

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 383 of 2000

FIROZ JUSAB SUMAR t/a
MALINDI AUTO PARTS PLAINTIFF
- Versus -
BARCLAYS BANK OF KENYA LTD DEFENDANT

R U L I N G

This suit was on 4th November 2004 dismissed for want of prosecution pursuant to an application made in that regard. The plaintiff had not filed a replying affidavit or grounds of opposition. So the orders were granted pursuant to Order 50 Rule 16. This application brought under Order 50 Rule 17 is therefore proper and it cannot be said that because counsel for the plaintiff was in court the application was not heard ex-parte. If the plaintiff had filed a replying affidavit or grounds of opposition and counsel appeared on the hearing date but for one reason or the other he was not ready to proceed and the matter was nonetheless heard then the hearing could not be said to be ex-parte. Mr. Busieka's argument that the dismissal order was not made ex-parte is therefore overruled.

I have considered the plaintiffs grounds for seeking a reinstatement of this suit. He says he was using a common post office box and because he closed down his business at Malindi and has not been there he has not been receiving his advocates letters. His mistake is that he did not advise his advocate of his change of residence. That is excusable.

Given that this case relates to a piece of land which the plaintiff may lose and the allegation that the plaintiff has paid in full the loan due to the defendant I think the plaintiff deserves to be given a chance to prosecute his case. Consequently I set aside the order of this court of 4th November 2004 and reinstate this suit. The plaintiff shall fix this case for hearing within six months. The defendant shall have the costs of this application and those of its application dated 22nd July 2004.

DATED and delivered this 11th day of May 2005.

D.K. MARAGA
JUDGE