



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS'**  
**CIVIL APPEAL NUMBER 23 OF 2002**

**SAMUEL MURUNDI KIMANI. .... APPELLANT**

**VERSUS**

**WANJA WAWERU (*Suing as the Personal Representative***

***Of the Estate of Michael Kinyanjui Miracho*). .... RESPONDENT**

***(From the Ruling and Orders of Mrs. Lesiit, Chief Magistrate in Milimani CMCC No. 4722 of 1996)***

**J U D G M E N T**

In a ruling dated 14<sup>th</sup> December, 2001, the learned Chief Magistrate, dismissed the Applicant/Defendant's application dated 29<sup>th</sup> October, 2001 which sought the setting aside of an ex parte judgment against the applicant/Defendant. In the judgment, the court had awarded the Respondent/Plaintiff Ksh.480,000/- general damages and Ksh.20,000/- as special damages.

The record further shows that although the Appellant had filed a defence to the damages and although the appellant was properly represented by a qualified advocate, both him and his advocate, Mr. Gachomba, were absent during the hearing which took place on 8<sup>th</sup> June, 2001. Eventually thereafter, the learned trial magistrate then entered the, ex parte, judgment of Ksh.500,000/- which included general and special damages aforesaid.

By a Chamber Summons dated 10<sup>th</sup> September, 2001, amended by another dated 29<sup>th</sup> October, 2001 the Appellant herein who was the applicant therein, inter alia, sought the setting aside of the entered judgment on the grounds that their non-attendance in court was because they were not served with a notice of hearing, notwithstanding that the date had been taken ex parte by the Respondent.

By a ruling dated 14<sup>th</sup> December, 2001, the Chief Magistrate rejected the application to set aside. That is what provoked this appeal. The grounds of appeal which are four, can be summarized into two: -

***1. That the learned trial magistrate erred in finding no sufficient grounds to set aside the ex parte judgment.***

***2. That the leaned trial magistrate erred in law and fact in not appreciating that the suit had arguable issues which should have been left to go to trial.***

I have perused the grounds upon which the learned trial magistrate refused to set aside the ex parte judgment which I will consider below.

First, the Appellant stated that the hearing was fixed ex parte and no hearing notice was served on them. The learned trial magistrate found however, that the previous advocate was properly informed of the hearing. The record shows that on 14<sup>th</sup> October, 1998 the counsel for the Defendant who was Ms Ndungu, was present in court. Mr. Kahonge for the Plaintiff sought and obtained an adjournment because plaintiff's witnesses were absent. The Defence counsel was also not ready to proceed. No next hearing date was fixed. On 29<sup>th</sup> January, 1999, the Defendant's advocate was allowed to withdraw from representing the Defendant. On the same day, the clerk to the Plaintiff's advocate took an ex parte hearing date of 23<sup>th</sup> August, 2000 on which Mr. Gachomba appeared for Defendants because a former advocate for the Defendant, had meanwhile passed on. An adjournment was this time granted generally and fresh hearing date was fixed at the registry for 17<sup>th</sup> January, 2001 when again the hearing was taken out and mentioned on 6<sup>th</sup> February, 2001. On the latter date a hearing date was fixed for 10<sup>th</sup> April 2001 in the absence of the Defendants and their counsel.

On 10<sup>th</sup> April, 2001, Mr. Muya appeared for Mr. Gachomba for Defendants and sought adjournment because Mr. Kahonge was also bereaved. The court fixed a fresh hearing on 4<sup>th</sup> May 2001 subject to Defendants paying various previous court adjournment fees. On 4<sup>th</sup> May, 2001 only the Plaintiff's advocate appeared. Hearing was once more adjourned to 8<sup>th</sup> June, 2001.

On 8<sup>th</sup> June, 2001 Mr. Kahonge again attended court but there was no appearance of the defendant's or their counsel. There was no indication that the Defendants had paid previously-ordered court adjournment fees. However, the court noted that the Defendant was absent although served. Hence the court proceeded with the hearing in the absence of the Defendant/Appellant. At the end of the hearing the court, ordered the Plaintiff's counsel to submit in writing, which the record confirms, was done. Then on 15<sup>th</sup> June 2001, the court fixed the 22<sup>nd</sup> June 2001 for the delivery of the judgment which the court duly signed as delivered in the absence of both parties.

Considering the above facts the trial magistrate observed that not only did the Defendant/Appellant's advocate know of the date of hearing, but he and his clients failed to attend court. The magistrate also noted that if the defendants intended to use their previous advocate's failure to attend court as a ground for the setting aside of the judgment, they should have obtained a supporting affidavit from him explaining his reasons for not attending court on the material date.

Further more examination of the lower court record, which I have done, does not confirm that the Defendants paid the severally ordered court adjournment fees, failure to pay of which, would disqualify them from being given audience as per two orders of court dated 10<sup>th</sup> April 2001.

The conclusion I come to from all the above facts is that the learned trial magistrate properly exercised her discretion in refusing to set aside the ex parte judgment on the above ground alone because the Appellants and their counsel failed to turn up in court to defend case and because they failed to comply with several orders of court on payment of court adjournment fees whose failure they knew would deny them audience.

But the court considered other grounds too. One of them was that the previous advocate had closed his offices and could not be found to swear the affidavit spoken about above. The court found as a fact that the Appellant should have reported to the Law Society to give them a letter that the advocate was indeed, no longer practicing. Failure to get such letter was considered by the lower court to be important.

I have considered that ground and I find it reasonable. I find it difficult to fault the trial magistrate in the exercise of such discretion. This court will be slow to interfere with exercise of lower courts discretion unless it clear and obvious that it was based on a wrong principle or was based on expressly ridiculous or unreasonable grounds. Such are not revealed here and I refuse to interfere with the

conclusions properly reached by the trial court.

The trial court appears to have properly taken into account and acted upon the principles for setting aside ex parte judgments. The learned trial magistrate found no inadvertent or excusable mistakes or error on the part of the applicant/Appellant during the conduct that led to the entry of the impugned judgment. Instead she saw a deliberate misconduct on their part in failing to attend court when they knew of the date. The Appellants also failed to comply with the court orders to pay court adjournment fees. Finally, there was a clear pattern of a conduct intended to delay the hearing of the suit. The record is full of instances of excuses leading to adjournment and delay. This case, as the learned trial magistrate found, had stayed in court for 18 years without being brought to a reasonable end. And then after the Defendants/Appellants filed this appeal, in the year 2002, it has also taken another 10 years to have the appeal heard and determined. The latter delay was clearly caused by the appellant alone while the earlier delay was shared between the parties with greater blame falling again on the Defendant.

I have considered the grounds of appeal carefully. I am satisfied that they show little merit. The appeal is accordingly dismissed with costs to the Respondent. Since the Appellants did not fault the actual damages awarded by the lower court, I hereby confirm them. Orders accordingly.

Dated and delivered at Nairobi this 19th Day of March 2012

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**D A ONYANCHA**  
**JUDGE**