



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

**Civil Appeal 873 of 2007**

**1. ECO-NEWS AFRICA.....**

**2. ELAM NGASE LUMWAJI**

**(T/A DOMICILE SERVICES LIMITED)**

**3. O.J. ABUODHA & F.I. OMINO**

**(T/A ABUODHA & OMINO ADVOCATES) .....  
APPELLANTS**

**VERSUS**

**GEORGE AKONGO ANYONGA.....RESPONDENT**

**R U L I N G**

On 19<sup>th</sup> February, 2008 the Appellants' application by chamber summons dated 19<sup>th</sup> October, 2007 was dismissed with costs for non-attendance at the hearing thereof. The application sought the main orders of stay of execution of the orders of the lower court of 17<sup>th</sup> October, 2007 and stay of the proceedings before that court pending disposal of the appeal herein.

The Appellants have now sought, by chamber summons dated 19<sup>th</sup> May, 2008, an order to set aside the aforesaid order of dismissal and reinstatement of the application dated 19<sup>th</sup> October, 2007 so that it may be disposed of on merit. There is a supporting affidavit sworn by the Appellants' advocate, FRANKLIN OMINO.

The Respondent has opposed the application by the replying affidavit filed on 22<sup>nd</sup> May 2008. It is sworn by the Respondent. The sum total of the replying affidavit is that there is no proper or credible explanation for the Appellants' counsel's failure to attend court on 19<sup>th</sup> February, 2008.

I have read both the supporting and replying affidavits. I have also given due consideration to the submissions of the learned counsels appearing. The reason given in the supporting affidavit for failure to attend court on 19<sup>th</sup> February, 2008 is that on 10<sup>th</sup> January, 2008 when the Appellant's counsel was driving from Westlands to Town Centre in Nairobi he was accosted by one of the marauding gangs in the recent post-General Election troubles who forcibly opened his car and from there stole his brief-case which contained, *inter alia*, his file of this matter and his diary. He thus could not remember that the matter was coming up for hearing on 19<sup>th</sup> February, 2008, and did not come to know of the dismissal of the application until he was served with a bill of costs on 8<sup>th</sup> May, 2008. He then filed this application. In the replying affidavit it is pointed out that the Appellants' learned counsel attended court in connection with other matters after his diary was allegedly stolen, thus raising doubt that his diary was stolen.

I see no reason at all why the Appellants' learned counsel should lie that on 10<sup>th</sup> January, 2008 he was robbed of his brief case containing his file of this matter, his diary and other valuables. I believe him. But he does not appear to have done enough to speedily reconstruct his diary or the lost file. He could

have done so by using his clerk's diary and papers obtained from the court record. Be that as it may, I do not think this failure is a sufficient reason to deny the Appellants an opportunity to prosecute their application by chamber summons dated 19<sup>th</sup> October, 2007. The Respondent will be adequately compensated by an award of costs for any inconvenience caused to him. The unfettered discretion of the court under rule 8 of Order IXB of the Civil Procedure Rules is intended to ensure justice for both parties. Justice will be best served here by allowing the application and awarding the Respondent costs.

I will in the event allow the chamber summons dated 19<sup>th</sup> May, 2008. The order of this court of 19<sup>th</sup> February, 2008, by which the Appellant's chamber summons dated 19<sup>th</sup> October, 2007 was dismissed, is hereby set aside and the application reinstated. The Respondent shall have the costs of this application. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS .....AY OF JUNE 2008.

**H.P.G. WAWERU**

**JUDGE**

DELIVERED THIS 6<sup>TH</sup> DAY OF JUNE 2008