



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Case 438 of 1998**

**TELKOM KENYA LTD .....APPLICANT**

**VERSUS**

**WATERBUCK HOTEL LTD .....RESPONDENT**

**RULING**

The plaintiff has made an application under **Order IXB Rule 8, Order XXI Rule 22 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** seeking the orders of this court to set aside its order made on the 18<sup>th</sup> of October 2004 dismissing the plaintiff's suit. The plaintiff further sought to have the consent order entered on the 4<sup>th</sup> of February 2005 set aside. The application is supported by the annexed affidavit of Paul Bongo Jilani, the company secretary of the plaintiff corporation and the grounds stated on the face of the application. The application is opposed. Lawrence Ngugi Mwangi, the advocate appearing on record on behalf of the defendant has sworn a replying affidavit in opposition to the application. At the conclusion of the hearing of the application, the parties to this suit entered into a consent which was adopted by this court. By consent, the consent order entered on the 4<sup>th</sup> of February 2005 together with consequent attachment of the plaintiff's motor vehicle was set aside. The issue that was left for the determination of this court is whether or not to allow the plaintiff's application to set aside the dismissal of the plaintiff's suit on the 18<sup>th</sup> of October 2004.

I heard the arguments made by Mr Mogeni, learned Counsel for the plaintiff and Mr Lawrence Mwangi, learned Counsel for the defendant. The issue for determination by this court is whether the plaintiff had established sufficient grounds to enable this court to set aside its order of dismissal and reinstate the plaintiff's suit to hearing. This court has unfettered discretion either to allow or refuse to set aside the said order of dismissal. The principles for setting orders of dismissal are more or less similar to the principles to be considered when setting aside ex-parte judgments. The said discretion must however be exercised judiciously. (See **CMC Holdings Ltd -vs- Nzioki [2004] I E.A. 23 at 28g**). This court is also aware that it is mandated to exercise its discretion to set aside orders of dismissal to avoid injustice or hardship to the applicant resulting from accident, inadvertence, excusable mistake or error. This court will however not exercise its discretion to assist a litigant who has deliberately sought (*whether by evasion or otherwise*) to obstruct or delay the cause of justice. (See **Shah -vs- Mbogo [1967] E.A. 116, Mbogo -vs- Shah [1968] E.A. 98, and Patel -vs- Cargo Handling Services Ltd [1974] E.A. 75**).

What are the facts of this case? On the 7<sup>th</sup> of July 2004, Mr Kiarago and Mr Mwangi, Counsels for the plaintiff and the defendant respectively appeared before this court on the day the suit herein had been fixed for hearing. Mr Mwangi for the defendant sought an adjournment on the grounds that he had a sour throat and could not therefore proceed with the case. Mr Kiarago for the plaintiff indicated to the court that he was ready to proceed with the case. He stated that he had one witness who was ready to testify for the plaintiff. In view of Mr Mwangi's inability to effectively represent the defendant, this court granted the defendant's application for adjournment. The court fixed the hearing of the plaintiff's case for the 18<sup>th</sup> of October 2004. On that day, neither the plaintiff's nor the defendant's Counsel were present in court. The plaintiff and the defendant did not send their representatives to court. In the absence of both the plaintiff and the defendant, this court ordered the plaintiff's suit be dismissed for want of prosecution. The court did not make any orders as regards costs.

In his submission before court, Mr Mogeni for the plaintiff stated that Mr Kiarago who was the

advocate then appearing on record for the plaintiff had written to Mr Lawrence Mwangi, the advocate for the defendant and indicated to him that he was not going to be in a position to attend the hearing of the case before this court on the 18<sup>th</sup> of October 2004 due to the fact that he had been instructed to appear before the Public Procurement Complaints, Review and Appeals Board by the plaintiff. Mr Kiarago wrote the said letter to Mr Mwangi on the 13<sup>th</sup> of October 2004. According to the affidavit of Mr Jilani, the said letter was sent by fax to Mr Mwangi. Mr Mwangi denies that he received the letter in question. He submitted that he did not own a fax machine and therefore could not have received the said letter. Mr Mogeni further submitted that a Mr Olola, an advocate based at Nakuru had been instructed to hold brief for the plaintiff and to seek an adjournment on the grounds stated above. The plaintiff assumed that its instruction had been given effect to.

As it were, neither Mr Mwangi or Mr Olola appeared before this court on the 18<sup>th</sup> of October 2004, hence the dismissal of the plaintiff's suit by this court for want of prosecution. The plaintiff has pleaded that it should be given a chance to ventilate its case on merit. The plaintiff has argued that there were sufficient grounds to enable this court set aside its said order of dismissal. The plaintiff argued that the defendant would suffer no prejudice if the said order dismissing the suit is set aside and the suit is reinstated to hearing. On its part, the defendant is vehemently opposed to the suit being reinstated to hearing. Although neither the defendant's representative nor its advocate were present in court on the day that this court dismissed the suit, Mr Mwangi submitted that this court properly exercised its discretion in dismissing the plaintiff's suit for want of prosecution.

Having carefully considered the said submissions made, it is the opinion of this court that the plaintiff has given a reasonable explanation why it's Counsel failed to appear in court on the 18<sup>th</sup> of October 2004. The plaintiff's then Counsel was instructed to appear before the Public Procurement Complaints, Review and Appeal Board on the same day that this case was scheduled to be heard. The said advocate made efforts to communicate to the defendant's Counsel and another advocate based at Nakuru to have this suit (*which had been listed for hearing on the 18<sup>th</sup> of October 2004*) adjourned. Unfortunately it appears that the said letter did not reach the defendant's Counsel or the advocate who was to hold their brief.

The plaintiff assumed that its instructions to seek adjournment had been given into. However the plaintiff was later to learn that its suit had been dismissed for want of prosecution. The advocate whom it had instructed to appear on its behalf and hold its brief and did not appear in court. I have perused the proceedings of the court. I have noted that the plaintiff had previously been keen to proceed with its case. At an earlier date, when the case was fixed for hearing, the plaintiff was ready to proceed with the case but for the fact that the defendant's Counsel sought an adjournment due to illness. I have also noted that the sum involved this suit is not insubstantial. It is only fair and just that the plaintiff be allowed to ventilate its case on merits. The defendant can be adequately be compensated for any inconvenience caused by an award of costs.

In the premises therefore, the plaintiff's application dated the 3<sup>rd</sup> of June 2005 is hereby allowed. The order of dismissal of suit issued by this court on the 18<sup>th</sup> of October 2004 is hereby set aside. The said suit is consequently ordered reinstated to hearing. The plaintiff shall however pay costs to the defendant. The said costs are hereby assessed at Kshs.15,000/-. The said costs shall be paid within fourteen (14) days of today's date or in default the orders issued herein in favour of the plaintiff shall automatically lapse.

**DATED at NAKURU this 5th day of August 2005.**

**L. KIMARU**

JUDGE