

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 1142 of 2002

TETRA PAK LIMITED.....PLAINTIFF

VERSUS

GREGORY M. KIILU.....DEFENDANT

AND

FRANCISCA NTHAMBI KIILU

**Administrator of the Estate of Kiilu Kimithi (Deceased).....1ST
OBJECTOR**

JOHN MUTUA KIILU.....2ND OBJECTOR

R U L I N G

In this application by notice of motion dated 18th October, 2005 the Objectors, FRANCISCA NTHAMBI KIILU (Administrator of the Estate of Kiilu Kimithi, Deceased) and JOHN MUTUA KIILU, seek the main order that the order of court entered ex parte on 18th October, 2005 be set aside. The said order dismissed the Objectors' application by chamber summons dated 26th August, 2005 for non-attendance. If the present application is allowed the said chamber summons shall be reinstated. The application is made upon the grounds that the failure by the Objectors' counsel to attend court was excusable and that in any event the mistake of counsel should not be visited upon the Objectors. The Plaintiff/Decree-Holder has opposed the application upon various grounds as set out in the replying affidavit sworn by JOHN KATIKU, learned counsel for the Plaintiff. One of those grounds is that there was a previous similar application by the Objectors, being chamber summons dated 1st March, 2005, which was dismissed for non-attendance on the 26th July, 2005. Another ground for opposing the application is that the non-attendance has not been satisfactorily explained.

I have considered the submissions of the learned counsels appearing. The order sought to be set aside was made ex parte. Rule 17 of Order 50 of the Civil Procedure Rules gives the court an unfettered discretion to set aside such order. Needless to say, it is a judicial discretion which must be exercised judicially. The present application was brought after the previous similar application by chamber summons dated 1st March, 2005 was dismissed for non-attendance. No application was brought to reinstate that previous application. For that reason, just as I ruled on 18th October 2005, the present application is an abuse of the process of the court. That is a sufficient reason to refuse the application. Even on merit, the reason given by counsel for failure to attend court is that the counsel had attended a subordinate court in Kiambu in preference to attending the application before this court which had been filed under certificate of urgency. That was in excusable. The High Court always takes precedence over the subordinate courts. The court will not exercise its discretion in favour of a party whose counsel chooses to go before a subordinate court rather than attend a matter before the High Court filed under certificate of urgency. Nothing, therefore, has been placed before the court as would enable it to exercise its discretion in favour of the Objectors.

For the above reasons the present application is hereby refused with costs to the Plaintiff/Decree-Holder. Order accordingly.

**DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2005. H.P.G.
WAWERU**

JUDGE