



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 1016 of 2000**

**MUKPAR LIMITED:.....PLAINTIFF**

**VERSUS**

**GUILDERS INTERNATIONAL BANK & 11 OTHERS.....DEFENDANTS**

**RULING**

On 27<sup>th</sup> May, 2004 an application dated 4<sup>th</sup> May, 2004 by 11<sup>th</sup> and 12<sup>th</sup> Defendant's was placed before me for hearing. It was listed in the cause list of the day. It sought the following orders:-

1. That the plaintiff's suit against the 11<sup>th</sup> and 12<sup>th</sup> Defendants be struck out with costs.
2. That in the alternative the 11<sup>th</sup> and 12<sup>th</sup> Defendants be struck out from this suit.
3. That costs of the suit and the application be awarded to the 11<sup>th</sup> and 12<sup>th</sup> Defendants.

On the hearing date, Mr. Omolo counsel for the 11<sup>th</sup> and 12<sup>th</sup> Defendants appeared to prosecute the application. Miss Mwanzi appeared for the 1<sup>st</sup> – 10<sup>th</sup> Defendants. There was no appearance for the Plaintiff Counsel for the Applicant told the court that he had served the hearing notice on 20<sup>th</sup> May, 2004 and that the plaintiff's had been given over three clear days as required by the rules. Mr. Omolo said that there were no grounds of opposition and no replying affidavit. He asked the court to allow the application.

After considering the brief submissions of Counsel, I allowed the application and dismissed the suit against the 11<sup>th</sup> and 12<sup>th</sup> Defendants. The court deemed that the application was unopposed. The court was satisfied that service of the application had been duly effected.

Being aggrieved with this decision the plaintiff has now filed this application inter alia for review under the provisions of Section 80 (a) Civil Procedure Act Order XLIV, Rules 1 and 2 of the Civil Procedure Rules. The grounds for the application include, that:-

1. The hearing of the suit had already been fixed for 23<sup>rd</sup> and 23<sup>rd</sup> September, 2004 by consent.
2. The hearing dates for the application by the 11<sup>th</sup> and 12<sup>th</sup> Defendants was fixed for hearing on two different occasions by Counsel for the Applicants without invitation to the Respondent's Counsel.

3. An earlier hearing date was unilaterally and unprocedurally changed and brought forward from 24<sup>th</sup>, May, 2004 to 27<sup>th</sup> May, 2007 without invitation to the Respondent's Counsel to attend the registry to fix a mutually convenient hearing date or otherwise without the knowledge of the Respondent's Counsel.
4. No valid service of the Hearing Notice was made and/or given to the Plaintiff's Advocates, nor to the Advocates for the Co-Defendants for the hearing of the subject Application on 27<sup>th</sup> May, 2004.
5. The default of attendance in court by Counsel for the Respondent was not wilful.

The 11<sup>th</sup> and 12<sup>th</sup> Defendants opposed the application and filed two Replying Affidavits sworn by the present Counsel for the two Defendants and a Counsel from the previous firm on record.

I have carefully perused the application, affidavit in support, the Replying affidavits, submissions and the record. This suit was fixed for hearing on 5<sup>th</sup> May, 2004. On the same day, A.W. Omolo & Company Advocates filed a Notice of change of Advocates to act for the 11<sup>th</sup> and 12<sup>th</sup> Defendants in place of M/S Mohammed Madhani & Co. Advocates. At the sometime, the application to strike out the suit against the 11<sup>th</sup> and 12<sup>th</sup> Defendants was filed. It could not have a date since the hearing of the main suit was to be on the same day.

Counsel for the parties appeared before Justice Azangalala when the following orders was made:-

**“ The only reason why this case is being adjourned is that it may not be reached as there is a part-heard case scheduled for the whole day. This case is, therefore, removed from today's hearing list and is fixed for hearing by consent on 23<sup>rd</sup> and 29<sup>th</sup> September, 2004.”**

It would appear that the parties were to proceed for the trial as no direction was given with regard to the application to strike out. The 11<sup>th</sup> and 12<sup>th</sup> Defendants on 13<sup>th</sup> May, 2004 through Counsel fixed the application for hearing for 24<sup>th</sup> May, 2004 for there was no evidence that the plaintiff was invited to fix the hearing date mutually. It is a well established practice particularly for the courts in Nairobi that a party wishing to fix a hearing date of any application which had been previously served and has no date, to invite the other to meet at the Registry to fix a mutually convenient date. I find that the 11<sup>th</sup> and 12<sup>th</sup> Defendants Counsel did not adhere to this practice. The plaintiff's advocate received the hearing notice for this date under protest on 14<sup>th</sup> May, 2004.

On the 19<sup>th</sup> May, 2004 the 11<sup>th</sup> and 12<sup>th</sup> Defendant's advocates wrote a letter to the plaintiff's Counsel sending them a fresh hearing Notice for 27<sup>th</sup> May, 2004. In the covering letter they asked the plaintiff's Counsel to ignore the first Hearing Notice as **“This was taken erroneously”**. The minutes show that the date of 24<sup>th</sup> May, 2004 was cancelled and a new date fixed for 27<sup>th</sup> May, 2004. There is no evidence to explain why this change was made and what error was being referred to. It is clear that once again the 11<sup>th</sup> and 12<sup>th</sup> Defendant's did not invite the plaintiff to fix this new date.

I find this to be quite irregular and unprocedural. The practice required that the two Defendants invited the plaintiff to fix a mutually convenient date rather than imposing a date on the plaintiff.

I accept that the fact that counsel fixed the hearing of the suit for 23<sup>rd</sup> and 24<sup>th</sup> September, 2004 **by consent** reasonably gives the impression that the application had been spent. If the two Defendants wished to prosecute the application, it was only fair that they invited the plaintiff to fix a mutually convenient date for the hearing of the application. Three or four days notice was not sufficient in such circumstances. Such an invitation would have given the plaintiff an opportunity to file a Replying Affidavit and/or grounds of opposition or take any other steps.

I also accept that a note from the Judge's clerk as to what transpired on 27<sup>th</sup> May, 2004 when inquiry was made was misleading and lead the plaintiff not to take immediate action to file the present application.

Upon consideration, I am satisfied that the plaintiff has suffered and has been prejudiced by the dismissal of its suit against the 11<sup>th</sup> and 12<sup>th</sup> Defendants. It is the conduct and acts of the two Defendants which has led to this situation by failing to invite the plaintiff to fix hearing date and unilaterally changing the hearing dates.

The plaintiff has acted promptly in making this application. The principles of natural justice demand that the plaintiff be heard in the application to strike out. The two Defendants shall not suffer any prejudice as the matter can be heard on its merits.

I do hereby exercise this court's discretion in favour of the plaintiff. I do hereby find that there are sufficient reasons to review the order dismissing the application. I do hereby review my orders of 27<sup>th</sup> May, 2004 and set aside/vacate the same. The suit against the 11<sup>th</sup> and 12<sup>th</sup> Defendant is hereby reinstated. The 11<sup>th</sup> and 12<sup>th</sup> Defendant's application dated 4<sup>th</sup> May, 2004 may be heard on its merits. The plaintiff shall file and serve its Replying Affidavit within the next 21 days from today. The 11<sup>th</sup> and 12<sup>th</sup> Defendant's shall be at liberty to file a Further Affidavit within 14 days of service of the plaintiff's Replying Affidavit and/or grounds of opposition.

Considering that Counsel for the plaintiff did not attend the hearing of the application due to being committed in the "**Goldenberg proceedings**" and the conduct of the two Defendants in catalyzing the situation herein, there shall be no order as to costs.

Finally, in view of the aforesaid Orders, it follows that the "Decree" herein shall be set aside and struck out which I hereby do. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI ON THIS 23<sup>RD</sup>, JUNE, 2006**

**M. K. IBRAHIM**

**JUDGE**