



REPUBLIC OF KENYA

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

Civil Suit 1650 of 2001

INSURANCE COMPANY OF EAST AFRICA LTD.....PLAINTIFF

VERSUS

WELLINGTON OMODHO.....DEFENDANT

RULING

The plaintiff has come to court by way of chamber summon under order IXB rule 8 seeking to set aside the exparte judgment entered against it and the decree arising there from.

This matter came up for hearing on 9th February 2005, where the plaintiff and its counsel failed to attend the defendant proceeded to prove its counter claim.

Now the plaintiff seeks to set aside dismissal of its case and the judgment entered in favour of the defendant.

Plaintiff's counsel submitted that failure to attend court was a consequence of a regrettable omission on the plaintiffs' counsel's employee. Plaintiffs counsel stated that she wrote a letter dated 2nd November 2004 when she invited the defendants counsel to sent its representative to the court registry on 19th November 2004, for purpose of fixing this case for hearing. On her part, plaintiff's counsel deputized her clerk Mr. Henry Nyamoko.

The said Henry Nyamboko by an affidavit confirmed that he attended the court registry and by consent of the defendant's advocates' clerk fixed this case for hearing on 9th February 2005.

Nyamoko further stated that on his return to the office because of other duties he failed to note the date in the advocate's diary.

Plaintiff's counsel submitted that the mistake committed by her clerk ought not to be visited upon the plaintiff who is innocent in this matter.

The defendant's counsel opposed the application arguing that the plaintiff has failed to show sufficient cause why the court should exercise its discretion in its favour. He accused the plaintiff counsel of delaying the present application then remarked that there is a certain responsibility laid before an advocate to ensure that clerks perform their duties. He also accused plaintiff's counsel of failing to make a follow up with her clerk to confirm date fixed.

Order IXB rule 8 donates unfettered discretion to the court in an application such as the one before court. The court in exercising that discretion should exercise it judiciously and ought to exercise that

discretion in favour of an applicant who has not deliberately sought to obstruct or delay the cause of justice. The court should also set aside *ex parte* judgment to avoid hardship, injustice resulting in inadvertence or excusable mistake or error: SHAH V MBOGO [1967] EA 116.

The court has considered the plaintiff's application and the defendant's opposition. The court does indeed accept a mistake was committed by the plaintiff's advocates' clerk in failing to note down the date of hearing in the advocates' diary. This I find to be an excusable mistake particularly when one considers that advocates offices are busy and there is always a possibility of a mistake occurring in the failure of updating the diary and as a consequence this can lead to failure to attend court.

I have considered the pleadings hereof and I accept plaintiff's counsel's submissions that the issue raised hereof show that the plaintiff has an arguable case which ought to go for full hearing.

Accordingly there will be orders as follows: -

- (1) That the *ex parte* orders of 9th February 2005 and the *ex parte* proceedings dismissing the plaintiff's claim and the judgment of 8th March 2005 are hereby set aside.**
- (2) That the plaintiff shall pay the defendant's thrown away costs which shall be agreed within 30 days failure to agree the same can be taxed.**
- (3) That the costs of the application dated 30th April 2005 are awarded to the defendant.**

Dated and delivered this 27th July 2005.

MARY KASANGO

JUDGE