

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

Civil Suit 329 of 2003

AWO SHARIFF MOHAMMEDPLAINTIFF

VERSUS

ABDULKADIR SHARIFF ABDIRAHIM

ABDINASIR ABDIRAHIM MOHAMMED

T/a AS ABDIRAHIM ENTERPRISESDEFENDANTS

RULING

This case was part heard before me when it came up on 7th April 2005 for defence hearing. On 7th April defence counsel failed to attend the hearing and on the application of the plaintiff the court ordered that submission be made on 18th April 2005.

The defendant has now moved the court for orders that the order made on 7th April 2005 closing the case and listing the matter for submissions be set aside; that the defendants applicant be permitted to prosecute their case to call the remaining evidence. It was submitted by defence learned counsel Mr. Kibunja that on 7th April the 2nd defendant and his witnesses were present in court ready to tender their evidence before court; that defence counsel was held up before Hon Justice Waweru where he had gone to inquire on a ruling. The defendant then prayed that the court be given an opportunity to tender his evidence.

The plaintiff opposed the defendant's application. Learned counsel Mr. F N Wamalwa did at the hearing concede that he was mistaken into thinking that the counsel who had appeared in this matter was someone other than Mr. Stephen Kibunja. The plaintiff's argument that the application of the defendants can only be entertained under Section 3 A of the Civil procedure Act was lost to me because the defendant indeed did invoke that very section.

The plaintiff's other argument was that the application ought to have rightly be brought under notice of Motion rather than chamber summons. The plaintiff sought the dismissal of the application. I have considered the arguments of counsel and I find that the best interest of justice would be served if the defendants were allowed to conclude their case. There is no prejudice that will be suffered by the plaintiff. The order of the court is that the order made on the 7th April 2005 is set aside and the defendants can proceed with their case. The costs of the application dated 16th May 2005 are awarded to the plaintiff in any event. It is so ordered.

Dated and delivered this 22nd July 2005.

MARY KASANGO

JUDGE