



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 22 of 1992**

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

**VERSUS**

**KIBOGOYE GENERAL STORES LTD.....1<sup>ST</sup> DEFENDANT**

**JAMES LABAN MOGOI .....2<sup>ND</sup> DEFENDANT**

**JANE MOGOI .....3<sup>RD</sup> DEFENDANT**

**RULING**

When this suit came up for hearing on 22<sup>nd</sup> November, 2004 there was no appearance by any party and the court proceeded to dismiss the suit for nonattendance. The present application by Chamber Summons dated 23<sup>rd</sup> November, 2004 relates to that dismissal. The Plaintiff has moved this court by that application brought under Order IXB Rules 2 and 8 of the Civil Procedure Rules. The Plaintiff seeks an order that this court would set aside the order dismissing this suit. The application is supported by three separate affidavits. The first one is sworn by the advocate for the Plaintiff where he stated that on 22<sup>nd</sup> November, 2004 he received a telephone call from the Plaintiff's representative who inquired why his firm had not attended court for the hearing of this case. He proceeded to check the cause list for that day and was able to confirm that indeed this case was listed for hearing. He then rushed to the court and it was confirmed by the Milimani court clerk that this case had been dismissed for nonattendance. He deponed that it was not the intention of his firm to fail to attend the hearing of this case but that failure was due to inadvertence of his court clerk. That his court clerk had failed after taking an exparte date to diarize the case in the firm's diary. He was of the view it would be just for the court to exercise its discretion in favour of the Plaintiff and to reinstate the suit. A further affidavit was sworn by the employee of the Plaintiff who confirmed what was deponed by the advocate that it was he who had attended court for the hearing of this court on 22<sup>nd</sup> November, 2004 and had telephoned the advocate to inquire why they were absent from court. The third affidavit was sworn by the court clerk of the advocate's firm. He confirmed that he took the hearing date of this case on 26<sup>th</sup> April, 2004. He thereafter instructed the firm's secretary to advise the Plaintiff of the hearing date. He however, confirmed that he failed to diarize that date in the firm's diary. He stated that the failure of the advocate to attend court for the hearing of this suit was due to his mistake.

The court has considered the reasons given by the plaintiff's advocate for their failure to attend court on 22<sup>nd</sup> November, 2004. The explanation given is reasonable and indeed would move this court to exercise its discretion to set aside the order dismissing this suit. Indeed the discretion given to the court is intended to be exercised to avoid injustice or hardship which results from accident or inadvertence. The court therefore, does hereby set aside the order issued by this court on 22<sup>nd</sup> November, 2004 dismissing the suit. There shall be no orders as to costs in regard to the Chamber Summons dated 23<sup>rd</sup> November, 2004. Orders accordingly.

**MARY KASANGO**

**JUDGE**

Dated and delivered this 7<sup>th</sup> day of November, 2006.

**MARY KASANGO**

**JUDGE**