

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 533 of 1995

NATIONAL BANK OF KENYA.....
.....**PLAINTIFF**

VERSUS

ISAACK KAGIA OBEDE.....DEFENDANT

RULING

The plaintiff filed an application dated 5th October 2005 by way of chamber summons brought under **Order IXB rule 8** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking reinstatement of its suit which was dismissed on 26th September 2005 for want of prosecution. On that day both the plaintiff's advocate and the defendant's advocate were not in court and so were the respective parties.

The plaintiff's advocate Mr. Christopher Kenyariri stated in his affidavit in support of the said application that on the 26th of September 2005 he was unable to attend court and had requested Mr. Nyamwange Advocate to hold his brief and apply for an adjournment and Mr. Nyamwange in turn requested Mr. Orina to do so. However, Mr. Orina inadvertently failed to respond when the matter was called out with the result that the court dismissed the suit for want of prosecution. Mr. Nyamwange also swore an affidavit in support of the averments by Mr. Kenyariri.

In his submissions, the plaintiff's advocate told the court that the defendant would not suffer any prejudice if the said suit was reinstated while on the other hand if the suit was not reinstated the plaintiff would suffer substantial loss as it was claiming from the defendant a sum of Kshs.4,979,198.25 plus interest. He urged the court to exercise its discretion and allow the said application. Counsel cited several authorities in support of his submissions among them **PITHON WAWERU MAINA VS THUKU MUGIRIA (1982-88)1KAR 172.**

Mr. Kipkogei for the defendant opposed the said application and said that there were no good reasons for allowing the same. He said that the defendant's advocates had not even been served with a hearing notice and that was the reason why the defendant was not in court. He further submitted that the plaintiff's suit was filed way back in 1995 and arose from a contract that was entered into between the parties in 1989. He said that his client was aging up and was losing some of the vital documents which he would have relied on in his defence. He therefore urged the court to dismiss the said application.

In **SHAH VS MBOGO [1967] EA 116** it was held that the court has wide discretion in considering matters of this nature and such discretion was intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence or excusable mistake or error but it is not designed to assist a person who had deliberately sought to obstruct or delay the cause of justice. In exercising the discretion, the court has to take into consideration the facts of each case. In this matter the plaintiff's advocate had clearly stated the reasons that led to the dismissal of the matter in his absence. He took over the conduct of the case from the plaintiff's former advocates on 4th November 2004. He made effort to secure a hearing date for 26th September 2005. It is not clear why he had not served a hearing notice upon the defendant's advocates. While I agree with the defendant's advocate that this is an old case, I am equally conscious of the principals that were set out by the court in **SHAH V MBOGO (supra)** and in my view it would be in the interest of justice to exercise my discretion in favour of the applicant so as to avoid injustice or hardship on its part that would arise if the application is dismissed. This is because the absence of the plaintiff's advocate on the material day was occasioned by an excusable mistake on the

part of Mr. Nyamwange who had agreed to hold brief for Mr. Kenyariri. I therefore allow the plaintiff's application. As the defendant was absent when the matter came up for hearing I will not award costs to him but instead order that the costs be in the cause.

DATED, SIGNED and DELIVERED at Nakuru this 18th day of July, 2006.

D. MUSINGA

JUDGE