

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 2476 of 1999

MERCY W. MUNENE.....PLAINTIFF

VERSUS

ROTO MOULDERS LTD1ST DEFENDANT

NATION NEWSPAPER.....2ND DEFENDANT

RULING

This case was filed on 20th December 1999. It came up for hearing on 1st February 2005 but counsel for the plaintiff was absent. Counsel for the defendant applied to have the dismissal of the suit since the date was taken by consent and there was no explanation. The suit was dismissed for non-attendance.

On 20th April 2005 counsel for the plaintiff filed this chamber summons which is dated 14th April 2005 seeking orders to set aside the dismissal order of 1st February 2005. On 22nd April 2005 counsel for the plaintiff took the hearing date *ex parte* for the hearing of the application and served the respondent with the hearing notice when the application came up for hearing, counsel for the applicant was absent Mr. Kaai holding his brief told the court that he had instructions to apply for adjournment on the ground that counsel for the applicant had traveled to Meru to attend to a personal matter involving a land dispute before a Land Disputes Tribunal where he was the defendant.

The application was opposed on the ground that counsel had taken the date *ex parte*, served the respondent and he never even bothered to inform him nor the court that the hearing was not going to proceed. Since the hearing before the Tribunal was not an emergency as he must have been aware of the date earlier. When the adjournment was refused, Mr. Kaai decided to proceed with the application. The application is premised on the ground that the suit was dismissed for failure of counsel to attend the hearing due to the confusion as to whether the hearing date was confirmed during the call over. The application is supported by an affidavit sworn by counsel in which he deponed that he had sent his clerk to attend the call over and when he came back he informed him that the suit was not confirmed.

The counsel for the respondent in opposing the application submitted that the affidavit in support of the application was defective in that it was sworn by counsel instead of the clerk who attended the call over and that this contravenes the provisions of Order XVIII Rule 3 of the Civil Procedure Rules. He further submitted that there were no sufficient reasons given to warrant the issuance of the orders sought. There is essentially only one ground of opposition to the application, that the application is incurable defective in that it offends the provisions of Order XVIII Rule 3 of the Civil procedure Rules which provides:-

“O.XVIII R 3 – Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.”

But the proviso to this rule states:

“Provided that in interlocutory proceedings or by leave of the court an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

In this application counsel has stated the source of his information. That he had his clerk to attend to the call over and who came back and informed him that the suit was not confirmed. This was sufficient

source and therefore it cannot be said that the application is incurably defective.

I therefore allow the application in terms of prayer 1 of the Chamber Summons dated 14th April 2005. Due to the age of the suit I order that the hearing date be taken in the registry on priority basis. Those are the orders of this court.

Dated and delivered at Nairobi this 12th day of July 2005.

J.L.A. OSIEMO

JUDGE