

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.830 OF 1997

RAO JAIVIRSINTHINJI T/A DARBAR WHOLESALERS.....1st PLAINTIFF

**PATRICK C. KINUTHIA T/A EQUITORIAL ACCOUNTANTS2ND
PLAINTIFF**

ISAAC W. NJOROGE T/A UMOJA CUSHION REPAIRS.....3rd PLAINTIFF

NANCY W. NGIGE T/A NANS HOT SPORT..... 4TH PLAINTIFF

VERSUS

PRUDENTIAL DRYCLEARNERS LTD DEFENDANT

RULING

This is an application by the Plaintiff to set aside the order of this Court dismissing his suit for non-attendance and for reinstatement of the same for hearing and final determination on merits. The application is supported by an affidavit sworn by Kahindi Waitindi the Plaintiff's Advocate. In opposition Counsel for the Defendant has filed Grounds of Opposition and a Replying Affidavit. The substance of the affidavit of Mr. Waitindi is that he misdiarized the date of hearing. Instead of indicating 8th July 2004 when this case was fixed for hearing, he indicated 29th July, 2004; that later he was served with an application by the Defendant with a hearing date of 8th July, 2004, that on 7th July, 2004 he sent one Julius Kamotho to file Grounds of Opposition and a Notice of Preliminary Objection and request one Vincent Kingati advocate to hold his brief, that however the said Julius Kamotho did not travel on 7th July, 2004 but did so on 8th July, 2004, and found when the suit had been dismissed for non attendance; that because of the erroneous diarizing he informed the Plaintiff to come for hearing of this case on 29th July, 2004. Counsel has further deponed that he made a genuine mistake which mistake should not be visited upon the Plaintiff.

Mr. Njau, Counsel for the Defendant in his replying affidavit swore that the hearing date of 8th July 2004 was taken by consent and both the suit and the Defendant's application were to be heard on this date and if Counsel for the Plaintiff misdiarized the hearing the hearing of the suit he correctly diarized the Defendant's application and yet he did not attend to oppose the application. Mr. Njau takes issue with failure of Vincent Kiingati to file an affidavit to confirm that he indeed had instructions to hold Mr. Watindi's brief and why he did not attend. Counsel for the Defendant has deponed that on the said date he waited in Court up to 10.30 a.m. but never saw either Kimotho or Kiingati: In short Counsel for the Defendant did not believe the averments in the supporting affidavit of aforesaid.

The application was canvassed before me on 12th October 2004. Mr. Kimotho for the Plaintiff recited the facts in the Supporting Affidavit and emphasized that there was no deliberate intention not to attend the Court. He also submitted that this application had been filed only two weeks after the order of dismissal, which shows that the Plaintiff is interested in his case being heard. He reiterated that

Mr. Waitindi's mistake should not be visited upon the innocent Plaintiff. For this proposition he relied upon the case of NJAGI KANYUNGUTI & 4 OTHERS – V – DAVID NJERU NJOGU: NAIROBI C.A. NO.181 OF 1994 (unreported). Counsel offered to pay costs to compensate the Defendant.

Mr. Njau for his part insisted that Counsel for the Plaintiff had not been candid and had not even exhibited his diary for 8th July, 2004 to confirm that indeed he had not diarized the hearing date of 8th July, 2004. He further submitted that in any event the Plaintiff did not have a cause of action against the

Defendant.

I have now considered the rival submissions of both sides. I have also carefully perused the record. Having done so I take the following view of the matter. The principles governing the exercise of judicial discretion to set aside ex-parte orders are well known. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice: *Shah –v- Mbogo* (1969) E.A. 116. The discretion is perfectly free and unfettered to be exercised on such terms as are just: *Patel –v- East Africa Cargo Handling Services* (1975) E.A. 75. In exercising the discretion the Court should consider, inter alia the facts and circumstances both prior and subsequent and the merits of either side. The Court should also consider whether or not the affected party can reasonably be compensated by costs for the delay and must remind itself that to deny a party a hearing should be the last resort of the Court: *Jamndas –v- Sodina Gormanda* (1952) 7 ULR 11, *Sebei District Administration –v- Gasyali* (1968) E.A. 300.

In the present case the Plaintiff’s application is attacked for two main reasons: that Counsel for the Plaintiff has not satisfactorily explained his failure to attend at the hearing and that the Plaintiff has in any event no case. I agree that these considerations are to be taken into account in deciding whether or not an ex-parte order should be set aside. But these are not the only considerations. I have set out the other considerations.

I have considered that this application has been made without inordinate delay. I have also considered the offer of the Plaintiff to pay the Defendant’s costs. I have further considered that the Plaintiff has not deliberately sought to delay the early conclusion of this matter. I have also considered that Counsel’s explanation for failure to attend at the hearing on 8th July, 2004 may not have been beyond criticism but the explanation is not altogether unreasonable. In the Court of Appeal decision of *Philip Chemnolo & Another –v- Augustine Kebende* (1982 – 88) KAR 103 Apaloo J.A. as he then was said at page 1042.

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits..... “I think the broad equity approach to this matter, is that unless there is fraud, or intention to overreach there is no error or default that cannot be put right by payment of costs. The Court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

Considering all the circumstances of this case I am inclined to exercise my discretion in favour of the Plaintiff and I hereby allow the Plaintiff’s application dated 15th July 2004 in terms of prayer 3 thereof. The Plaintiff shall pay to the Defendant the costs of this application and all thrown away costs in any event.

DATED AND DELIVERED AT NAIROBI THIS 1st DAY OF NOVEMBER, 2004.

F. AZANGALALA

AG. JUDGE