REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL CASE NO. 256 OF 2002

TRUPHENA ADHIAMBO……....……..PLAINTIFF

=VERSUS=

NZINGO NICOLAS THUVA KALUME…….1ST DEFENDANT

MICHAEL GIN EARNEST GAKAI…….2ND DEFENDANT

R U L I N G

The plaintiff herein filed a Notice of Motion dated 28th March 2003 based on Order L rule 1 and Order 1XB rule of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Plaintiff sought to have this court 's order of 4/3/2003 dismissing chamber summons dated 25th June 2002 set aside and to grant an order to reinstate the same. The application sets out the grounds in which it is based. The same is also supported by the affidavit of Truphena Adhiambo sworn on 28th March 2003.

The main ground put forward by the applicant is that her advocate failed to attend court due to a misunderstanding between them and that she has since then changed advocates. She therefore urged this court not to let her suffer due to mistake of her counsel.

The Respondent surprising opposed this application on the ground that this application was brought in bad faith and that the applicant is guilty of laches. It should be noted that on 4th March 2003, the chamber summons dated 25/6/02 had been listed for hearing before the Honourable Mr. Justice Onyango Otieno and when it was called out neither the plaintiff nor the defendant were present to prosecute the application hence the same was dismissed for non attendance by the parties.

There are ample authorities touching on situations like this instant one. In the case of **MAINA =VS= MURIUKI [1984] K.L P. 407** The High Court presided over by Justice Okubasu as he then was adopted the decision in the case of **SHABIR DIN =VS= RAM PARKASH ANAND [1955] 22 E.A.C.A. 48** and held inter-alia that as the applicant had stated that he was not aware that the suit was to proceed and that he was relying on his advocate, who had failed to turn up at the hearing, the applicant would not be punished due to his advocate's faults. I am satisfied that the applicant was let down by her previous advocate and the fact that what was before the Honourable court was a Chamber Summons being heard in chambers and her presence was not required save for her advocate.

The principles governing the setting aside of exparte orders are well settled. In the case of **NJAGI KANYUNGUTI ALIAS KARINGI KANYUNGUTI & 4 OTHERS =VS= DAVID NJERU NJOGU NAIROBI C.A. NO. 181 OF 1994** (unreported). The Court of Appeal stated that in an application brought under wither O.IXA rule 10 or O.IXB rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court's discretion is wide, provided it is exercised judicially. The court is also enjoined to consider all the circumstances of the case, both before and after the judgment being challenged before coming to a decision whether or not to vacate the judgment.

The court of Appeal went further to Sate that, it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice or hardship resulting from accident, inadvertence , or excusable mistake or errors, and will not assist a person, who has

deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. I am bound by these principles. I find that the applicant's delay in filing this application is not inordinate hence it is excusable. There is no evidence that the applicant has sought to delay the hearing of this case. I will therefore allow this application and order for the Chamber Summons dated 25th June 2002 to be reinstated with the orders in existence as of 4/3/2003 arising out of the application. Costs of this application be in the cause.

Delivered at Mombasa this 3rd day of June, 2003.

J.K. SERGON

J U D G E