



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI**

Civil Suit 1113 of 2002

GIRO COMMERCIAL BANK LIMITEDPLAINTIFF

VERSUS

HERONSGATE LIMITED.....1ST DEFENDANT

MAKUPA CHEMISTS LIMITED.....2ND DEFENDANT

KAMLESH PRITAMLAL PATEL3RD DEFENDANT

BHAVESH RUGNATSH HEMRAJ KANABAR4TH DEFENDANT

KANUBHAIL RAMANLAL AMBALAL PATEL.....5TH DEFENDANT

AND

PEARL CHEMISTS LIMITED.....1ST OBJECTOR

HARDWARE ACCESSORIES2ND OBJECTOR

INDIRA RUGNATH KANABAR3RD OBJECTOR

KUNDANBENS PATEL.....4TH OBJECTOR

RULING

The objectors application dated 26th August 2004 was dismissed on 8th April for non-attendance.

By the application dated 12th April 2005 the objectors seek to set aside that dismissal.

The objector's counsel submitted that failure to attend court on 8th April 2005 was inadvertent. He expounded this in the affidavit in support which stated that; on that day he had three other matters, that is HCCC NO. 1256 OF 2003, HCCC NO. 257 OF 1987, at the central registry and CMCC NO. 5674 OF 2004. He annexed a copy of the relevant page of his diary in support. That he first went to the central registry to get an indication of hearing time but sent his clerk, Eric Osigo to attend to this matter by asking a counsel to hold his brief and get an intimation of time for hearing.

He said clerk delayed and arrived at the court at 9.10 am by which time this matter had been dismissed.

The supporting affidavit then stated that the Objector's counsel spoke with counsel for the plaintiff at

9.15 am who intimated that an application be made by the objector to set aside the dismissal; the plaintiff's counsel undertook not to execute.

The objector's counsel stated that the application is merited because it sought to establish ownership of the attached goods. He finally deponed that the plaintiff will not suffer any prejudice if the dismissal was set aside.

The plaintiff's counsel opposed the application, by stating that the objectors had failed to give reasonable explanation on non-attendance. Counsel argued that the objector's counsel had failed to explain why he delegated this case to Mr. Wandabwa, who obviously had his hands full, who in turn delegated it to a court clerk.

The opposition was also on the basis that objectors application lacked merit and there was no useful purpose to be gained by reinstating it. The plaintiff relied on the case of PATEL V E.A. CARGO HANDLING SERVICES LTD (1974) E.A. 75. He said that although the court had discretion to set aside dismissal, such discretion had to be applied judicially.

Indeed and quite rightly as stated by the plaintiff, the court has wide discretion on such an application as this one. Judge of Appeal William Duffus, P. stated as follows in the PATEL V E.A. CARGO HANDLING SERVICES LTD (Supra), in relation to court's exercise of its discretion;

“No judge could, in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there is no possible defence to the action and (b) how it came about that the applicant found himself bound by a judgment.....”

A casual look at the objector's dismissed application gives an impression that the matters raised there ought to be subjected to a hearing and a decision be made on merit. I have considered the objector's explanation for failing to attend court in time and I think counsel's explanation can only surprise those who are strangers to the manner under which counsel's are sometimes under extreme pressure to attend to many matters and are left with no option but to request either their pupils or their clerks to get another counsel to hold their brief. This is a common occurrence. The objectors brought their application to set aside the dismissal without delay and I accordingly in exercise of my discretion do accede to the same.

The orders of the court are: -

- **That the order of the court made on 8th April 2004 dismissing the application dated 26th August 2004 and all the consequential orders therefore are hereby set aside.**
- **The costs of the application dated 12th April 2005 will be in the cause of the objection proceedings.**

Dated and delivered at NAIROBI this 31st May 2005.

MARY KASANGO

JUDGE