



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL CASE 145 OF 1999**

**MWICHIURI FARMERS CO. LTD.....PLAINTIFF**

**VERSUS**

**MIARAGE COMPANY LTD.....DEFENDANT**

**RULING**

The applicant company, through its Chairman, Mr. Jackson Kiraithe who through company resolution being Board of Directors meeting held on 1/10/2011 was authorized to sue, and/r represent the company in this matter, sought court's leave to act for the defendant company through an application dated 17<sup>th</sup> October, 2011 instead of the defendant's advocates M/S L. Kimathi Kiara, and which application was granted on 16<sup>th</sup> February, 2012, brought this application under Order 10 Rule 11 and order 51 Rule 1 of Civil Procedure Rules 2010 seeking the following orders:-

*a) That the Honourable Court be pleased to set aside the ex-parte judgement entered herein on 22/5/03 and the decree made on 27/5/05”.*

*b) That the costs of this application be provided for.*

*c) The plaintiff's respondent by themselves, their members or agents be restrained by an injunction from using their fraudulently acquired titles for TIMAU/ TIMAU BLOCK 3 to do any development, transaction on the former miarage property L.R.9835/1 until this case is heard and determined in merit and the order to be served to OCS Timau Police Station and the Ontulili Chief and the land registrar Imenti North District for execution.*

The grounds in support of the application are stated on the face of the application. The application is supported by the supporting affidavit and annexures thereto. The application in support and in opposition and annexures thereto as well as the grounds of opposition.

The issue for determination by this court is whether the applicant has laid down sufficient basis for this court to set aside the ex- parte judgement entered on 22<sup>nd</sup> May, 2003 and the decree made on 27<sup>th</sup> May, 2005. Under Order 10 Rule 11 of Civil Procedure Rules court has wide discretion to set aside exparte judgement but before exparte judgment can be set aside, the court must be satisfied that first is valid defence and the defence should not be a sham and secondly whether there would be any prejudice and thirdly the explanation for delay should be considered. Further the discretion to set aside exparte judgment is to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party which has deliberately sought to

obstruct or delay the cause of justice.

In the instant case, the applicant contended that it was never served with summons to enter appearance in this case and the company had already been dissolved as of 1995 vide attached gazette notice no. 7464 of 1995. That the company has subsequently been resorted in the registrar's register. The applicant averred that it became aware of this matter on 11<sup>th</sup> March, 2010 through a letter signed by C.M. Ngatia for Permanent Secretary. The applicant complained to the Land Registrar and also applied for registration of court order and caveat. The applicant averred that it also complained to anti – corruption Commission because of the fraud. The applicant further stated that it came to be aware of the people involved in the same people were not members or Directors of Mwichiuri Company Limited. The applicant further averred that the instrument of transfer signed by Meru deputy Registrar on 9<sup>th</sup> December, 2008 was fraudulently executed. The applicant further stated the letter used by Mutumbi & Mung'ata to Government Officers that they were Directors of the company was false as the said company never filed any returns for the last 20 years. On the other hand the respondent through Jacob Matumbi Mberia, averred that the applicant Jackson Kiraithe is not a Chairman or Director of Miaraage Co. Ltd. He further averred that he has information from Chairlady of Miaraage Co. Ltd that the said JACKSON KIRAITHE is not even a member of the defendant company. That the suit land, have vested in Mwichiuri Farmers Co. Ltd and the title L.R 72276LLR 9835(1) no longer exists and that setting aside the expert judgment of 22/5/2003 would deprive persons who are not parties to the suit land, without being heard.

The court record reveal that the Originating Summons was filed on 27<sup>th</sup> October, 1999 together with an application for injunction order against the defendant/ applicant herein by the firm of M/S Murithi & Co. Advocates. That service was effected upon the defendant as per affidavit of service by STEPHEN MWIRIGI M'INOTI dated 2<sup>nd</sup> November, 1999, on 29<sup>th</sup> October, 1999 upon the Secretary or directors of the defendant company. That the Managing Director Mis ANGELA NYAWIRA, of the company was served. That by notice of appointment dated 14<sup>th</sup> August, 2001 the firm of m/s Muthaura Kiome and Mwarania Advocates filed notice to act for the defendants herein and the same was to be served upon M/S WANGARI & CO. ADVOCATES and M/SMURIUKI & CO. ADVOCATES.

That on 8<sup>th</sup> May, 2003 the firm of M/S MWANGI KARIUKI & CO. ADVOCATS filed notice of change of advocates to act for the defendant instead of M/S WANG'ONDU and company advocates. Subsequently ANGELA NYAWIRA appointed the firm of M/S ARITHI & ASSOCIATES to act for the respondent. M/S Miaraage Co. Ltd, who filed their notice of appointment on 25<sup>th</sup> July, 2003. Once again on 11<sup>th</sup> March, 2010 the defendant appointed M/S L. KIMATHI KIARA & CO. ADVOCATES to act for the defendants who died an application dated 11<sup>th</sup> March 2010 seeking that the exparte judgement dated 22<sup>nd</sup> May, 2003 be set aside on the grounds that the applicant was not served with hearing notice. The affidavit in support was sworn by Mr. Jackson Kiraithe who deponed that on 6<sup>th</sup> March, 2003 when the case came up for hearing they were not informed and as such they did not attend hearing.

That before the application was heard the advocates filed a consent letter to set aside the exparte judgement dated 23<sup>rd</sup> May, 2003 and the subsequent decree made on 27<sup>th</sup> May, 2003. On 25<sup>th</sup> June, 2010 the consent was adopted as an order of the court and exparte judgement set aside. On 5/7/2010 the plaintiff/ respondent filed an application to set aside the consent order dated 25<sup>th</sup> June, 2010 and all subsequent orders. The court by its ruling dated 30<sup>th</sup> June, 2011 set aside the consent order dated 25<sup>th</sup> June, 2010 and restored the judgment of the court dated 22<sup>nd</sup> May, 2003 and the decree made on 27<sup>th</sup> May, 2003.

Having gone through the court file and arguments by both the applicant and the respondents counsel I note that summons to enter appearance were served on the defendants on 29<sup>th</sup> October, 1999 and that explains why the firm of M/S WANG'ONDU & CO. Advocates filed grounds of opposition to the respondents application dated 27<sup>th</sup> October, 1999. The court record shows thereafter the applicant/ defendants were able to engage various firm of advocates to act for them. In an application dated 11<sup>th</sup> March, 2010 which I referred to earlier on, the applicant herein stated that applicants were not served with

hearing stated that applicants were not served with the hearing notice and that is why they did not attend hearing of the suit. In the present application the same applicant claims that they were not served with summons to enter appearance in this case as the company was dissolved as at 1995.

I do not agree with the applicant's assertion that they were not served with summons to enter appearance as the court record indicates otherwise. Furthermore when the case came up for hearing before the trial Judge, the court was satisfied the applicant's advocates were served with hearing notices and were absent.

Before this court can set aside an *ex parte* judgement it must be satisfied that there is valid defence on record which defence is not a sham and secondly the court should consider whether there would be any prejudice to the parties and thirdly the explanation of delay ought to be considered – See **SWALEH A. HASSAN & ANOTHER – V – MARAIKA SHOKA CIVIL APPEAL NO. 163 of 1989** (Unreported) in which Court of Appeal laid down the tests to be followed in setting aside *ex parte* judgement i.e.

***“i.e. whether there is a defence on merit whether there would be any prejudice and thirdly that the explanation for any delay be considered.”***

I have noted that there is no defence on court file and the applicant has not disclosed the nature of the applicant's defence (if any). In the instant case the court has no opportunity to interrogate the nature of the defence. I cannot therefore speculate the nature of defence save to say as of now there is no defence on record and this court has no opportunity to consider whether applicant has defence on merits or not.

Following entry of judgement on 22<sup>nd</sup> May, 2003 the respondent has deponed that the suit title No. L.R. 72276 (LR. 98351) (I). Longer exists and by setting aside the aforesaid judgement would deprive persons who are not parties to this suit of their land, without affording them an opportunity to be heard. The applicant has not denied that the land has already been transferred to third parties. I therefore as I have indicated that there is no defence on record, find that there cannot be any prejudice in the *ex parte* judgment entered on 22<sup>nd</sup> May, 2003.

On the issue of whether there is explanation for delay in failing to appear on the hearing date the learned Judge noted that both firm of Advocates were served and there was a return of service and ordered the matter to proceed.

In the present application the applicant has not addressed the court on that issue but claims the application was never served with summons to enter appearance, which this court find was not the positions and gave reasons herein above. The applicant's assertion under paragraph 2 of his affidavit dated 5<sup>th</sup> March, 2012 in which he stated as quoted:-

***“That in 1999 the applicant was never served with summons of this case as the company was dissolved hence not competent to sue or be sued ( the said gazette is herein attached and marked “ JKI”.)***

is with all due respect incorrect as the defendants were served and was represented by several advocates. The explanation by the applicant is no correct and is untenable. The delay for non explained by the applicant's counsel who were on record as of the time of hearing of the matter or better so by the applicant explanation of why there was no attendance on their part on 6/3/2003 but not to deny service of summons to enter appearance.

Taking into account all submissions by parties, affidavits and grounds of opposition and guided by binding authority stated hereinabove following the *ex parte* judgment, I am unable to exercise my discretion in favour of the defendant/ applicant and grant the prayers sought in the application dated 5<sup>th</sup> March, 2011.

The upshot is that the application is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 26<sup>TH</sup> DAY OF JULY, 2012.**

**J.A MAKAU**  
**JUDGE**

**DELIVERED IN OPEN COURT IN PRESENCE OF:**

- 1. Mr. Kaumbi h/b c. Murithi for the respondent**
- 2. Applicant in person ( present)**

**J.A.MAKAU**  
**JUDGE**