



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION – MILIMANI**

**Civil Case 270 of 1999**

**BENSON LIMITED .....PLAINTIFF**

**VERSUS**

**SAVINGS AND LOAN (K) LTD .....DEFENDANT**

**RULING**

The Chamber Summons dated 12<sup>th</sup> May 2005 is expressed to have been brought under the provisions of Order 1XB Rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks one order which is that the order made on 29<sup>th</sup> April, 2005 dismissing this suit be set aside and the suit be reinstated for hearing. The grounds for the Application are that:

1. The failure to attend Court by the Plaintiff and the Advocate was caused by a genuine mistake by the Advocate’s staff.
2. The Advocate had been erroneously informed by the Clerk in the office that the matter was not listed.
3. The Applicant has always been ready and willing to proceed with this matter and it is just to be granted a chance to prosecute this suit.
4. The clerk was misled by the Diary where the matter had been erroneously recorded as HCCC No.848/99

The Application is supported by an affidavit sworn by Mr. Patrick Kerongo the Plaintiff’s Advocate. The Application is opposed and there is a Replying Affidavit sworn by one Lawi Kimathi Njuki who depones that he is conversant with the issues herein.

The Application was canvassed before me on 17<sup>th</sup> June 2005 by Mr. Kerongo, Learned Counsel for the Plaintiff and Mr. Murugu, Learned Counsel for the Defendant. The gist of the Plaintiff’s Application is that its Counsel while in Meru on 28.4.2005 was informed by his office by telephone that the case was not listed for hearing on 29<sup>th</sup> April, 2005. Consequently Counsel did not travel and further informed a Director of the Plaintiff that the case would not proceed on 29<sup>th</sup> April, 2005. However on 11<sup>th</sup> May 2005 Counsel for the Plaintiff was informed by a former Advocate in the suit that the suit had in fact been dismissed. On these premises, Counsel for the Plaintiff urged me to set aside the order dismissing the suit otherwise the Plaintiff would suffer because of its Counsel’s mistake.

Responding to the submissions by Counsel for the Plaintiff Counsel for the Defendant recited the

averments in the replying affidavit aforesaid. He emphasized that the Plaintiff's case was dismissed on 28<sup>th</sup> April, 2005 and not on 29<sup>th</sup> April as submitted by Counsel for the Plaintiff. In his view Counsel for the Plaintiff and his clerk had relied on falsehoods and equity would not aid a party who had not done equity. Reliance was placed on the case of **Paul Ojogo Omanga –v- Japheta Angila and Another: Nairobi HCCC No.1740 of 2002 (UR)** in which Nyamu J. refused to set aside an ex parte judgment on the ground that the Applicant had been less than candid regarding service of summons. For the same principle reliance was placed upon the case of **Joseph Karanja Mukuna –v- Gabriel Mburu Maina & 2 Others: Nairobi HCCC No.448 of 2004 (UR)**. In that case Nyamu J. declined to grant a temporary injunction because the Applicant had failed to disclose material facts and particulars. Counsel for the Defendant further relied upon the case of **Kamunyi –v- Macharia and Another (1990) KLR 470** where Bosire J. as he then was declined to set aside an order dismissing an application to discharge an injunction as Counsel's excuse for non-attendance was not genuine.

Counsel was also of the view that as the Affidavits relied upon by Counsel for the Plaintiff contained falsehoods; the same were incompetent and should be struck out. For this proposition he relied upon the case of **Kifur & Another – V- Standard Chartered Bank & 2 others (2002) 1 KLR 640** where Tunya J. struck out a verifying affidavit on the ground that it was false.

Finally Counsel placed reliance upon the case of **Omwoyo –v- African Highlands & Produce Co. Ltd (2002) 1 KLR 698** where Ringera J. as he then was observed, Obiter, that the time had come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour.

I have considered the Application, the Affidavits both for and in opposition to the Application and the Submissions of Counsels appearing. I have also given due consideration to the authorities cited. Having done so I take the following view of the matter. I am aware that to grant or not to grant the order sought is a matter of discretion. There are no restrictions to the discretion which discretion like all judicial discretions should be exercised judicially and not arbitrarily or whimsically. The record of this case shows that on 2<sup>nd</sup> February, 2005 the present Counsels by consent fixed this case for hearing on 28<sup>th</sup> April, 2005 and not on 29<sup>th</sup> April, 2005 as submitted by Counsel for the Plaintiff. When the case was called on for hearing outside the Court on 28<sup>th</sup> April 2005 only the Defendant attended. There was no explanation for the failure of a representative of the Plaintiff or its Counsel to attend. The case was accordingly dismissed as there was no good cause not to do so. The affidavits in support of the Application attempt to explain Counsel's failure to attend Court on 29<sup>th</sup> April 2005. No explanation has been given for failure of Counsel and his client's representative to attend on 28<sup>th</sup> April, 2005 when the case came up for hearing. This is rather surprising because the Replying Affidavit of Lawi Kimathi Njuki aforesaid clearly showed that the case had been scheduled for hearing on 28<sup>th</sup> April, 2005. The replying affidavit was filed on 20<sup>th</sup> May 2005. On that day I granted leave to both parties to file and serve further or supplementary or responding affidavits. Notwithstanding the leave granted the Plaintiff filed no response to the Defendant's replying affidavit. It now must be obvious that the cause list annexed to the supporting affidavit was in respect of matters scheduled for 28<sup>th</sup> April 2005 contrary to the averments of both Counsel for the Plaintiff and his clerk. It is clear to me that Counsel for the Plaintiff has been less than candid both in the affidavit and in the submissions before the Court. This is not a case where there has been an accidental lapse of vigilance by Counsel or inadvertence or excusable mistake or error. Justice looks both ways. It is not only the Plaintiff's position to be considered. The Defendant's position must also be considered. The Plaintiff seeks to set aside an order made on 29<sup>th</sup> April, 2005. No order was made on that date. No Application for leave to amend the Application was made. The Plaintiff did not seize the opportunity granted to file a supplementary or responding affidavit to explain the failure to be represented on 28<sup>th</sup> April, 2005.

In sum I have not been persuaded that the Plaintiff is deserving of the exercise of the Court's discretion. The Plaintiff is not without remedy if it is convinced that it is being punished because of its advocate's mistake.

In the result, I decline to exercise the Court's discretion in favour of the Plaintiff/Applicant. The Plaintiff's Application dated 12<sup>th</sup> May 2005 is accordingly dismissed with costs.

For avoidance of doubt the dismissal of the Plaintiff's suit did not affect any compromises that had been recorded in Court. It was what was left of the Plaintiff's suit that was dismissed.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY, 2005

F. AZANGALALA

JUDGE