

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL SUIT 66 OF 2005

SHADRACK KARIUKI KIRUHI PLAINTIFF

VERSUS

TRANSNATIONAL BANK LIMITED DEFENDANT

RULING

The plaintiff wishes to have this court grant him orders to have reinstated interim orders, which were dismissed on 16.8.2005 for want of attendance. He bases his application in various grounds but mainly that his counsel was delayed and could not attend court in time to prosecute his application, in which he had sought to restrain Trans-National Bank Limited (“the Bank”), from disposing of his property, namely Eldoret Municipality/Block 11/413 (hereinafter called “the subject property”), in an effort to recover moneys which it claimed were owing to it.

The application is however opposed by the Bank whose contention it is that he does not deserve the order that he seeks.

I have perused the pleadings, which were filed in support of this application, the cases which were cited, and I have also taken the submissions of both able counsel into account.

It has not escaped my attention that the plaintiff does not deny being indebted to the bank. It is now trite law that an issue of taking accounts in a loan of the nature which this applicant enjoyed from the Bank cannot warrant the granting of orders to restrain a Bank from exercising its power of sale. However, it is not for me at this stage to determine whether the application which was dismissed was meritorious or not, for to do so at this stage, would be tantamount to determining an application, which as it is, is not on record at the moment. It would in any event prejudice the hearing and determination of that application, should this application be successful.

Be that as it may, I agree with counsel for the plaintiff, who admits that it was due to his delay in attending court, that the order was dismissed, that mistakes of counsel should not be visited upon clients, and on that account alone one would sympathise with the applicant and grant him the order that he seeks.

But that would not be all that a court has to consider in an application of this nature, for it is imperative that the court looks into the application to establish whether it raises excusable reasons for the non-attendance. The application is supported by Counsel’s affidavit which unfortunately contains matters of fact.

This is contrary to trite law, for, were he to be called for cross-examination on the facts, it would require that he steps into the arena and to become a witness. It is also trite law that, a person cannot be an advocate and a litigant in the same matter. Having deponed as he has, he has committed the cardinal sin and the affidavit stands struck out, of being counsel and litigant at the same time which leaves the application unsupported and hence lacking in material evidence on reasons for non attendance.

The upshot of this all is that the application lacks in merit and it is dismissed with costs.

Dated and delivered at Eldoret this 22nd day of September 2005.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Miyianda for the plaintiff/applicant

No appearance for the defendant