REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIV CASE 2309 OF 96

JOSEPH NDUNGU GACHOKA…….. ..PLAINTIFF

VERSUS

UNITED INSURANCE COMPANY LTD……..DEFENDANT

R U L I N G

I heard the main suit ex parte on 10. 04. 2002 and gave judgment for the plaintiff. Execution then followed and on 10. 7. 2002 attachment was levied on the defendants property.

That is when they came rushing to court one week later on 18. 7. 2002 seeking to have orders for stay and setting aside. A temporary stay was granted and new Advocates for the defendants came on board. It is the application for setting aside that was argued before me and the subject matter of this Ruling.

As Order 9B 8 Civil Procedure Rules is invoked, this court has unfettered discretion to exercise but it must do so judicially. It should expect an explanation if there was delay and also give sound legal basis for the exercise of the discretion. As has been stated on many occasions the discretion is exercised to avoid injustice or hardship arising from inadvertence, mistake, or accident but is not meant to assist a party who seeks to delay the cause of justice.

Two affidavits are relied on by the defendants. One by the Advocate seized of the matter, the other by the client. It is conceded by the Advocate, one Thomas Ombura Nyakero that a hearing notice was indeed served on their firm one month before the hearing date. The hearing Notice was for two days, 10th and 11th April, 2002. But their court clerk made an error and entered only one date, the 11th, in their Master diary. He informed the clients that the matter would be heard on that day. He was ready to go to court on 11th but on checking the Daily Case list he did not find it and he so informed his client. He only came to know that the matter proceeded on 10th April when he accidentally met the plaintiff's

Advocates two weeks later. Presumably that was still in April or early May. The date is not stated. He says however that he sent the court clerk to peruse the court file on 10. 06. 2002 and it was confirmed that the case had been heard. Apparently nothing was done dispite that confirmation until there was an attachment made one month later on 10. 7. 2002. The defendant's Claims Manager swears that indeed the

only information received on the hearing of the case was the 11th of April. She despatched her witnesses only to be informed by their Advocates that the case was not listed. They have a good defence since the claim was fraudulent and the quantum, even if it was payable, should be discounted. The matter at any rate was prematurely before court as there was an Arbitration Clause.

Learned Counsel for the Plaintiff Mr. Thuo did not think much about these stated defences as they were not placed before the court for consideration. Both the Advocates and their clients knew the case was coming up in April but did not bother to find our what transpired until the attachment. They cannot plead innocent mistakes and have not explained the delay. The application, he submitted, was a mere afterthought since the plaintiffs had offered to settle the decretal amount by instalments and had already paid the first instalment of Sh.300,000/=. The intention is merely to frustrate the plaintiff.

I agree with Mr. Thuo that the defences raised are an afterthought. If the matter was prematurely in court the defendants do not show what they have done to draw the attention of the court to that fact since filing their defence in October 1996. Fraud which is alleged is a serious imputation bordering on crime but no particulars are pleaded in the defence. That the plaintiff was entitled to less payment may be arguable but there was no one to put the argument forward.

There may well have been an omission made by the court clerk in recording the hearing dates which is not an unknown phenomenon in Advocates offices, but one that should not be encouraged by any means and should be discouraged by all means.

The clerk should have sworn to the truth of what he did or did not do, which he has not. Clearly however, the Advocates became aware of the ex parte hearing of the matter two weeks after the event. The clerk indeed perused the file on 10. 06. 02 and confirmed it. There is no explanation for the delay upto the date of filing this application.

It has became fashionable lately for counsel at their negligent best to plead that the mistakes of counsel should not be visited on their clients. It may well be time, in order to stave off such negligence and encourage prudence, to insist on high standards of legal practice and to let the losses lie where they fall.

The Plaintiff in this matter has been waiting for six years to have his matter heard and determined. It is a straightforward Insurance Claim. Justice must surely cut both ways. I am reluctant to prolong the Plaintiffs agony any further but I will give a limited opportunity to the defendant to urge their defence, whatever the merits thereof. Accordingly the application will be granted on the following strict conditions:-

1) That the defendants do deposit the sum of Shs.800,000/= in an Interest-earning Bank Account in the joint names of Counsel for both parties within 14 days from the date for this Ruling.

2) That the defendants do pay all costs thrown away and the costs for the application assessed at Shs.30,000/= within 14 days.

3) That the defendants do pay the Auctioneers' charges to be taxed if not agreed. 4) In default of compliance with conditions 1,2 & 3, the Application shall stand dismissed with costs without further application and execution shall proceed. Dated this 29th day of October, 2002.

P. N. WAKI

JUDGE

29. 10. 2002

Waki J.

Kimani h/b for Mariaria fro Defendant/Applicant

No appearance for Respondent

CC: Mulinge

Ruling delivered dated and signed in chamber.

P. N. WAKI

JUDGE