



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

Civil Suit 162 of 2008 & 69 of 2008

KIHARA MUTTU AND 20 OTHERS PLAINTIFFS

VERSUS

1. THE STANDARD LIMITED

2. KWENDO OPANGA

3. OKECH KENDODEFENDANTS

AND

SAMUEL MUTUA KIVUITU PLAINTIFF

VERSUS

1. THE STANDARD LIMITED

2. KWENDO OPANGA

3. OKECH KENDODEFENDANTS

CONSOLIDATED RULING

In these two suits, the Plaintiffs' applications, both by chamber summons respectively dated 20th and 16th May 2008, were dismissed on 4th June 2008 for non-attendance of the Plaintiffs or their advocate when the applications came up for hearing. Both sought temporary injunction under Order 39, rules 2, 3 and 9 of the Civil Procedure Rules (the Rules) pending disposal of the suits. The Plaintiffs promptly filed applications, both dated 4th June 2008, for orders to set aside the dismissal and for reinstatement of the applications. I heard the applications on 10th June 2008. They were both opposed by the Defendants.

I have read the supporting affidavits and the grounds of opposition. No replying affidavits were filed. I have also considered the submissions of the learned counsels appearing, including the cases cited.

The main point taken by the Defendants is that the court does not have jurisdiction under rule 8 of Order IXB of the Rules invoked by the Plaintiffs to reinstate an application that has been dismissed for non-attendance, and further, that there exists no provision under the Rules giving the court the power to reinstate such dismissed application. Upon a strict interpretation of rule 8 of Order IXB, the Defendants may well be right, as that Order deals with substantive hearings of suits and consequences of non-

attendance at such hearings. It is also apparent that no particular rule provides for reinstatement of applications dismissed for non-attendance at hearing. But I deem it unnecessary to decide that issue now.

The first provision of the law that the Plaintiffs have invoked is section 3A of the Civil Procedure Act, Cap. 21 (the Act). That section saves the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The court, under its inherent power, certainly has jurisdiction to hear the present applications.

The supporting affidavits disclose that the Plaintiffs' learned counsel was late by only a few minutes at the hearing of the applications. He immediately sought to find out what happened to his applications. Having seen that the applications had been dismissed for non-attendance, he immediately prepared and filed the present applications on the very same day of the dismissals, and presented them before the Duty Judge the following day.

The Plaintiffs' counsel has stated under oath that though he was present outside these chambers in time he did not hear the matters called out by the court clerk. Though this is unlikely, it is nevertheless possible, especially when there is a big crowd of advocates and litigants waiting outside judges' chambers. Such crowds tend to be quite noisy. Judges, including me, have had occasion to send their clerks and orderlies out to try to have advocates tone down the noise, often without much success. As there are no replying affidavits challenging the facts set out in the supporting affidavits, I will give the Plaintiffs' advocate the benefit of doubt.

The ends of justice herein demand that the Plaintiffs' dismissed applications be disposed of on merit. I will therefore allow these two applications. The orders of dismissal of 4th June, 2008 are hereby set aside and the dismissed applications reinstated. But there will be a small price to be paid by the Plaintiffs. They shall pay the Defendants' costs of these applications, hereby assessed at KShs. 10,000/00. The same must be paid within 14 days of delivery of this ruling. In default the Defendant may execute for the same. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JUNE 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 20TH DAY OF JUNE 2008