



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Suit 237 of 2001**

**L.N. MOMANYI**

**T/A L.N. MOMANYI & CO. ADVOCATES ..... PLAINTIFF**

**VERSUS**

**GEORGE W. SCHULTZ ..... DEFENDANT**

**Coram: Before Hon. Justice Mwera**

**Akanga for Applicant/Defendant**

**Ms. Osili for Respondent/Plaintiff**

**Court clerk – Kazungu**

**R U L I N G**

On 20-5-05 and by a notice of motion of even date, the defendant sought prayers under O.50 r. 1 Civil Procedure Rules and SS 3, 3A Civil Procedure Act that this court set aside its order of 18-5-05 by which it dismissed the applicant's application dated 11.11.03. From Mr. Akanga's arguments it became obvious that when the application dated 11-11- 03 came up for hearing on 18-5-05, no lawyer from his firm was in court to prosecute it. The plaintiff/respondent did not accept any part of that application (which concerned depositing in court or paying out some Sh. 1 m) and sought dismissal of the same. Such an order issued – hence this application to set aside the order of dismissal and to reinstate that application of 11-11-03, so that it is heard on its merits. Without doubt the applicant's lawyers did not arrange to appear to prosecute the said application dated 11- 11-03 because, as it transpired after hearing Mr. Akanga, he himself had listed too many matters before different courts on that 18-5-05 to allow him to be present and prosecute the application dated 11-11-03. And his colleague is said to have been engaged in the High Court at Malindi.

Ms Osili was of the strong view that the dismissal order of 18-5-05 be left undisturbed because that date had been taken by consent yet the defendant did not prepare to appear to prosecute his application even after the matter was deferred and called out at a later hour to allow the defendant to come. That the defendant seemingly had lost interest in the matter which was filed under a certificate of urgency. That not only did the defendant seem not keen on taking hearing dates of his application dated 11- 11-03 but also there were occasions he did not make some deposits when the court granted him time to. Ms. Osili however told the court that if the court was minded to grant the orders sought, the defendant be given a specific time within which to list and prosecute the said application dated 11-11-03.

The court was left with the impression already expressed above, and a regrettable one that Mr. Akanga simply listed too many cases before different courts on the same day as to disable him from appearing and prosecuting the application dated 11-11-03 on 18-5- 05. It has often been said that mistakes, errors etc of counsel should not be visited on his client, the litigant, but that leaves one wondering how elastic that allowance should be. Should it include where counsel consciously and deliberately loads himself with such work whereupon he cannot physically attend to them all as and when they come? Not surely. That cannot be.

In this case however the defendant has 45 days to list and prosecute his application dated 11-11-03. The dismissal order of 18-5-05 is set aside. It shall however not be prudent on the part of the defendant to

take a date on the 45th day allowed here to have his application. Such a chance cannot be assured of success and he risks his application standing dismissed for non-listing and prosecution. Before then the defendant shall pay costs assessed at Sh.7,000/- for 18-5-05 and for this application, in the next 15 days. In default he can forget about listing the application dated 11-11-03 in 45 days from the date hereof.

Orders accordingly. Prayers granted on conditions set out above.

**Delivered on 27th July 2005.**

**J.W. MWERA**

**JUDGE**