



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

**Civil Suit 418 of 2003**

**BEN PANPHILL SIFUNA.....  
.....PLAINTIFF**

**VERSUS**

**HARAMBEE SAVINGS AND CREDIT SOCIETY LIMITED.....  
DEFENDANT**

**R U L I N G**

This suit was fixed for hearing, by consent of both counsel, hearing being on 10<sup>th</sup> February 2005.

When this case came up for hearing plaintiff's counsels brief was held by Mr Adere who had limited instruction to apply for adjournment. The application for adjournment was declined and the court set the suit for hearing at the end of its list for that day.

When this matter was called out again at 10.00 a.m. the plaintiff and his counsel were absent and the court dismissed the suit.

The plaintiff has now moved the court by his chamber summons application dated 16<sup>th</sup> February 2005, seeking to set aside the said dismissal. The same is under Order IXB Rule 8.

Ms Rebecca Chege advocate has in the supporting affidavit sworn to untruth, something that the court would not expect for one who is an officer of the court. She stated that she did not address the court because she was informed by the court that she was unsuitably attired. She further stated that when the matter was allocated hearing at the end of the list she went out of court to call the plaintiff who, on her instructions had left the court, and also to call another counsel from her firm to conduct the matter. That the matter was dismissed during her said absence.

The said affidavit of Ms Rebecca Chege advocate did not contain a '*tinge*' of an apology to the court for what was tantamount to dereliction of duty.

Despite the aforesaid behaviour and even though the defendant has opposed the plaintiff's application the court is of the view that in considering the application it ought to look beyond the behaviour of the plaintiff counsel in the interest of justice. In that regard the court has in mind the words of Apoloo J.A., in the case CHEMOLO & ANOTHER – V – KUBENDE CIVIL APP. NO. 103 OF 1984, that:

**“Blunders will continue to be made form 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 determined on its merits.”**

I will therefore look beyond the sins and omissions of the plaintiff’s counsel and exercise the undoubted wide discretion afforded by Order 1 X B Rule 8 of the Civil Procedure Rules, in favour of the plaintiff. The defendant counsel was of the view that the plaintiff counsel’s behaviour on the day of trial was intent on obstructing the trial. I am of the view that notwithstanding that, the court can set aside the dismissal of the suit, but the costs of the application will be awarded to the defendant who through no fault of his own has been involved in this application.

The orders of this court are:

- (1) That the order of the court made on 10<sup>th</sup> February 2005 dismissing the plaintiff’s suit is set aside.**
- (2) The costs of the application dated 16<sup>th</sup> February 2005 are awarded to the defendant.**

**MARY KASANGO**

**JUDGE**

Dated and delivered this 22<sup>nd</sup> June 2006.

**MARY KASANGO**

**JUDGE**