

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPLICATION NO. NAI.210 OF 1998 (84/98UR)

BARCLAYS BANK OF KENYA LIMITED APPLICANT
VERSUS
COME TO AFRICA SAFARIS LIMITED..... RESPONDENT

RULING OF THE COURT

The suit in the High Court, was fixed for hearing on the 6th and 7th days of May, 1998. Mr. Namachanja who acts for the applicant here (plaintiff in the superior court) did not find the suit listed for hearing on the 6th May, 1998. Mr. Namachanja has explained why he did not attend the court on 7th May, 1998. Mrs. Sitati appeared before Kuloba J. The learned judge dismissed the plaintiff's claim and although requested to postpone the hearing of the defendant's counterclaim, also dismissed the same as the defendant's witness was not available to give evidence to prove the counterclaim. He was overseas, Mrs. Sitati says. In fact Mrs. Sitati had forewarned Mr. Namachanja to the effect that the suit would not proceed to hearing as her witness was not available.

In these state of affairs the plaintiff applied for setting aside of the ex-parte dismissal of its claim but the learned judge did not accept the explanation given by Mr. Namachanja for his non-attendance and dismissed the application.

Mrs. Sitati is not disputing Mr. Namachanja's explanation for non-attendance. She argues that her 'client' was acquitted in respect of criminal charges brought against him arising out of facts relevant to the suit. But that does not take Mrs. Sitati any further - acquittal of an accused person does not have much bearing on the civil suit. Only a conviction is Prima facie evidence of liability in a civil suit. The simple issue before us is as to whether the applicant has an arguable appeal and there is in our view an arguable appeal. The learned judge should have accepted the unchallenged explanation by Mr. Namachanja for his nonattendance. The issue as to whether or not the already filed appeal, if successful, would be rendered nugatory is a moot point. The superior court had granted an injunction to the applicant (plaintiff) earlier. That order is no more as the plaintiff's defence counsel in his application we allow the same in terms as prayed in the first prayer before us. Cost of this application shall be costs in the appeal.

Dated and delivered at Nairobi this 8th day of September,

J.E GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.