

REPUBLIC OF KENYA

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

Civil Case 218 of 2005

EAST AFRICAN PORTLAND CEMENT

COMPANY LIMITED.....
.....PLAINTIFF

VERSUS

PHILIP MONGONY.....DEFENDANT

R U L I N G

This is an application (by chamber summons dated 24th October, 2005) brought by the Defendant under Order 9B, rule 8 of the Civil Procedure Rules seeking the main order that the order of this court made on the 11th of October, 2005 dismissing his application by chamber summons dated 13th July, 2005, be set aside in order to reinstate the said application for hearing on merit. The application is made upon the grounds that failure of the Defendant's advocate to attend court was inadvertent in that he was held up in traffic when proceeding to court, and that it is therefore in the interests of justice that the order of dismissal be set aside. In the said chamber summons dated 13th July, 2005 the Defendant had sought the main orders that the *ex parte* judgment entered against him on 24th June, 2005 and all consequential orders and proceedings be set aside unconditionally, and that the Defendant be granted leave to file defence out of time. There is a supporting affidavit sworn by the Defendant's advocate, PETER ONYANGO BONYO, in which he explains his failure to attend court in time on 11th October, 2005. There are also two supplementary affidavits sworn by the Defendant.

The Plaintiff has opposed the application upon the main ground that the Defendant's counsel has not been candid in his affidavit. See the replying affidavit sworn by his counsel, WILLIS O. NYENDE, filed on 16th October, 2005. There is also a replying affidavit sworn by the auctioneer, MUGADA WASULWA, filed on 25th November, 2005 which is not quite relevant to this application.

I have read all the above-mentioned affidavits. I have also given due consideration to the submissions of the learned counsels appearing, including the cases they have cited. The main purpose of the discretion granted to court under rule 8 of Order 9B is to do justice. The Defendant's learned counsel has explained under oath how he got to be late in attending court on 11th October, 2005. Getting unexpectedly held up in traffic in Nairobi is not an unusual occurrence. The Defendant's counsel was late only by a few minutes. He brought the present application without undue delay. I see no reason why his learned colleague, the Plaintiff's learned counsel, should doubt his veracity. I think the justice of this matter demands that the Defendant's application by chamber summons dated 13th July, 2005 be heard and disposed of on merit. It should not be defeated only because his counsel was late by a few minutes in attending court.

I will for the above reasons allow this application. The order of this court of the 11th October, 2005 is hereby set aside and the chamber summons dated 13th July, 2005 reinstated. The Plaintiff shall have the costs of the application. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF MARCH, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 3RD DAY OF MARCH, 2006.