IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 42 OF 2002

DANIEL K. RUGUT.....PLAINTIFF

-VERSUS-

AUGUSTINO ARAP RONO.....1ST DEFENDANT

MATHEW KIPNGETICH SOI.....2ND DEFENDANT

RULING

Mathew Kipngetich Soi, the 2nd Defendant, took out a Notice of Motion dated 10th December, 2013 in which he sought for interalia:

1. **That the judgment decree and all consequential orders herein be set aside and the 2nd defendant/applicant be granted leave to defend the suit on its merits.**

2. **That pending the inter-parties hearing and determination of this application, this Honourable court be pleased to issue interim orders staying the notice to show cause proceedings now pending before the Deputy Registrar of this Honourable court.**

3. **That the costs of this application be provided for.**

The 2nd Defendant swore an affidavit he filed in support of the Motion. **Daniel K. Rugut** the Plaintiff herein, filed a replying affidavit he swore to oppose the Motion. Prayers 3 and 4 had been granted at the *ex-parte* stage hence the remaining prayer to be determined is prayer 2.

When the Motion came up for interpartes hearing learned advocates appearing invited this court to make its ruling based on the material placed before it. It is the submission of the 2nd Defendant that the Judgment and Decree should be set aside and that he be granted leave to defend the suit. The 2nd defendant argued that when the case came up for hearing, his advocates did not inform him of the hearing date hence he did not testify. The 2nd defendant further stated that had he been given a chance to testify, he would have been able to show the court that the motor vehicle registration no. KAH 919P, giving rise to this suit actually belonged to Wesley Koech and Benjamin Koech and not him. The Plaintiff on the other hand was of the view that the application should be dismissed because the case proceeded for hearing on merits and the judgment was lawfully entered on its merits. He claimed that the 2nd defendant was all along aware of the hearing date but chose not to attend court hence there is no good reason to set aside the judgment. The Plaintiff further complained that the 2nd Defendant is guilty of delay and laches. The 2nd Defendant stated that the original court file was misplaced forcing the parties to reconstruct a skeleton file hence the delay in bringing this Motion. It is also argued that the 2nd defendant was only jolted to file this motion after the Plaintiff changed the mode of execution from attachment to that of committal to civil jail.

After a careful consideration of the grounds stated on the face of the Motion and the facts deponed in the rival affidavits. A critical examination of the 2nd Defendant's Motion is that he was not made aware of the entry of judgment until 14th December 2004 when his wife informed him that Gillete Traders Auctioneers had attached her Motor Vehicle registration no. KAP 712Q Toyota Hiace Matatu and household goods. He complained that his previous advocates Khan & Katiku advocates gave him the false impression that the case has not been fixed for hearing and that they had filed a third party notice as per his instructions. There is no dispute that when this case came up for hearing on 7th June 2004, this

court upon being satisfied that the 2nd Defendant's advocate had been served proceeded to allow the Plaintiff to prosecute his suit *ex-parte*. The record shows that at the close of the Plaintiff's case the Honourable Judge who heard the case proceeded to fix a date for judgment. There was no order to close the defendants' case. The 2nd defendant has specifically stated that his advocate did not invite him to the hearing. I have looked at the 2nd defendant's defence and it is clear that the 2nd defendant denied owning motor vehicle registration no KAH 919P. He has now averred that he had instructed his advocate to issue a third party notice but he had discovered instruction was not acted upon. He has also stated that had he been invited to attend the hearing he would have told the court the actual owners of the aforesaid motor vehicle. There is no suggestion from the Plaintiff to show that what the 2nd defendant has averred is false. I am convinced the 2nd defendant was thoroughly let down by his erstwhile advocate. It is a mistake this court cannot attribute to the 2nd defendant. This court appreciates the fact that an advocate is always the agent of the litigant he represents and that the client is bound by the actions of his advocate. However, this is a unique case where an advocate fails to turn up in court and also fails to inform his client of a hearing date. In such a case the court cannot allow the client to suffer for the mistakes of his advocate. It is better for the Plaintiff to suffer a little discomfort but award costs to cushion his losses then completely shut out the defendant from the temple of justice. It would appear that the real torfeasors in this suit are not parties to this suit. The 2nd defendant has sufficiently explained the reason for the delay in filing the Motion.

In the end, I find the Motion to be well founded. It is allowed in terms of prayer 2. I am alive of the fact that costs follows the event but the circumstances of this case makes this court award the Plaintiff costs of the Motion which I hereby direct. The suit to be heard *de novo* but on priority basis.

Dated, Signed and delivered in open court this 26th day of June, 2014.

….....

J.K.SERGON

JUDGE

<u>In the presence of:</u>

N/A Mr. Ojienda for Plaintiff

Mr. Koskei for 2nd Defendant