

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 2456 of 1994

JOHN NJAU NJUGUNAPLAINTIFF

V E R S U S

RAMESH LILADHAR SHAHDEFENDANT

AND

HANSA R. SHAH OBJECTOR

R U L I N G

On 6th February 2006, the notice of motion dated 7th February 2005 was dismissed with costs for the non-attendance of the Interested Party to prosecute it. The application had been called earlier in the morning for hearing; an advocate holding brief for Mr. Mutiso for the Interested Party sought adjournment on the ground that Mr. Mutiso was then before another judge at the Central Registry. Adjournment was opposed by the Plaintiff's learned counsel. The court placed the matter aside until 10.00 a.m. when the application would be heard. At 10.30 a.m. when the matter was next called, there was no appearance for the Interested Party. Upon the Plaintiff's application, the application was dismissed with costs.

The said application had sought an order that the Interested Party be enjoined in these proceedings; it also sought an order that the caveat lodged by the Plaintiff herein upon land parcel L. R. 209/17/29 (Grant No. I. R. 85343) in execution of the decree of this court be lifted.

The Interested Party has now come back to court by chamber summons dated 3rd May, 2006 seeking an order to set aside the order of dismissal of 6th February, 2006. The application is brought under Order IXB, rule 8 of the Civil Procedure Rules (the Rules). The application is predicated upon the main ground that the failure to attend court on 6th February 2006 was caused by circumstances that were both unavoidable and unfortunate, but excusable. There is a supporting affidavit sworn by the Interested Party's advocate, RICHARD M. MUTISO. I have read the same.

The Plaintiff has opposed the application as set out in the replying affidavit filed on 8th June, 2006. It is sworn by the Plaintiff's advocate, SUSAN NDIRANGU. The grounds of opposition emerging therefrom are, *inter alia*:-

1. That the application is defective and an abuse of the process of the court.
2. That it has not been made in good faith.
3. That it otherwise lacks merit.

I have considered the submissions of the learned counsels appearing. In the course of arguments, there was no attempt at all to show how the application is defective and an abuse of the process of the court. I do not find any defect at all in the application; it is properly before the court and is not an abuse of the process of the court.

The court's discretion under rule 8 of Order 9B aforesaid is unfettered; but it is a judicial discretion that must be exercised judicially and upon settled principles. It is exercised in order to do justice to the parties. It will be available where there has been an excusable error or mistake; it will not be exercised in order to aid an indolent litigant or one who has set out, by commission or omission, to obstruct the course of justice.

I accept the explanation given by the learned counsel for the Interested Party that he found himself required to be before two courts at the same time in circumstances where, inevitably, he had to fail to make an appearance in one of the courts. It is to be noted that when the matter was first called earlier in the morning of 6th February 2006 the learned counsel had taken the trouble to have another counsel hold his brief.

In these circumstances it is unjust that the Interested Party, who is personally faultless, should not have an opportunity to prosecute his application by notice of motion dated 7th February, 2005. The Plaintiff will be adequately compensated by an award of costs for any inconvenience caused to him.

In the circumstances, I will allow the application by chamber summons dated 3rd May, 2006. The order of 6th February, 2006 dismissing the notice of motion dated 7th February, 2005 is hereby set aside and the application reinstated. The Plaintiff shall have the costs of the present application. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 21ST DAY OF SEPTEMBER, 2007