



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 619 of 2003

INTERMART MANUFACTURERS LTD.PLAINTIFFS

VERSUS

AKIBA BANK LTD.DEFENDANT

RULING

This is an application (by Chamber Summons dated 16.11.2007) by the plaintiff seeking primarily that the dismissal order or 15.11.2007 be set aside and the suit be set down for hearing on priority basis. The main reasons for the application as expressed on the face of the application are as follows:-

1. That the plaintiff and its witnesses non-attendance was not intentional but was occasioned by the sudden unavailability of its advocates.
2. That the plaintiff is desirous of concluding this matter and will suffer substantial loss if the orders sought are not granted.
3. That the plaintiff and its advocates failure to attend court for hearing of the matter was occasioned by matters beyond their control and it is only fair that the suit be reinstated.
4. That the plaintiff should not be punished for events that are not of his own making but those of its advocates.

The application is supported by the affidavits of one Diryesh Indubhai

Patel the plaintiff's Managing Director and Jimmy Wafula Simiyu, the plaintiff's advocate. The application is opposed on the basis of Grounds of Opposition filed by the plaintiff's advocates. The affidavits elaborate the above grounds.

The application was canvassed before me on 21.11.2007 by Mr. Simiyu, Learned Counsel for the plaintiff and Mr. Kipkorir, Learned Counsel for the defendants. The gist of the plaintiff's application is that when the suit came up for hearing on 15.11.2007, Counsel for the plaintiff had traveled to Mombasa to lodge an urgent application to save one of their client's properties which was threatened with sale. Counsel therefore explained his predicament to the plaintiff's Managing Director and further informed him that he would accordingly seek an adjournment of this case. The plaintiff's said Managing Director, believing that the suit would be adjourned, traveled to Naivasha and could not attend court when the suit was called out for hearing. In the premises, the failure to attend court was not deliberate. The plaintiff's Managing Director swears that the plaintiff is desirous of concluding this matter and unless the suit is reinstated the plaintiff will suffer irreparable loss. On the other hand, according to the plaintiff, the

defendants will not suffer prejudice if the suit is reinstated.

The defendants object to the application on the basis that the plaintiff has not shown that the discretion of the court should be exercised in its favour as their absence in court at the hearing of their case has not been satisfactorily explained. In the premises, the defendants contend, that this application is scandalous, frivolous, vexatious and therefore not maintainable in law.

I have read both the supporting affidavits and the Grounds of Opposition. I have also perused the court record. Finally, I have given due consideration to the submissions of Learned Counsel appearing. Having done so, I take the following view of the matter. Both Counsel appreciate that I am being asked to exercise judicial discretion in this application. That discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice: (see **Shah vs. Mbogo [1969] E.A. 116.**) The discretion is unfettered and is exercised on such terms as are just: (see **Patel vs. East Africa Cargo Handling Services [1975] E.A. 75.** In exercising the discretion, the court considers *inter alia* the facts and circumstances both prior and subsequent and the merits of either side. The court also considers whether or not the affected party can reasonably be compensated by costs for the delay always remembering that to deny a party a hearing should be the last resort of the court. (see **Jamdas vs. Sodina Gormanda [1952] 7 UR** and **Sebei District Administration vs. Gasyali [1968] EA 300.**

Applying the above principles to the present case, I have found as follows:- The absence of the plaintiff's witnesses and their Counsel has been explained in their affidavits filed by the plaintiff's Managing Director and that of Counsel for the plaintiff. Counsel may have made an imprudent decision to assume that the suit would be adjourned as a matter of course. But Counsel's explanation is not altogether implausible. The plaintiff's Managing Director was entitled to rely upon advice given by Counsel. So the explanation for the plaintiff's absence may not be entirely satisfactory but it is clear that when the plaintiff's suit was dismissed for non-attendance, the blame rests more on Counsel's shoulder than the plaintiff's.

The plaintiff has strongly pleaded that it is desirous of prosecuting its suit. If this application is not allowed the plaintiff will be shut out from the judgment seat without being heard for largely a mistake of its Counsel. As Apaloo, J.A., as he then was, said in **Philip Chemwolo & Another vs. Augustine Kubende [1982 – 88] KAR 103** at page 1042:-

**“Blunders will continue to be made from time to time
and it does not follow that because a mistake has been
made that a party should suffer the penalty of not having
his case heard on merits. I think the broad equity
approach to this matter is that unless there is fraud, or intention
to overreach, there is no error or default that cannot be put
right by payment of costs. The court, as is often said, exists for the purpose of deciding the
rights of the parties and not for the purpose of imposing discipline.”**

Considering all the circumstances of this case, it cannot be said that the plaintiff deliberately sought to obstruct or delay the course of justice. I have also not detected any fraud or intention to overreach on the part of the plaintiff. I have also come to the conclusion that the delay that will be caused by allowing the plaintiff's application can be compensated by costs. The defendants did not rebut the factual position presented by the plaintiff and did not also show how the plaintiff's application is scandalous, frivolous or vexatious. They did not also demonstrate that they stand to suffer such prejudice as cannot be

compensated in costs. In the premises, I am inclined to exercise my discretion in favour of the plaintiff.

Accordingly, the plaintiff's application dated 16.11.2007 is allowed in terms of prayer 3 thereof. The plaintiff shall pay to the defendants costs of this application and all costs thrown away in any event.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 6th day of December 2007.

F. AZANGALALA

JUDGE

Read in the presence of:- Simiyu for the plaintiff and Mungai Ms. holding brief for Kipkorir for the defendants.

F. AZANGALALA

JUDGE

6/12/07