REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 43B of 2006

FREDRICK NTONGAI M'ERIMBA ……...……. 1ST PLAINTIFF

MURINGENE ENTERPRISES LTD ……..…. 2ND PLAINTIFF

VERSUS

M. T. ASANYO (sued as legal representative of

Stallion Insurance) ……. 1ST DEFENDANT

M.N. WAIGANJO ……. 2ND DEFENDANT

RULING

The applicant's suit was dismissed with costs on 20th September 2006 for non-attendance. He has now brought the instant application by way of chamber summons dated 2nd October, 2006 pursuant to order 9B Rule 8 of the Civil Procedure Rules.

The application is based on the grounds that the applicant's counsel had intimated to both counsel for the respondents in writing that he would not proceed with the hearing on the 20th September 2006. That the Hon. Mr. Justice Lenaola had indicated that morning that all civil matters would be taken out of the cause list as he was engaged with criminal trials. The applicant further avers that despite the above, an advocate by the name Chweya appeared before Lenaola, J purporting to hold brief for counsel for both the respondents. There is also an affidavit by the applicant's counsel to the effect that his absence before Lenaola, J was not deliberate.

He explained that after writing to counsel for the respondents of his inability to proceed on 20th September 2006 and the learned judge having indicated that the matter, along with other civil cases, would not proceed that day he went before Sitati, J for a murder plea, only to appear before Lenaola, J for a criminal trial that he learnt of the dismissal of his suit.

The respondent in a replying affidavit sworn by Marchall T. Osaya deposed that the letter in question by the applicant's advocates was received by the 1st respondent's advocates on 19th September 2006 after all the arrangements to attend court were finalized. It is further averred that the application along with the affidavit in support are irreparably and fundamentally defective. On this last point, I was not addressed.

The application is brought pursuant to Order 9B Rule 8 of the Civil Procedure Rules. But I need to start with the provisions of Order 9B Rule 4(1) which provides that:-

"***4. (1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, <u>the suit shall be dismissed</u> except for good cause to be recorded by the court."***

Rule 8 further stipulates that:-

"***8. Where under this order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such terms as are just."***

By dint of Rule 4(1) aforesaid, the court has no alternative but to dismiss the plaintiff's suit if he fails to attend, unless there is good cause which must be recorded. The hearing date in this matter was fixed at the registry *exparte* for 20th September 2006.

On 12th September 2006, eight (8) days before the date of the hearing, counsel for the applicant addressed a letter to the two advocates for the respondents. According to the copy of that letter, annexed to the affidavit sworn by the applicant's counsel, it was received by the advocates for the respondents on 19th September 2006 at 4.30pm in respect of the 2nd respondent's counsel and at 5.10pm (under stern protest) by counsel for the 1st respondent.

On 20th September 2006, it is clear from the record that the matter was called out and only Mr. Chweya is recorded as present and holding brief for "Mr. Rachier for the respondent" while the plaintiff is marked as absent. The court on its own motion then proceeded to dismiss the suit with costs for non-attendance.

The only broad question in this application is whether the applicant is entitled to the orders sought. The court has wide discretion under rule 8 to set aside its order dismissing a suit on such terms as are just.

It was held in **<u>Maina V. Mungira,</u>** (1983) KLR 78 that the principles governing the exercise of judicial discretion to set aside an order obtained in default of attendance can be summarized as follows:-

(i) the court's discretion in setting aside the order is not limited except that it must be based on such terms as may be just because the sole concern of the court is to do justice to the parties.

(ii) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought to obstruct or delay the course of justice.

The court will also consider factors such as the unique and peculiar circumstances and facts of the case, the nature of the action, the defence, whether the respondent can reasonably be compensated by costs for any prejudice caused.

Finally, it is a cardinal principle of the law that no party should be denied a hearing. Applying these principles to the present application, the fact that learned counsel for the applicant communicated to counsel for the defendants of his inability to proceed with the hearing on 20th September 2006 is admitted. The only quarrel with it is that it was received on 19th September 2006 at the close of business after the 1st respondent had made arrangements to travel to Meru for the hearing.

There is also no dispute that on the hearing day (20th September, 2006) learned counsel for the applicant was in the precincts of the court. That the learned judge indicated that civil matters would be taken out. However, and more significantly, are the proceedings before Lenaola J, on 20th September 2006 when the action was dismissed. The record is clear and to demonstrate that fact, the relevant part is herebelow reproduced:-

"***20/9/06***

Before Lenaola, J.

CC Mercy/Kirimi

Mr. Chweya h/b for Mr. Rachier for defendants

N/A for plaintiff

<u>Order</u>

Suit dismissed for non-attendance. Costs to the defendant."

There cannot be any doubt in view of the above that Mr. Chweya was holding brief for Mr. Rachier who is representing the 1st respondent. The use of the word 'defendants' in relation to Mr. Chweya holding brief for Mr. Rachier for the 'defendants' was clearly erroneous. That fact is confirmed by the order for costs to the 'defendant', presumably referring to the 1st defendant. The effect was that both the 2nd defendant and the plaintiff were absent.

The suit was still for dismissal in the absence of the plaintiff. Having found that counsel for the applicant did what all advocates do in the circumstances of the case, namely notify the other side of his difficulties, albeit late, I am further persuaded that given the nature of the claim herein injustice and hardship will be occasioned to the applicant if the order of dismissal of his suit was left to stand.

I am also satisfied that both the applicant and his counsel did not intend to obstruct or delay the course of justice. For the reasons stated this application is hereby allowed. The applicant to pay the costs of this application to the 1st respondent. The order of 20th September 2006 is set aside.

Orders accordingly.

Dated at delivered at Meru this 3rd day of June 2008.

W. OUKO

<u>JUDGE</u>