REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 223 of 2005

JOSPHAT NDERITU KARIUKI

(Legal Representative Of John Kinyua Nderitu (DECEASED)……PLAINTIFF

VERSUS

PINE BREEZE HOSPITAL LTD…….....…….....DEFENDANT

RULING

The defendant/applicant instituted the chamber summons dated 25th May, 2006 wherein they have applied for orders of stay of execution of the judgement entered against the defendant /applicant and any consequential orders/or decree be set aside.

This application is expressed to be brought under the provisions of order 14B rule 8 and order XXI rule 22 and 91 of the Civil Procedure Rules. The grounds upon which this application is premised are stipulated in the body of the application. It is stated that the plaintiff proceeded with the hearing of this matter exparte despite the fact that the defendant had filed a defence. It is also stated that the applicant is desirous of defending the suit and they have a good defence which raises triable issues.

During the hearing of this application **Mr. Patrick Kiprop** applied to have his affidavit sworn on 25th May, expunged from the records as it contained false information after he realized that his office had duly been served with a hearing notice. This request was allowed and the said affidavit having been expunged from record this application was supported by only the affidavit of Vijay Singh. According to the deponent, all the summons and plaint were forwarded to Kenindia Assurance Company Limited who instructed the firm of Yano & Company advocates to enter appearance and defend the defendant's suit. Subsequently a defence dated 20th September, 2005 was filed but the hearing proceeded exparte. Counsel for the applicant argued that although the plaintiff's counsel served a hearing notice upon the defendants counsel's offices at M/s Yano & Co. Advocates they failed to attend Court for unexplained reason but they urged this court not to visit upon their client the counsel's mistake. Counsel submitted that for the ends of justice, this court should exercise its inherent powers to set aside the exparte judgement upon any terms.

On the part of the respondent this application was opposed. Counsel for the respondent argued that there is no justifiable reason why the applicants failed to attend court. The procedures were followed to serve them with the summons subsequent to which they filed a defence and memorandum of appearance by M/s Yano & Co. Advocate which indicated the address of service in Nakuru. On 22nd November, 2005 the

defendant's advocates were invited to fix the mater for hearing but failed to turn up and thus, the plaintiff's counsel fixed the mater formally and sent the hearing notice to the firm of the defendant's counsel which was duly acknowledged. The plaintiff's counsel also filed an affidavit of service and thus on the day of the hearing the defendant failed to turn up. No explanation has been given why the defendant or his counsel why they failed to attend Court. In this case it would be futile to exercise the discretion of this court in favour of an application to set aside an exparte judgement when there are no plausible reason or any reasons at all advanced by the applicant for their failure.

I have considered the rival arguments herein. It is clear that the plaintiff's counsel complied with all the procedures set out in setting the matter for hearing and notifying the defence counsel. The reason given by the defendant for their failure to attend court was that the hearing notice was not served upon their Nairobi offices of Yano & Co. Advocates, yet the memorandum of appearance that the defence counsel filed gave the address of service for their Nakuru Offices. I agree with the submission by counsel for the plaintiff that this court can set aside an exparte judgement under the provisions of order 14B rule 8 in exercise of this court's discretion, however such discretion is unfettered save that if the judgement is to be set aside it should be on terms and the discretion should be exercised judicially and not whimsically. In doing so the court must also consider the reason if any given for the default, the conduct of the parties prior to, and whether there is a defence on merits and whether the respondent/plaintiff can adequately be compensated in costs. It has to be borne in mind that to drive away a litigant from the judgement seat unheard, should be the last resort of a court of justice. The discretion is intended to avoid hardship resulting from inadvertence or a mistake but not to assist a party who has sought to delay or obstruct the cause of justice. (***See the case of Hezekiah Ogao Abuya –Vs- Kuguru Food Complex Ltd. Milimani HCCC Misc.No. 400 of 2001).***

Considering this matter in the light of the above grounds, I have put into consideration this matter involves a claim arising out an occupiers liability, where the plaintiff'' son died while swimming at the defendant's swimming pool. This death was followed by an inquest where the cause of death was attributed to the defendant's negligence.

That aside, the defendant chose their advocate who failed to attend court. This is a proper case where an advocate should bear the consequences of their own professional negligence of failure to attend court on behalf of their client. Similarly the client should bear the consequences for the choice of his legal counsel. I am not satisfied that there are good reason to unseat the plaintiff from his judgement. I decline to exercise my discretion, as there are no plausible reasons advanced by the applicant for me to do so.

I dismiss the application with costs to the plaintiffs.

It is so ordered.

Ruling read and delivered in Nakuru on 9th August, 2006.

MARTHA KOOME

JUDGE

9.8.2006

Before: M. Koome – Judge

Mwiti: Court Clerk

Musembi for the plaintiff/respondent

Non appearance by the defendant/applicant

Ruling read and signed in Nakuru on 9th August, 2006.

MARTHA KOOME

JUDGE