



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**CIVIL SUIT NO. 81 OF 2012.**

**HELEN NASAMBU WANYONYI ::::::::::::::::::::::::::::::::::::::: PLAINTIFF.**

**VERSUS**

**WILBERFORCE AMBWERE ::::::::::::::::::::::::::::::::::::::: DEFENDANT.**

**R U L I N G.**

The defendant//applicant herein brought a notice of motion seeking to have the ex-parte judgment herein set aside. The applicant contends that the case proceeded and judgment was entered against him in default of appearance and defence. He contends that prior to the case proceeding against him, he had appeared twice before the court when he sought time to go and engage services of a lawyer. When he managed to engage a lawyer, the lawyer came to court and perused the court file where he discovered that the case had proceeded by way of formal proof and judgment had been delivered. He contends that the failure to enter appearance and file defence was not deliberate and that the delay in entering appearance and defence was because he could not raise fees in time. He therefore prays that the ex-parte judgment be set aside as he has a good defence to the plaintiff's claim.

The application is opposed by the plaintiff/respondent who contends that the defendant is out to delay the realisation of fruits of her judgment. The respondent contends that the applicant appeared twice before court but has not explained why he did not file defence and that in any case, the draft defence annexed to the defendant's application has no merits as it does not raise any triable issues.

I have carefully considered the application by the defendant and the objection to the same by the plaintiff/respondent. There is no doubt that the defendant/applicant was duly served with summons to enter appearance and file defence. When he was served with summons to enter appearance and file defence, he was also served with an application seeking injunction orders.

The defendant/applicant actually appeared twice before court and on one such occasion, he sought for time to go and engage services of a lawyer. This was on 8/10/2012. The judge before whom the application for injunction was listed adjourned it generally.

The plaintiff abandoned the application for injunction and opted to apply for entry of judgment in default of appearance and defence. The Deputy Registrar of the court directed that the matter do proceed by way of formal proof.

On 24/1/2013 the case proceeded by way of formal proof and the plaintiff got judgment on 7/3/2013. It is this judgment that he seeks to set aside.

When the plaintiff proceeded by way of formal proof, she did not disclose that the defendant had presented himself before court before when he sought time to go and look for a lawyer. Had this fact

been disclosed to the court, the court would have insisted that he be served for formal proof. As the plaintiff was aware that the defendant had appeared in court before, she should have served him with a hearing notice for formal proof even though he had not formally entered appearance.

It is clear from the conduct of the defendant/applicant that he was desirous of defending this suit and all that he required was a lawyer. He was given time to do so but before he could do so, the plaintiff quickly moved against him by way of formal proof. I do not find anything herein to suggest that the applicant is out to obstruct the plaintiff/respondent from realising the fruits of her judgment.

The defendant/applicant has annexed a draft defence to his application. The defendant is raising issues of fraud. These are serious allegations and the defendant ought to be given time to prove the same. I find that this is a proper case where judgment can be set aside. I proceed to set aside the ex-parte judgment with all the consequential orders. The defendant is granted unconditional leave to file defence to the plaintiff's claim within 14 days from the date hereof. Costs shall be in the cause.

It is so ordered.

**[Dated, signed and delivered in open court on this 23<sup>rd</sup> day of July, 2013.]**

**E. OBAGA.**

**JUDGE.**

In the presence of Mr. Onyancha for applicant and Mr. Gatune for Mr. Waweru for respondent. Court Clerk – Ameyo.

**E. OBAGA.**

**JUDGE.**

**23/7/2013.**