



REPUBLIC OF KENYA

MILIMANI COMMERCIAL COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE 1434 OF 2000

FORTUNE FINANCE LIMITEDPLAINTIFF

VERSUS

VACATIONAL DEVELOPERS LIMITED1ST DEFENDANT

FAZAL SHAMJI2ND DEFENDANT

NAVAZ FAZAL SHAMJI3RD DEFENDANT

HASMAT FAZAL SHAMJI4TH DEFENDANT

R U L I N G

By its Notice of Motion the Applicant seeks to set aside the orders made herein. The order is not specified but Mr. Owino said it was the one of the 28.7.03 in which this suit was dismissed by Mr. Justice Njagi and to reinstate the suit for hearing.

The application is brought under O 9B rule 8. This relates inter alia, to the setting aside of a dismissal of a suit for non-attendance at the hearing.

The application heard by Njagi J was brought under the Provisions of O 16 rule 5. On the hearing of that application on the 30.6.2003 Mr. Ohaga for the Respondent to that application sought an adjournment and the application was adjourned for hearing on the 15.7.2003 when only the advocate for the Applicant appeared.

In the affidavit of Jotum Abuodha Otiende of the 18.4.2005 he gives as the reason for non attendance on the 15.7.2003 that Mr. Owino his partner had confessed to him that the dates was not communicated to him at all by their clerks. This application as well as the supporting affidavit of Mr. Owino allege that they have a good claim which should be heard on its merits.

It must be borne in mind that this is not an appeal against the order of Mr. Justice Njagi that an application to set aside his order on the grounds that the Applicant has shown good cause why he did not attend and the justice of the case demands that it should be heard on its merits.

Mr. Wekesa who opposed the application submitted that the application was brought under the wrong order, which should have been under O 16. rule 5.

He further relied on the case of *Charles Omuoyo v African Highlands & Produce Co. Limited CC. No. Misc.308 of 2002* in which Ringera J. (as he then was) referred to the case of *Manji v Lalji & others, Civ. App. No.236 of 1992* in which Kwach JA cited with opulence a passage for ***Kettleman v Hanel Properties Ltd (1988)*** in which Lord Griffiths made the following remark:-

“Another factor that a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings.”

Mr. Wekesa submitted that this was a case where the court should refuse to exercise its discretion to set aside the dismissal order as the non attendance of the respondent to that application was negligent and should not be overlooked.

I concur the application is brought wrongly under O 9B rule 8 as this application is brought due to the non attendance of the applicant at the hearing of the application for dismissal. In any event failure to cite the correct rule is not a reason to dismiss an application. (see O 50 rule 12).

The consequences of setting aside the order of Njagi J will be that the application of the 27.4.03 will have to be heard de novo. I think in considering this application I am entitled to consider whether a different outcome is likely to ensue. I have read the ruling of Njagi J. which is very detailed and thorough and gives reasons why he dismissed the suit. He came to the conclusion that the plaintiff was not apparently keen on prosecuting this case. The non attendance of the applicant at the hearing of the application before Njagi J. was another manifestation of the Applicant's turpor in proceeding with this case. Although a clerk may not have informed Mr. Owino of the date of hearing one would think that Mr. Owino would have inquired himself as to the outcome of the application for an adjournment of the application.

Taking all things into account in my view the pendulum falls against setting aside the order of Mr. Justice Njagi.

That being the case I have no alternative but to dismiss this application with costs to the respondents.

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

P. J. RANSLEY

JUDGE