REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL SUIT 126 OF 1998

WILLIAM KILIMO KIPTOO Alias CHESEREK KIPTOO……………………………………………PLAINTIFF

VERSUS

CHESEREK KIPTOO ALIAS KANDA KIPTOO…………DEFENDANT

R U L I N G

By an application by way of chamber summons dated 6th April 2009, pursuant to the provisions of order 1XB Rule 8 and order XLIV, sections 3 and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya the applicant seeks orders:

(a) That this application be dispensed with in the first instance.

(b) That this honourable court be pleased to set aside and or review its orders of 24/3/2009 dismissing the plaintiff's application dated 11th December, 2008.

(c) That the costs of this application be provided for.

The application is based on the grounds:

1. That the orders dismissing the said application were made due to non-attendance by the plaintiff/applicant's advocate.
2. That the plaintiff/applicant's advocate arrived in court at 9.20 am and found the application had been dismissed at 9.15 am.
3. That the plaintiff/applicant was personally present in court and informed the court that his advocate was on the way.
4. That the plaintiff/applicant's advocate arrived in court late due to mechanical breakdown of the public transport he was using from Eldoret to Kitale.
5. That the respondent had been duly served and both parties were present in the courtroom when the application was being dismissed.
6. That it is in the interests of justice that the orders made be set aside and/or be reviewed and the application be heard on merits.
7. That the respondent will not suffer any prejudice and or at all should the orders made be set aside or reviewed and the application heard on merits.
8. That plaintiff is bound to suffer irreparable harm if the application is not allowed.

The application is supported by the annexed affidavit of Antony Sang sworn on the 6th day of April 2009.

On behalf of the applicant, it was argued that the application dated 11th October 2008 was dismissed on 24th March 2009 at 9.15am for want of prosecution. That the reason for non-attendance was that counsel had a mechanical break down around say when traveling from Eldoret to Kitale.

That the applicant/plaintiff was present in court when the application was dismissed. Equally the defendant/respondent was also in the court room. However, the plaintiff/applicant did not inform the court that counsel was on the way.

By reason of the foregoing, counsel's failure to be in court was not deliberate. In any event mistakes of counsel should not be visited on his client. The applicant shall suffer loss and damages if the order is not reviewed. It is therefore in the interest of justice that the orders made on 24th March 2009 be set aside or reviewed and the application heard on its merits. That the respondent shall not be prejudiced at all if the application is allowed because he would be compensated by costs.

The application was served upon the firm of Chebii & Co Advocates who failed to file grounds of opposition or replying affidavit as enjoined by the provisions of order L Rule 16(1) of the Civil Procedure Rules. The application thus proceeded ex-parte.

I am grateful for counsel for the applicant for reminding me of the time honoured principle of law that sins of counsel should not be visited on his client. This has been the position of the law for a long time.

However, in the peculiar circumstances of the 21st century, in my view, it is no longer good law. It should be departed from. It is a cardinal principle in the administration of justice that each case has to be viewed on its own peculiar circumstances. In my view the peculiar circumstances of the 21st century, characterized by technological advancement, militates against the principle that sins of counsel should not be visited on his client. Here is counsel who was traveling from Eldoret to Kitale. He had a mechanical breakdown, real or imagined, along Eldoret-Kitale road. In this era of technological advancement, nothing would have been easier than to call any Kitale based advocate on a mobile hand set to hold his brief. Alternatively, he could have called his client through the same system to ask the court to take notice of his predicament and put the file aside. This approach should be seen in the light of the fact that all courts are currently overwhelmed by backlog of cases. The general public have day in day out pressurized the courts to undertake expeditious disposal of cases. It is a worrisome state of affairs at the moment.

Against that background, the law as it was yesterday in Kenya ought to be changed to be in conformity with other jurisdictions. The law has been changed in England.

As we said in **Ketterman V. Hansel Properties Ltd. (1988) 1 ALL ER 38** at page 62:-

> **"We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequence of the negligence of the lawyers to fall on their heads rather than allowing an amendment at a very late stage of the proceedings."**

I subscribe to those views.

In my view, it is time our courts take a bold step and tell advocates who have been contributing to the delay in finalization of cases that enough is enough. I have taken a bold step. For those reasons, I decline to exercise my discretion in setting aside the dismissal order. Accordingly, I dismiss the application with no orders as to costs.

In doing so, I am aware that the litigant has nothing to lose by reason of the fact that each advocate is now enjoined by practice and/or law to take up insurance cover to protect himself/herself against occupational hazards including but not limited to negligence.

In this case, should the client sue the advocate he shall refer the matter to his/her insurance for settlement.

I have taken this decision in good faith. It is with a view to ensuring that cases disposed of do not find their way back in the courts. If that were to be allowed no case would be disposed of. We shall not make any meaningful move in disposing of back-log in that event.

Dated and delivered at Kitale this…**3RD** day of………**JUNE**………2009.

N.R.O.OMBIJA

JUDGE

Mr William Kiptoo plaintiff in person

Mr Mukoross for interested party