



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 656 of 2006**

**RIDGE MOUNT HOLDINGS.....PLAINITFF**

**VERSUS**

**TELEPOSTA PENSION SCHEME.....1<sup>ST</sup> DEFENDANT**

**JOHN WAWERU.....2<sup>ND</sup> DEFENDANT**

**DAVIDSON KAMAU.....3<sup>RD</sup> DEFENDANT**

**BENSON OKWARO.....4<sup>TH</sup> DEFENDANT**

**ELIUD NDEGWA.....5<sup>TH</sup> DEFENDANT**

**JOSEPHUS OWIYO.....6<sup>TH</sup> DEFENDANT**

**X SHINGIRA.....7<sup>TH</sup> DEFENDANT**

**MS KHADIJA MIRE.....8<sup>TH</sup> DEFENDANT**

**LLOYD MASIKA LIMITED.....9<sup>TH</sup> DEFENDANT**

**SANNEX ENTERPRISES.....10<sup>TH</sup> DEFENDANT**

**RULING**

The sequence of events leading to this application is that on 27<sup>th</sup> March 2007 the application was scheduled for hearing but the Plaintiff applied for adjournment on the ground that the Advocate who had conduct of the matter was engaged elsewhere. On 9<sup>th</sup> May the Plaintiff's application came up for hearing and neither the Plaintiff's representative nor its Advocates were present in court when the suit was called twice. And as a result of that failure the application was dismissed.

The Plaintiff has now filed Chamber Summons under **Order IX B Rule 8** of the Civil Procedure Rules seeking that this Honourable Court be pleased to set aside the order dismissing the application dated 21<sup>st</sup>

March 2005. On 9<sup>th</sup> May 2007 it is alleged that the Plaintiff's Advocate failure to attend on 9<sup>th</sup> May 2007 was due to circumstances beyond his control. Mr. Ian Joshua Kasina Advocate avers that on 8<sup>th</sup> May 2007, he began feeling unwell and proceeded to see a doctor. And that he was diagnosed with food poisoning and put on medication and bed rest. He contends that on 9<sup>th</sup> May 2007 he was still bedridden and could not attend court for hearing of the application, wherein he informed the office clerk about his predicament. He also contends that Mr. John Musyoka Annan Advocate was away on duty at Oloitoktok.

Mr. Kasina further states that he resumed on 15<sup>th</sup> May 2007 when he was informed that the Plaintiff's goods had been proclaimed by M/s Baseline Auctioneers. In short he pleads that the non-attendance on 9<sup>th</sup> May 2007 was not intentional but due to his indisposition, which is excusable.

The application which was dismissed on 9<sup>th</sup> May 2007 is the one dated 21<sup>st</sup> May 2005 which was filed simultaneously with the undated and unsigned plaint which is on court record. The said plaint has 3 prayers namely: -

- 1) A permanent injunction to restrain the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants by themselves, their agents, servants under or otherwise from interfering, alienating or disposing of or in any manner whatsoever the Plaintiff's property so proclaimed.**
- 2) Costs and interests of the suit at court rates.**
- 3) Any other or further relief the Honourable Court deems fit.**

It is alleged that at all material times the 1<sup>st</sup> Defendant is the Plaintiff's landlord and that the Plaintiff has leased a space on 5<sup>th</sup> floor at Telposta Towers, Kenyatta Avenue Nairobi where the Plaintiff runs a food court in the name and style of Chakula Chetu. The 2<sup>nd</sup> to the 8<sup>th</sup> Defendants were trustees of the 1<sup>st</sup> Defendant which is a pension scheme.

The Applicant's Advocate came to court on 27<sup>th</sup> March 2005 and obtained an order of injunction restraining the Defendants from disposing, alienating or interfering with the property proclaimed belonging to the Plaintiff. The property was being proclaimed due to rent arrears amounting to Kshs.1,260,685/50 which the Plaintiff had failed to pay. The monthly rent is alleged to have been a sum of Ksh.80,000/= payable quarterly in advance.

I have considered the application, the supporting affidavit, the submissions of Mr. Kasina Advocate on behalf of the Plaintiff/Applicant. I have taken into consideration the replying affidavit filed on behalf of the Defendants and the able submissions of Mr. Bundotich Advocate. Having addressed my mind to the issues at stake, I am satisfied that the Plaintiff has been engaged on a consistent and persistent abuse of the court process. As stated the application for injunction was filed in the year 2005 citing certain urgent matters which referred the intervention of the court. The court intervened on behalf of the Plaintiff but the Plaintiff appears to have gone into a perpetual and endless sleep so that the Defendant is kept away from its premises and the rent due.

The reasons given by the counsel for the Plaintiff are insufficient to warrant the excuse of my discretion in favour of the Plaintiff. The reasons advanced are not good enough to persuade to set aside the orders of 9<sup>th</sup> May 2007. The Advocate contends that he was on sick leave but it was easy for him to send another Advocate to hold his brief so that the matter could either be adjourned or argued on his behalf. He has not done so. I do not think the circumstances and the nature the claim warrants this court to excuse the conduct of the Plaintiff and his Advocates.

I have gone through the file and I have discovered that the Plaintiff's Advocates applied for adjournment more than 5 times, while the application was brought under certificate of urgency. The orders granted on 23<sup>rd</sup> March 2005 lapsed several times and the court has been magnanimous with the Plaintiff by restoring the same even when the reasons offered were flimsy. In short the conduct of the Plaintiff, is wanting and

usually does not deserve the exercise of my discretion.

Having looked the matter from all angles, I am satisfied that no purpose would be served to restore the gains acquired by Plaintiff through the orders of 23<sup>rd</sup> March 2005. The orders of 23<sup>rd</sup> March 2005 and subsequent extension were not meant in good faith but were meant to drive the Defendants to despair. I think it would be unfair and unjust to set aside the orders of 9<sup>th</sup> May 2007, which were in my view correctly done. The record shows that it is the Defendants who had taken steps for the prosecution and disposal of the dispute and in particular the application dated 21<sup>st</sup> March 2005 filed in court on 22<sup>nd</sup> March 2005. No purpose would be served to set aside the order dismissing the application for injunction. The claim for injunction in my view not genuine, it was a false claim to deprive the 1<sup>st</sup> Defendant of the rent due and owing for the premises let to the Plaintiff.

In the premises, I see no merit in the application dated 18<sup>th</sup> May 2007 and it is dismissed with costs to the Defendants.

***Dated, signed and delivered this 5<sup>th</sup> day of June 2007.***

**M .A. WARSAME**

**JUDGE**

**Court:** Ruling delivered in the presence of Mr. Kasina for the applicant and Mr. Bundotich for the respondents in open court.

**M. A. WARSAME**

**JUDGE**

**05/06/07**