



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

**Civil Suit No. 65 of 2005**

**INVESCO ASSURANCE CO. LTD .....  
PLAINTIFF**

**V E R S U S**

**CYRUS NGANG'A NJURU.....  
DEFENDANT**

**JOSEPH M'EKONGA IKONGA.....1<sup>ST</sup> INTERESTED  
PARTY**

**JOEL THURANIRA M'ERIMBA (SUING AS THE ADMINISTRATOR OF  
THE  
ESTATE OF THE ESTATE OF THE DECEASED M'KIRINGA M'ITAMBARA  
THIMUTI).....2<sup>ND</sup> INTERESTED PARTY**

**R U L I N G**

1. On 22/4/2004 the interested parties Application dated 28/1/2004 was dismissed by Nyamu J. Because the record would show that neither the interested party nor its advocates were present to prosecute it. That Application inter alia sought orders that the orders of court issued on 28/5/2002 be reviewed so that the contents of that Ruling should not affect or bind the parties in Meru CMCC 971/1999, CMCC NO. 975/1999 and as a consequence also Meru CMCC 391/2005. The substance of those suits is not important at this stage.
2. Nonetheless on 20/5/2005 the interested party then filed a Chamber Summons under Order IXB Rule 8 of the Civil Procedure Rules and S. 3A of the Civil Procedure Act seeking setting aside of the orders of dismissal of the Application and its reinstatement for hearing.
3. The supporting Affidavit of Joseph Kaberia Arimba Advocate sworn on 18/4/2005 explains why there was no attendance on 22/4/2004; that at all times Mr. Rogers Luthugua Advocate practicing in the firm of M/S Munya and Kimaiyu Advocates in Nairobi had been instructed by the said Mr. Arimba Advocate to file serve and prosecute the Application dated 28/1/2004. That the said Mr. Rogers Luthugua did not communicate to the instructing Advocate and filed no progress reports between 3/2/2004 and 10/2/2005 a period of slightly more than one year. Mr. Arimba only learnt on 10/2/2005 that the Application had been dismissed on 22/4/2004. On enquiring from Mr. Luthugua he was informed that he arrived in court at 8.55 a.m. and found that the same had been dismissed although one Mr. Makori Advocate had appeared and sought its dismissal while he had earlier indicated to Mr. Luthugua that the date was not agreeable with his diary. Mr. Arimba lays the blame for the dismissal of the application on Mr. Luthugua who failed to communicate in time or at all the dismissal of the Application to Mr. Arimba.

4. It is the submission in a nutshell on behalf of the Applicants that the mistake of an advocate should not be visited on an innocent litigant who knew nothing about what was going on in court.
5. The Plaintiff/Respondent filed grounds of opposition and argues in reply to submissions made by Mr. Arimba in line with the above exposition that;

Firstly, the Application has been brought without due explanation as to the long delay and is otherwise an afterthought.

6. Secondly, that the Application ought to have been brought under Order 50 Rule 17 and not Order IXB Rule 8.
7. Thirdly, that the 3<sup>rd</sup> parties had no Locus Standi since the review sought in its Application dated 28/1/2004 was not available to them.
8. I have carefully listened to submissions on both sides and I am satisfied that there is no serious opposition to it. The first ground in opposition has been explained and in any event the delay although in excess of one year and would otherwise have been inordinate has been so explained as to mitigate the 3<sup>rd</sup> parties case. The action of Mr. Luthugua in relation to the instructing Advocate who entrusted him with a brief to handle to completion is both unprofessional and to be detested but those actions should not be the basis for punishing an innocent litigant. The second ground is a technical question and should not be the basis for striking out an Application whose impact is clear from its body and supporting affidavit. Such are the times that Order 50 Rule 12 of the Civil Procedure Rules should be invoked so that a court of discretion should look to the substance and merit of a matter than the technicalities with which it has been laden. The third ground is equally mistaken because it goes to argue against the Application sought to be reinstated and is a premature premise for opposing the present Application.
9. Having so said the conduct of both Mr. Arimba and Mr. Luthugua will necessitate that they shall shortly pay for their inadequacies in the handling of the Application dated 28/1/2004.
10. I will accede to the Application and shall grant prayer 1 of it but costs shall not be in the cause.
11. I agree that an innocent litigant should not be punished for the conduct of its advocates. I do not subscribe to the view on the other hand that advocates who act improperly should escape sanction. That sanction includes costs personally payable by them.
12. While allowing the Application with costs to the Plaintiff/Respondent both Mr. Arimba and Mr. Luthungua shall bear the costs thereof which I shall assess graciously at Ksh.4,000/= to be shared equally between them.

Orders accordingly.

Dated, signed and delivered in open court at Meru this 3<sup>rd</sup> day of May 2006

**ISAAC LENAOLA**

JUDGE