



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Civil Case 212 of 1982**

**PETER THOMAS WANDAKA ..... PLAINTIFF**

*Versus*

**PETER THUO RUKUNGU ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS KARANJA MUTHEMBA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

The chamber Summons dated 4<sup>th</sup> October 2007 is filed by the first defendant. He seeks an order setting aside the dismissal of the application dated 25<sup>th</sup> May 2007. That order of dismissal was made on 24<sup>th</sup> July 2007. The application is brought under Order IXB Rules 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In the affidavit in support the first defendant who by the time the application was dismissed was acting in person, stated that on 23<sup>rd</sup> July 2007 he was traveling using public means to Nyeri High Court from Muranga District. He stated that on that date he had left home early but the vehicle he was using broke down and it took time before he could get another vehicle. Between the distance of Karatina and Nyeri the vehicle he later bonded was stopped by Traffic Police Officer and that caused a delay in the journey. He arrived at Nyeri High Court at 9.30 a.m. He later discovered that the application had been dismissed in his absence. He is ready and willing to prosecute that application and to that end has now appointed an advocate to represent him. The application was opposed. In opposition the plaintiff deponed that the applicant had failed to give explanation on what action he had taken in this matter between 23<sup>rd</sup> July and 4<sup>th</sup> October 2007. That was a period of 2 months. The applicant was also said to have failed to show tangible evidence to support his allegation that the vehicle he traveled in broke down or that the vehicle he later bonded was stopped by traffic police. The plaintiff finally deponed that he has been in occupation of the suit land since 1960. That he is in the process of applying for extension of time to lodge a notice of appeal in respect of this matter. I confirm that I have considered the application before court. The primary duty of all courts is to ensure that parties are heard. I have considered the reason given by the first defendant for his failure to attend court in time. That explanation in my view is plausible and believable. The applicant in my view would find it very difficult to prove to the court that a public motor vehicle broke down or that it was stopped by traffic police. Bearing in mind the reason given by the first defendant I find that the application is merited. I grant the following orders:

1. *That the order made on 23<sup>rd</sup> July 2007 dismissing the application dated 25<sup>th</sup> May 2007 is hereby set aside and the application is hereby reinstated for hearing.*
2. *The costs of the chamber summons dated 4<sup>th</sup> October 2007 are awarded to the plaintiff as against the first defendant.*

**MARY KASANGO**

**JUDGE**

*Dated and delivered at Nyeri this 27<sup>th</sup> day of October 2008.*

**BY**

**M. S. A. MAKHANDIA**

**JUDGE**