



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPL. NO. 757 OF 2002**

UNITED INSURANCE CO. LTD APPLICANT

VERSUS

CHIEF MAGISTRATE COURT MILIMANI DEFENDANT

RULING

On 17. 07. 2002 I dismissed a Chamber Summons dated 04. 07. 2002 which was coming up for hearing on that day as there was no applicant to prosecute it. The Chamber Summons was seeking leave to Institute Judicial review proceedings for orders of Certiorari and prohibition against proceedings finalized in a suit before the lower Court. An Order had been made by Kuloba J. on 04. 07. 2002 that the Application be served which it was, and the affected party attended Court.

There is now before me another Chamber Summons taken out one day later on 18. 7. 2002 seeking to set aside the dismissal of the application under Order 9 B rule 8 Civil Procedure Rules. The Advocate seized of the matter, Peter Ngoge swore an Affidavit in support stating that he was aware that the case was listed before me at 2.30 P. M. on 17. 07. 2002. He never made it to Court in time however because the lift he took at the K. I. C. C. where their offices are on the 18th floor jammed and he was stuck in it until 2.39 P. M. Instead of heading straight to the court however he headed for the Registry to file an Affidavit of Service. By the time he reached the Chambers the Application had been called out and dismissed. He pleads inadvertence and accident. He further pleads that the dismissed application is meritorious as it seeks to quash an unlawful decree which does not conform to the Judgment.

The main ground for opposition to the application is that the explanation given was vague on the exact time the Advocate was stuck in the lift, if at all he was stuck, which is not proved by other evidence from the caretaker of the building. Mr. Oyugi for the affected party saw no merits in the application sought to be reinstated because the Applicant had already started settling the decree he seeks to annul and has paid a substantial sum. The intention is simply to buy more time. The Respondent who is the Attorney General through Mr. Agonga submitted that the Advocate, even if he was to be believed, lost only 9 minutes and could have been in court in time if he did not detour to the Registry for no good reason. He was negligent and should suffer the consequences.

The application lies in the discretion of this Court which as always should be exercised on sound legal and factual basis, or as is normally put, Judicially.

It was certainly desirable that the Applicant's Advocate should have obtained and submitted tangible evidence to buttress his claim that he was stuck in a lift. The statement however is made on oath by an officer of this Court and I see no compelling reason to disbelieve him as there was no attempt made to cross-examine him on that assertion. That however is not the end of the story. The Advocate was aware that his matter was listed for 2.30 P. M. and that he was already 9 minutes late. It did not matter that the matter was listed 7th on the list. Whatever the number of matters listed the time for calling them out is always the same and that is 2.30 P. M. when allocations for hearing are determined. The Advocate was

under a duty to make his first call at the Judge's Chambers but instead he chose to detour to the Registry. In my view that was a reckless decision and the Advocate has himself to blame. The dismissal was a regular one.

In the event, although I am inclined to grant the application, I will only do so on the following terms.

- (1). That the Advocate, Peter O. Ngoge, do personally pay the costs of the application to the affected party and the Respondent assessed at Shs.3,000/= each within 14 days.
 - (2). That the Applicant do deposit the balance of the decretal sum in an interest earning Bank Account in the joint names of the Applicants Advocates, Advocates for the affected party and the respondent within 21 days.
 - (3). In the alternative to (2) above, the Applicant do provide a Bankers' Guarantee for payment of the decretal sum within 21 days.
 - (4). In default of compliance with any one of the terms
- (1) (2) and/or (3), the application shall stand dismissed with costs without further application.
- (5). If the terms are complied with the Application dated 4th July, 2002 shall be reinstated forthwith for hearing interpartes as ordered by Kuloba J. Dated this 31st day of July, 2002.

P. N. WAKI

JUDGE

31. 07. 2002

Waki J.

Wamalwa h/b Ngoge for Applicant Oyugi for I. P. CC. Mulinge Dated, delivered, signed in Chambers.

P. N. WAKI

JUDGE