REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(NNNNNNNAIROBI LAW COURTS)

Misc Civ Appli 388 of 2002

JACK AND JILL SUPERMARKETS LIMITED……PLAINTIFF

VERSUS

GITONGA KIMANI H NJOROGE MBURU T/A MBURU GITONGA & COMPANY ADVOCATES……..……...DEFENDANTS

R U L I N G

The plaintiff by a chamber summons dated 10th December 2004 seeks the setting aside of the dismissal of the application dated 22nd September 2004. The affidavit in support of the application was sworn by a director of the plaintiff's company. He stated that the application dated 22nd September 2004 sought orders that the defendants be cited for contempt of court for having disobeyed court orders. That the plaintiffs then, advocate, failed to attend court because of his clerk's failure to note the case in his diary. He annexed to his affidavit a letter written by his former advocate, which supported his averments.

Plaintiffs counsel relied on tow cases: MAINA V MUGIRIA [1983] KLR 78; and CIVIL APPEAL NO 216 OF 1997 JOSEPH MUNIU – AND – MEDICINO GIOVANNI.

The latter case's facts are similar to our facts in this case. The counsel's clerk had also failed to enter the date into the counsel's diary. The court of appeal stated as follows: "Once the judge has accepted that somebody had forgotten or overlooked to do so, as he did, in our views, it is not material to know who that person was or how or why he or she had forgotten. In our view the explanation given by Miss Jan Mahamed was good enough to show why she failed to attend at the hearing of the suit." This quote ought to satisfy the argument, raised by the defendant that because the plaintiff's then advocate did not swear an affidavit, or his clerk, there was no sufficient explanation why he failed to attend court. The defendants counsel also opposed the application on the basis that paragraph 3 should be struck out for contravening order 18 rule 3 of the Civil Procedure Rules. I have considered that submission and I find it is not merited, the paragraph merely repeats what the plaintiff's then advocate stated in the annexed letter.

I have considered the submissions made before me and I am conscious of the discretion bestowed upon me, in an application brought under order IXB rule 8, and I am aware that, that discretion should be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error. What happened here and was the cause of counsel failing to attend court on 3rd November 2004 was an excusable mistake or error, and I, in exercise of my discretion, will set aside the aforesaid dismissal.

The order of the court is: -

(1) That the order made on 3rd November 204, dismissing the plaintiff's application dated 22nd September 2004 is hereby set aside with no order as to costs.

Dated and delivered this 19th August 2005.

MARY KASANGO

JUDGE