is hereby struck out with costs to the plaintiff.

Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of June, 2008.

**M. A. WARSAME**

**JUDGE**