



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**HIGH COURT CIVIL CASE NO. 1332 OF 1999**

**JACINTA PRISCILLA MUTHEMBA.....PLAINTIFF**

**V E R S U S**

**KENYA BUS SERVICES.....1ST DEFENDANT**

**NJOROGE IRUNGU.....2ND DEFENDANT**

**R U L I N G**

By an application by way of Chamber Summons dated the 15th day of October, 2001 the applicant seeks orders:-

- (1) staying execution of the decree passed herein.
- (2) setting aside of judgment delivered on 15th March, 2001 together with all consequential orders.
- (3) for costs of the application, and/or thrown away costs to be borne by the defendants.

The application is predicated upon the annexed affidavit of one KIBAYA IMAANA LAIBUTA sworn on the 15th day of October, 2001.

The gravamen of the matter is that Mr. Laibuta, who has no eye sight, for the applicant was misled by his assistant, one Miss Jane W.

Thuo, that the case was not cause listed on the 14th day of November, 2001. That failure on part of Miss Thuo to spot the suit as listed for hearing was an inadvertent mistake which should not be visited upon the defendants. That in any event the defendants have a strong defence to the plaintiff's claim and should be accorded an opportunity to present their case.

At the hearing of the application Mr. Laibuta's submission was as follows:- That he has no eye sight. That on the 14th day of November, 2001 on mis-advice of Miss Thuo, whom he relied on, he believed the

matter would not be heard as the same was not cause listed. That having failed to take off on the first day, he did not believe that the case would be heard on the second day (15th November, 2001). That in any event he has diligently pursued the expeditious determination of this case. Mr. Laibuta referred me to exhibit "L1" annexed to his affidavit aforesaid as testimony of his good-will.

Mr. Sevany who appeared for the respondent filed grounds of opposition only and submitted that Mr. Laibuta's assistant, one Miss Thuo, has not sworn an affidavit in support. That in the circumstances there is a lacunae in the evidence. He further submitted that paragraph 4 of Mr. Laibuta's affidavit is at variance with paragraph 9. That the two aforesaid paragraphs are mutually destructive. He further contended that on 14th November, 2001 neither the advocate for the applicant nor his witness was in court. That there was no annexure of a letter informing the client of the hearing date. That in any event there was a call over at which the hearing was confirmed for two days. That in the circumstances there is no cogent reason for setting aside the judgment already in place.

I subscribe to the view that an application under order 1XB rule 8 is in the nature of a review application. It is an application which should preferably be heard by the same judge who either entered judgment or dismissed the suit under the provisions of that order. The only reason why this application was placed before me is that Sheikh Amin, J. was on leave pending retirement after an illustrious career in the bench.

The principles upon which the Court acts in applications under order IXB rule 8, as also under O. IXA rule 10, of the Civil Procedure Rules, are well enumerated in several decisions of the Court of Appeal and its predecessor. The notable ones are SHAH –VS– MBOGO [1968] EA 93 and PATEL –VS– CARGO HANDLING SERVICES LTD [1974] EA 75.

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.

The Court has taken judicial notice of the fact that the appellant's counsel has no eye –sight and walks with the aide of a guide and therefore Miss Mugo could easily have misled him. I find and hold she actually did. I find and hold that the Laibuta's conduct after realizing that the matter was heard ex-parte when viewed objectively clearly shows that he was not bent on delaying or obstructing the cause of justice.

In the circumstances I order that the judgment delivered herein on 15th March, 2001 together with all consequential orders be and is hereby set aside. The applicant is condemned to pay the respondent thrown away costs. The same to be agreed upon if not to be taxed.

DATED and DELIVERED at NAIROBI this 20th day of December,

2001.

**N.R.O. OMBIJA**

**JUDGE**

Delivered in the presence of:- Mr. Laibuta for applicant

Mr. Onyango Ogutu for Mr. Sevany

for the respondent.

