



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 375 of 1995

FREDRICK NGARE MUCHIRA.....PLAINTIFF

VERSUS

JOSEPH WACHIRA NJOROGE.....1ST DEFENDANT

NATIONAL BANK OF KENYA.....2ND DEFENDANT

RULING

The Plaintiff filed an application by way of Notice of Motion dated 20th April, 2004 seeking to set aside *ex parte* orders made by Visram J. on 12th February, 2003. The Plaintiff further prayed that the second defendant be ordered to serve the application dated 23rd September, 2002 upon his Advocates for hearing and determination on merits. The Plaintiff’s application was made on the ground that the application dated 23rd September, 2002 was not served upon him or his advocate and was heard *ex parte* and adverse orders made against him in that the plaintiff’s case against the second defendant was dismissed.

The orders made by Visram J. on 12th February, 2003 were as follows:

“Based on the Ruling of Ondeyo, J. dated 25/6/2002 this

application dated 23/9/2002 id allows as prayed.”

On 25/6/2002, Ondeyo J. allowed as application by the second defendant dated 6th April, 2001 and dismissed the Plaintiff’s suit against the second defendant with costs to the second defendant. That application had been argued *inter partes* when Mr. Achola Advocate held brief for A. Otieno Advocate for the Plaintiff and Mr. Mahida held brief for M/s. A. B. Patel & Patel for the second defendant. Thereafter, the Plaintiff’s advocate appeared before Visram J. on 10/7/2002 and urged the court reinstate the second defendant into the suit. The court marked the matter as stood over generally.

Although the plaintiff’s case against the second defendant was dismissed on 25th June, 2002, the plaintiff served the second defendant with purported amended summons to enter appearance on 23rd August, 2002.

That is the background upon which the former second defendant made the *ex-parte* application dated 23rd September, 2002 and sought the following orders:

- “1. *THAT in the first instance, service of this application be dispensed with.*
2. *THAT further proceedings against the former second defendant be stayed until determination of this application.*
3. *THAT the former second Defendant be deemed no longer a party to the suit save in respect of its costs.*
4. *THAT the former second defendant be deemed struck off from the suit.*
5. *THAT the purported amended summons to Enter Appearance dated 23rd August, 2002 served upon the former second Defendant be struck out as offending order V. Rule 13 (1) (b), (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Although that application was granted on 12th March, 2003, the present application was not filed until the 20th April, 2004.”*

In my view, that application was misconceived in law because the Plaintiff was well aware that his suit as against the second defendant has been dismissed more than two years prior to his filing the aforesaid application. No appeal was preferred against the ruling of Ondeyo, J. delivered on the 25th June, 2002. Even if the second defendant had not filed the application of 23rd September, 2002 which was allowed on 12th February, 2003, the plaintiff did not take any step against the second defendant as long as the orders issued by Ondeyo, J. on 25th June, 2005 remained in force as they do. I agree with Miss Manyoni for the Second defendant that the plaintiff's application is incompetent and hereby dismiss it with costs to be borne by the plaintiff.

DATED, SIGNED and DELIVERED at NAKURU this 12th day of May, 2006.

D. MUSINGA

JUDGE

12/5/2006

Ruling delivered in open court in the presence of Miss Manyoni for the respondent and N/A for the applicant.

D. MUSINGA

JUDGE

12/5/2006