

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2025 of 1999 (OS)**

RAJAB MOHAMMED SULEIMAN PLAINTIFF

-VESUS-

BURHANI MARJANI.....DEFENDANT

RULING

The Plaintiff/Applicant, in a Chamber Summons application dated the 29th June 2004 and filed on the 30th June, 2004, has moved the court for orders (inter alia) to set aside the dismissal order made on the 1st October 2003 by Mbitio, J. whereby the Originating Summons dated and filed on the 21st October 1999 was dismissed by reason of the Plaintiff's failure to attend court to prosecute the suit notwithstanding that he had been duly served with a hearing notice.

The application is made on the ground that **“the suit was no confirmed for hearing in the call over held on the month of September 2003”** and further upon the ground that failure to attend by the Plaintiff and his counsel was inadvertent. The application is supported by the affidavit of Mwaura Shairi, learned counsel for the Plaintiff/applicant, made on the 29th June, 2004.

Though it is a matter of fact as to whether or not the suit was in the call over list and also as to whether or not it was confirmed for hearing on the 1st October 2003, which information could easily have been obtained from the Court Registry, the Applicant has placed no evidence before me in this regard nor has his learned counsel, in his said affidavit, explained why he elected to ignore the hearing notice served upon him notwithstanding his mistaken belief that the suit had not been confirmed at the call over.

In his said supporting affidavit, Mr. Mwaura Shairi depones in paragraph 4 thereof **“that I was advised by my said court clerk which advice I verily believed to be true that this case was either not on the call-over list and/or was not confirmed for hearing on the 1st or 2nd October 2003.”** Later in the affidavit at paragraph 11, the deponent states “that the plaintiff has lived on the suit land (LR. NO. NGONG/NGONG/7406) from 1975 to date and has effected substantial development thereon and will suffer grave prejudice if this case is not heard on merit.” The deponent ends at paragraph 14 of his said affidavit by stating that what is deponed to in the affidavit is true to the best of his knowledge, information and belief.

I have considered the contents of paragraphs 4 and 11 aforesaid in conjunction with the provisions of order 18 rule 3(1) of the Civil Procedure Rules and the Ruling dated the 15th July 1996 of Ringera, J. (as His Lordship then was) in **Kisya Investment Ltd. & Another v. Kenya Finance Corporation Ltd. & others** (HCCC No. 3504 of 1993) and wonder, with respect, what Mr. Shairi would have to say if cross examined thereon under order 18 rule 2(1). In the absence of affidavits by Mr. Shairi's court clerk and client respectively, how is the court properly to evaluate the strength of the foundation of the deponent's belief and the grounds and reasons thereof? In Yusuf Abdul Gani vs. Fazal Garage [1955] 28 K.L.R. 17, affirmed by the Court of Appeal in **David Kinyanjui & others v. Meshack Omari Munyoro** (Civil Appeal No. 121 of 1993) (unreported), it was held that:-

“While order 18, rule 3 (1) in interlocutory applications relaxed the best evidence rule and the rule excluding hearsay by admitting statements on belief the use made of the rule must be strictly scrutinized lest there be risk of rendering nugatory and salutary proviso that the grounds for belief must be stated. When a client was himself available to depone either to his own knowledge or to his own belief and so state his own grounds was preferable, that he, rather than his advocate on this behalf, swore the affidavit

lest unacceptable grounds were obliterated or some undue advantage obtained to the defeat of the rule.”

By reason of the foregoing, I find and hold Mr. Mwaura Shairi’s said affidavit made on the 29th June 2004 to be defective and incompetent because the Plaintiff’s/Applicant’s counsel as deponed to contested matters of fact and said that the same are true to the best of his knowledge, information and belief but without advancing any grounds and reason for his beliefs. Accordingly, I strike out the said affidavit and, as a consequent thereof, order that the Chamber Summons application dated the 29th June 2004 be and is also hereby struck out with costs to the Defendant/Respondent.

Dated and delivered at Nairobi this fifth of November 2004.

P Kihara Kariuki

Ag. Judge