**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**Civil Case 150 of 2005**

**JAMES OMWANGE KENYANYA.........................................................................................PLAINTIFF**

**-VERSUS-**

**HARON ONDARA KARANI..............................................................................................DEFENDANT**

**RULING**

The instant application which is brought pursuant to Order XX Rule 22, 23 IZA rule 10 and 11 and Section 3A of the old **Civil Procedure Rules** was filed in court on 23rd July 2010. The applicant seeks the following orders:-

*1. That this honourable court be pleased to certify this application urgent and hear it exparte in the first instance.*

*2. That this honourable court be pleased to grant for stay the decree and all consequential orders entered herein pending the interparte hearing of this application (sic!).*

*3. That this honourable court be pleased to set aside the judgment entered herein upon such terms as are just.*

*4. That this honourable court be pleased to allow the defendant/applicant to file his statement of defence out of time stipulated by law.*

*5. That this honourable court be pleased to deem the annexed statement of defence as duly filed upon payment of requisite court filing fees.*

*6. That this honourable court be pleased to grant any further and or other order(s) as it may deem fit to grant in the interest of justice.*

The application is supported by an affidavit sworn by the applicant. He depones that the failure to file a statement of defence was substantially occasioned by the mistake of his advocate and that the mistake of his advocate ought not to be visited upon him. He further averred that the suit ought to be heard on merit.

In opposition to the application the respondent filed a replying affidavit dated 15th July 2011. He pointed out that the applicant had explained why it took 8 months for him to file this application after he had been served on a number of occasions with hearing notices. The counsel however had received the same under protest. Two such hearing notices were annexed to the replying affidavit. The respondent then resorted to

serving the applicant directly with hearing notices. The applicant has annexed to the affidavit two affidavits of service upon the applicant directly.

Both parties agreed to proceed with the matter by way of written submissions which were duly filed and which I have carefully considered. I have also perused the file herein. In brief the facts are as follows. The suit was first filed in the High Court on 10th November, 2005. The defendant through his advocate entered appearance in the matter on 23rd November 2005. He however did not file his defence within the stipulated time and judgment was entered in default on 18th January 2006. The same was then listed for formal proof a number of times and was finally heard before **Musinga J.** on 29th September, 2009. He delivered his judgment on 8th October 2009 allowing the plaintiff's suit. It is this judgment that the applicant now seeks to have set aside.

The issue for determination by this court is whether the defendant has made out a case to warrant this court to allow its application and to set aside the judgment already entered against him.

The principles to be considered by a court when deciding whether or not to set aside an ex parte judgment have long been settled.

In **Shah –vs- Mbogo (1967) EA 116 at 123** the Court of Appeal held that the court's discretion to set aside a judgment obtained exparte is intended to be exercised so as to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

In **Gandhi Brothers –vs- H. K Njage T/A H.K Enterprises Nairobi HCCC No. 1330/01 Milimani** (unreported) the court held that:

*"In exercising the discretion the court should consider among other things, the facts and circumstances both prior and subsequent and all the respective merits of the parties".*

I have considered the facts and circumstances in this matter. There is no dispute that the applicant/defendant was served with the summons to enter appearance. Indeed he instructed an advocate to enter appearance for him. This was back in 2005. Judgment was then entered in default. It is clear from the court record that the applicant was informed of the same and yet he did not move or instruct his advocate to move the court to set aside the judgment entered on 19th January 2006.

The respondent then served the applicant's counsel to attend the formal proof. Again this averment by the respondent in his replying affidavit has not been refuted by the applicant or his counsel. For some reason the applicant's counsel protested the service and the applicant was personally served to attend the formal proof. Again this service has not been refuted by the applicant. The applicant did not attend court for the hearing of the formal proof and judgment was entered.

The applicant now alleges that the failure to file a defence was occasioned by a mistake on the part of his counsel. This cannot be so. The applicant himself was personally served with the hearing notice. He however chose to ignore the same. Indeed he ignored this whole matter from the time the suit was filed in 2005. He ought to have made this application much earlier.

Discretion must always be exercised judiciously. It cannot be used to assist a person *"who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice"* or where one has been indolent as the applicant herein has been.

In the premises and for all the foregoing reasons, I find the application dated 23rd July, 2010 lacking in merit and dismiss it with costs.

Orders accordingly.

**Ruling dated, signed** and **delivered** at **Kisii** this 21st day of September, 2012.

**R. LAGAT-KORIR**
**JUDGE**

**In the presence of:**

.................................... for applicant

.................................... for respondent

.................................... court clerk

**R. LAGAT-KORIR**
**JUDGE**