

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 622 of 1995

TRANSAMI (K) LIMITEDPLAINTIFF

V E R S U S

SOKHI INTERNATIONAL (K) LIMITEDDEFENDANT

R U L I N G

On 9th May, 2006 the Plaintiff's case herein was dismissed with costs for non-attendance at the hearing. It has therefore applied by chamber summons dated 31st October, 2006 for an order to set aside the dismissal and reinstatement of the suit for hearing. The application is brought under Order 9B, rule 8 of the Civil Procedure Rules (the Rules). That rule gives the court an unfettered discretion to set aside or vary dismissal orders, *inter alia*, upon such terms as are just. It is a judicial discretion that must be exercised judicially upon settled principles. The court will exercise the discretion in favour of an applicant in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. But it will not exercise the discretion in order to assist an indolent litigant, or one who has deliberately sought, by evasion or otherwise, to obstruct or delay the course of justice. See the well-known case of **SHAH –VS- MBOGO & ANOTHER [1967] E.A. 116**.

The Defendant has opposed the application. I have read the supporting and replying affidavits. I have also considered the submissions of the learned counsels appearing, including the cases cited. The reason given in the supporting affidavit for failure to attend court at the hearing is that the advocate then handling the brief failed to notice that the matter was listed in the cause list because it was listed only by its number and not also by the names of the parties. But there is no affidavit to that effect by the advocate himself, one NELSON HAVI. The explanation for this is that he had already left the firm acting for the Plaintiff by the time the application was made. It has not been contended that Mr. Havi could not be found or available to make such affidavit.

The reason given for failure of the Plaintiff's learned counsel to attend court is not entirely satisfactory, especially in the absence of an affidavit by Mr. Havi. But I have perused the court record, and, as contended in the supporting affidavit, a certain keenness on the part of the Plaintiff to proceed with the suit is disclosed. To let the one lapse of failure to attend court on 9th May, 2006 shut the Plaintiff out from the seat of judgment would, I hold, occasion greater injustice than the inconvenience to be suffered by the Defendant. The court must always strive to dispose cases upon a proper hearing on the merits where possible.

Having considered all matters placed before the court, and the principles applicable to applications of this nature, I hold that justice demands that the Plaintiff be given one more opportunity to prosecute its case. I will therefore allow the application and set aside the order of dismissal of 9th May, 2006. The suit is hereby reinstated for hearing. The Defendant shall have the costs of this application and also any thrown-away costs that it may have incurred as a result of the order of 9th May, 2006 (now set aside). Those shall be the orders of the court.

DATED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 9TH DAY OF NOVEMBER, 2007