



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL DIVISION**

**CIVIL CASE 285 OF 2004**

**VIJAY MORJARIA.....PLAINTIFF**

**VERSUS**

**HARRIS HORN JUNIOR.....1<sup>ST</sup> DEFENDANT**

**HARRIS HORN SENIOR.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application dated 20<sup>th</sup> May 2008, was fixed for hearing on the 29<sup>th</sup> September 2008. However on that date, the matter was not listed in the daily cause list. The file was however brought to court by counsel for the respondent who urged the court to deal with the matter as the date was fixed in the presence of two parties. He submitted failure by the counsel for the applicant to attend court was not explained. He prayed that the application be dismissed for want of prosecution. The application was accordingly dismissed.

On the 6<sup>th</sup> October 2008, counsel for the applicant promptly filed another application under order 9B rule 8 of the Civil Procedure Rules. This application seeks to set aside the orders of 29<sup>th</sup> September 2008, and to reinstate the application for hearing. The application is founded on the grounds that the matter was not listed on 29<sup>th</sup> September 2008. On 26<sup>th</sup> September 2008 the defendant's counsel was informed by Mr. Karanja, that the Court file had been forwarded to the Court of Appeal for the hearing of Civil **Appeal No. 64 of 2008**, which was scheduled for hearing on 2<sup>nd</sup> October, 2008. It is also alleged that counsel for the plaintiff demanded, for the file to be forwarded to court when the matter was not listed, and urged the court to dismiss the application. This application was also supported by an affidavit of Lawrence Macharia Karanja who was to hold brief for Mr. Machira and who informed Mr. Machira that the matter would not be listed for hearing.

Counsel for the plaintiff, in opposition of this application, submitted that this application was brought under the wrong provisions of the law because this was not an **ex-parte** judgment that was entered. Moreover the court is called upon to exercise discretion, it is necessary for the court to look at the conduct of the applicant. The record will show that the applicant is bent on frustrating the execution of the decree. The date for 29<sup>th</sup> September 2008 was fixed in the presence of the parties. The normal practice is that, even if the matter is not listed, counsel would always appear before the judge. In any event the appeal was listed for 2<sup>nd</sup> October, 2008 and not 29<sup>th</sup> September, 2008.

In this matter, the court is called upon to exercise its discretion to set aside an order. It is to be noted that although the discretion is flexible, it is to be exercised on terms that are just to avoid injustice or hardship resulting from accident, inadvertence error or excusable mistake. Discretion cannot be exercised to assist a person who deliberately seeks to obstruct the cause of justice.

Going by the circumstances of this matter, it is more probable than not that there was an error on the part of the counsel for the defendants. He has attached an affidavit by an advocate of the High Court who advised him that the matter would not be proceeding on the 29<sup>th</sup> September 2008. It is more probable than not that is why counsel for the defendant did not attend court on the 29<sup>th</sup> September, 2008 when the

matter was fixed for hearing. The matter was also not listed in the daily cause list. It is for those reasons that I will allow the application, set aside the order dismissing the application dated 20<sup>th</sup> May 2008. That application is reinstated for hearing. The costs of this application will be in the cause.

It is so ordered.

**Ruling read and signed on 14<sup>th</sup> November, 2008**

**M. KOOME**

**JUDGE**