



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 248 OF 2003**

**ISAAC KAESA MWANGANGI & ANOTHER.....PLAINTIFF**

**-V E R S U S-**

**JACOB KIPCHUMBA**

**YASIN SWALEH WASWA.....DEFENDANTS**

**RULING**

1. The notice of Motion dated 26<sup>th</sup> January 2014 is filed by JACOB KIPCHUMBA, the first defendant. He seeks by that application to set aside the exparte judgment entered against him on 10<sup>th</sup> August 2012

**BACKGROUND**

2. The two plaintiffs initially filed this case against the 1<sup>st</sup> defendant only. They claimed against him, as the owner of the motor vehicle registration number KAP 187F, for general and special damages that flowed from the motor vehicle accident between 1<sup>st</sup> Plaintiff's vehicle and KAP 187F on 4<sup>th</sup> January 2003.

3. 1<sup>st</sup> defendant filed a defence denying the alleged negligence in plaint

1<sup>st</sup> defendant also denied being the registered owner of vehicle KAP 187F.

4. The plaintiffs by the amended plaint filed on 3<sup>rd</sup> August 2007 amended their pleadings by adding the 2<sup>nd</sup> defendant. The amended plaint pleaded that the 1<sup>st</sup> defendant was the beneficial owner of KAP 187F while the 2<sup>nd</sup> defendant was the registered owner of the same.

5. The 2<sup>nd</sup> defendant did not defend the suit and interlocutory judgment in default of appearance was entered on 12<sup>th</sup> August 2008 by the deputy registrar

6. The case was fixed for full hearing on 26<sup>th</sup> May 2010 and the 1<sup>st</sup> defendant being absent the case proceeded for hearing by way of formal proof. The hearing was not concluded on that day and proceeded for further hearing on several other days namely 17<sup>th</sup> June, 2010. It was fixed for submissions on 20<sup>th</sup>

September 2010. Judgment was finally delivered on 10<sup>th</sup> August 2010.

### **THE APPLICATION**

7. The 1<sup>st</sup> defendant in seeking to set aside the ex parte judgment of 10<sup>th</sup> August 2012 relied on his defence where he denied being the registered owner of motor vehicle and also relied on his allegation that his then advocate Yano & Company advocates did not inform him when the case was fixed for hearing.

8. The plaintiff opposed the application on the ground that 1<sup>st</sup> defendant's then advocate was served with hearing notices and if he failed to attend court the 1<sup>st</sup> defendant's remedy lay in him suing his then advocate for negligence.

### **DETERMINATION**

9. I have considered the parties affidavit evidence, their annexures and their written submissions. The court when faced with an application such as the one before court it is afforded a wide discretion in determination or to set aside the ex parte judgment. This is clear from Order 10 Rule 11 of the civil procedure which provides:

**“where judgment has been entered under this order the court may set aside or vary judgment and any consequential decree or order upon such terms as are just.”**

10. That discretion has been the subject of many previous decision of the court, and I first refer to a few as follows:

(i) **PATEL –V- EA CARGO HANDLING SERVICES [1974] EA 75.** The Court

Stated in the case as follows:

**“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of the Court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”**

(ii) **SHAH –V- MBOGO (1967)EA**

**This discretion is intended so as to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who had deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”**

(iii) **BARAKA APPAREL EPZ (K) –V- ROSE OJWANG T/A FAIDA 2002 CATERER (2007) eKLR** where it stated

**“It is our humble view that where there is a defence which raises bona fide triable issues, or even a solitary bonafide issue, the same ought to be allowed to proceed to hearing and final determination on merit.”**

11. In my view the judgment entered against the first defendant was irregular and shall be set aside ex debito justitiae (as matter of right it is irregular because the 1<sup>st</sup> defendant's then Learned advocate was not served with a hearing notice for the hearing on 26<sup>th</sup> May 2010. That was the day the 1<sup>st</sup> plaintiff, who was the driver of the other vehicle that collided with KAP 187F, gave evidence and concluded his evidence. There is no affidavit of serving proving that the then 1<sup>st</sup> defendant's advocate was served with a hearing notice for 26<sup>th</sup> May 2010. The 1<sup>st</sup> defendant was therefore denied a hearing for that day.

12. The subsequent further hearing on 17<sup>th</sup> June and 1<sup>st</sup> July 2010 the then advocate of the 1<sup>st</sup> defendant was served but failed to attend court. He was however not served with a hearing notice for 20<sup>th</sup> September 2010 when the matter was before court purpose of submission.

13. It is because of the lack of service for some of the dates when this case was before court that I shall exercise my discretion to set aside ex parte judgment against the 1<sup>st</sup> defendant. That setting aside will enable the 1<sup>st</sup> defendant to agitate his defence on record.

**CONCLUSION**

14. I therefore grant the following orders:

**a) The ex parte judgment against the 1<sup>st</sup> defendant dated 10<sup>th</sup> August 2012 and delivered on 18<sup>th</sup> October 2012 is hereby set aside.**

**b) The 1<sup>st</sup> defendant is awarded costs of the Notice of Motion dated 26<sup>th</sup> January 2014.**

**DATED and DELIVERED at MOMBASA this 2 1<sup>st</sup> day of  
AUGUST, 2015.**

**MARY KASANGO**

**JUDGE**

**Coram**

**Before Justice Mary Kasango**

**C/A .....**

**For Plaintiff:**

**For 1<sup>st</sup> Defendant:**

**Court**

**Ruling delivered in their presence/absence in open court.**

**MARY KASANGO**

**JUDGE**