

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 176 of 2006

KAIMOSI TEA ESTATE LTD.PLAINTIFF

VERSUS

COUNTRY MOTORS LIMITEDDEFENDANT

R U L I N G

Chamber summons dated 26/6/08 seeking to set aside ex parte judgment entered on 25/4/2004 and time be extended within which the list of documents may be filed and costs of this application. The grounds are stated that non attendance was neither willful nor deliberate; that the defendant had filed a coGent response which was not considered by court; that plaintiff had been compensated by insurance the amount claimed. Suit not filed by the insurers in exercise of the right of subrogation and the plaintiff would be seeking unjust enrichment and that the defendant has substantially complied with order for discovery.

The application is supported by affidavit of Advocate K'Opot who swears that on 23/4/08 he was sick as shown under exhibit "SAK 1" and the annexed declaration which shows that there was a mistake in writing the date of attending the clinic. He also states that he sent a text message to the mobile phone shown in the letter heads of the applicant advocate and informed him he would not be able to attend court and that the matter should be adjourned.

The advocate states that he came to know of ex parte judgment on 22/5/2008. A similar application was heard by Justice Warsame but it was dismissed on the ground that no judgment was entered on 24/4/08. However the Honourable Judge dealt with the submissions of parties as raised in the application but nevertheless dismissed the application. It is clear that the Hon. Judge apart from setting out the issues raised did not proceed to determine the same but found the application incompetent. It is my duty therefore to examine the issues herein raised.

The issue of non appearance in court on the date for hearing has now been explained that the illness was on 23/4/08 not 23/5/08 and it appears the advocate was in Kisumu not Nairobi. This probably made it difficult to attend. On the issue of failure to file list of documents the advocate says he had served the answer but had omitted to file the same in court. **Order 10 rule 20 Civil Procedure Code** provides that non compliance with order for discovery the plaintiff shall be liable to have his suit dismissed.

However, by application dated 6/7/2007 the respondent applied by notice of motion for striking out of the defence for the reason of non compliance of court order to file and serve on the plaintiff response to request for particulars dated 24/8/2006 within 14 days. However on 6/10/07 the defendant filed what is headed: "Particulars supplied" dated 11/9/06.

On 28/2/2007 the plaintiff made an application for full and proper response to the request of particulars sought and dated 24/8/2006 and a further order to file a list of documents within 14 days. There was default. On the hearing dated 26/4/07 the defendant was not represented when the application came for hearing and orders were made ex parte. Another application was filed dated 6/6/06 by the

plaintiff seeking orders to strike out the defence for non compliance with order to respond to request for particulars and to file list of documents within the 14 days ordered.

It is that application was heard on 24/4/08 in absence of defendant counsel and ruling delivered on 25/4/08. Statement of defence was struck out and judgment entered against the defendant. It is clear the court did not and was not required to consider the merits of the defence. The provisions of **Order 10 rule 20** amounts to penalty for disobeying court order for discovery.

Regarding particulars **Order VI rule 8** is relevant. The court shall not make order under this rule before the filing of statement of defence. The order may be made on such terms as the court thinks just. **Order VI rule 8** does not demand dismissal of the suit for non compliance. I have perused the plaintiff's request for particulars and I am of the view that the response ("answer") to the particulars is fair regarding the particulars sought. I therefore find that the defendant had complied with court order as to particulars. Nevertheless no reason has been shown why the order was not complied with. The counsel submits that the failure to file list was his own mistake and should not be visited on his client the party to suffer injustice.

I have considered all the submissions of both parties. I have considered that there was non appearance of the defendant or his counsel on the day the matter came up for hearing. The explanation given by counsel why he was unable to attend is not satisfactory. Whereas this court is not quick to disbelief its officers the fact that the advocate was not admitted in hospital and the fact that he himself had not noted his exhibit was not correct creates a doubt in the mind.

Furthermore there is no reason given that court orders why court orders were not complied with, a list of documents is served first and filed, and list of documents is compiled accordance with the list. The defendant states that the suit is not bona fide because the plaintiff has been paid the loss by their insurers and the suit is meant towards self enrichment. This cannot be true. There is no basis in making such allegation. The fact that the insurance claim was settled shows that indeed the plaintiff did suffer loss since the insurance do not pay without investigations.

For these reasons I do not find any ground to set aside the judgment.

The application is dismissed with costs.

DATED and DELIVERED this 7th day of October 2008.

JOYCE N. KHAMINWA

JUDGE