



**AGNES WAMBUI KIRITU & SUSAN WANJIKU KAMAU**  
**(Suing as Chairlady, Treasurer & Secretary**  
**of Olive Groove Self Help Group).....PLAINTIFF**

**VERSUS**

**JOSEPH GACHOKI GITARI T/A GEO-ACRE SURVEYS.....DEFENDANT**

**RULING**

By a Chamber Summons dated 29<sup>th</sup> August 2012 expressed to be brought under the provisions of Order 10 rule 11 of the Civil Procedure Rules 2010, the defendant seeks the following orders:

- 1. That the firm of Narangwi & Associates be allowed to come on record instead of the firm of Mwangi Wambugu & Company advocates.**
- 2. That there be a stay of execution.**
- 3. That this honourable court be pleased to set aside the ex-parte judgement herein and the applicant be given unconditional leave to defend this suit.**
- 4. That the cost of this application be provided for.**

When the application came up for hearing on 3<sup>rd</sup> October 2012, prayer 1 not being opposed was allowed thus paving way for the other prayers as required under Order 9 rule 10 of the Civil Procedure Rules.

For some reasons unknown to the Court the application is, as already stated, brought by way of Chamber Summons despite the fact that the application was filed after the Civil Procedure Rules, 2010 under which all applications unless provided otherwise are to be brought by Notice of Motion. That procedural lapse deplorable as it is, is however excusable under the provisions of Article 159(2)(d) of the Constitution as read with sections 1A and 1B of the Civil Procedure Act.

The application is supported by an affidavit sworn by **Joseph Gachoki Gitari** on 29<sup>th</sup> August 2012. According to the said affidavit, the defendant had earlier on instructed the firm of **Mwangi Wambugu & Company Advocates** to enter appearance and file the defence. The defendant came to learn that despite entering appearance, no defence was filed. According to the defendant, he has a good defence to the suit and should therefore not be made to suffer on account of mistakes and or inadvertence of his previous advocates. Further, the defendant contends that the judgement is irregular since the same was obtained despite appearance having been entered contrary to the provisions of the law. It is further contended that the suit is bad in law and hence the Court in the exercise of its discretionary powers ought to set aside the judgement since the plaintiffs' loss is capable of being compensated by thrown away costs.

In opposition to the application the plaintiffs filed a replying affidavit sworn on 25<sup>th</sup> September 2012 by **Agnes Wambui Kiritu** in which the deponent states that the judgement entered herein was regular having been entered due to the failure by the defendant to file a defence. According to the deponent, the

defendant does not have any defence to the Plaintiff's claim having admitted receipt of the money in respect of the property by banker's cheques whose copies she exhibited. On going to the land, the plaintiff's found the same in possession of a third party after which the defendant cancelled the said agreement vide a letter dated 22<sup>nd</sup> November 2010 whose copy was similarly exhibited. The defendant however, never refunded the money paid to him despite the plaintiffs demanding for the same. In the deponent's view, the application is an abuse of the Court process and an injustice to the Plaintiffs' right to a fair and speedy determination of the issues.

In his submissions in support of the application **Mr. Narangwi**, learned Counsel for the defendant while reiterating the contents of the supporting affidavit submitted that the defendant's defence raises arguable issues one of which being that the agreement in issue was subject to the Law Society's Conditions of Sale and therefore the same is still in force as the same has not been rescinded. The other arguable point, according to learned counsel is that it is the plaintiffs who are in breach since they did not pay the balance of the purchase price. The third point is that the self help group does not exist anymore and the plaintiffs are not the officials of the said group. Further, in counsel's view Order 10 rule 4 does not provide for entry of judgement in default of defence as opposed to appearance and the defendant is ready and willing to shoulder any conditions that the Court may impose.

On her part, **Miss Makori**, learned counsel for the plaintiffs, while relying on the replying affidavit submitted that whereas a litigant ought to be given an opportunity of being heard, it would be a waste of time to set aside the judgement herein as the defence does not raise any triable issue in light of the annexures to the replying affidavit. On being served with demand notices to refund the purchase price, the defendant asked for indulgence. With respect to the suit being defective it is submitted that the defendant received the money after the sale agreement without raising the issue of the plaintiff's status. A self help group, it is submitted belongs to and is owned by the members. Accordingly, the defendant is estopped from raising the issue of capacity at this stage and the Court ought to invoke the overriding objective and dismiss the application.

In his rejoinder **Mr. Narangwi**, while conceding that the defendant received the money, reiterated that the agreement has never been terminated.

The decision whether or not to set aside is purely discretionary, the main consideration being that of justice. The discretion, it is now trite, is intended 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.

The law relating to setting aside *ex parte* judgement is now well settled. I can do no better than to cite that case of **Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193** in which **Platt, JA** expressed himself as follows:

**“The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside *ex debito justitiae*. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised 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...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. The principle**

obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. ..It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an *inter partes* hearing, than the judge who acts *ex parte*... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgement would be set aside in the exercise of the court's inherent jurisdiction".

The first issue for the Court to consider in such application is whether or not the ex parte judgement was regularly entered. Where the judgement was irregular, the Court has no discretion in the matter and has to set aside the judgement as a matter of right or as in usually put *ex debito justitiae*. The defendant contends that the judgement that was entered herein was irregular since there is no provision for entry of judgement in default of a defence as opposed to default of appearance. It is true that Order 10 rule 4 of the Civil Procedure Rules deals with default in entering appearance. However, Rule 10 of the same Order provides:

***The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.***

When this provision was brought to the attention of **Mr. Narangwi**, learned counsel retorted that for the said subrule to apply there must be modifications. In my respectful view the modifications contemplated are in respect of such mundane issues as substituting the appearance for defence and such like. It is therefore my view that under Order 10 rule 4 as read together with rule 10 aforesaid a judgement may properly be entered in default of defence. Accordingly I reject the contention that the judgement that was entered herein was irregular.

Once there is a determination that the judgement was regular the next issue is whether the defendant has a defence on merits. A defence on merits is not one that must necessarily succeed but one which is arguable. In this case it is not disputed that there was a contract pursuant to which the defendant received money for sale of land. It has not been contended that the said land was transferred to the plaintiffs, purchasers. The defendant's case is that the agreement had not been rescinded. However looking at the letter dated 22<sup>nd</sup> November 2010 from the defendant to the first plaintiff it is clear that the defendant had put the land for sale and was preparing to refund the money paid to him. The rescission, according to this letter, came from the defendant. Therefore his contention that the agreement had never been rescinded or that it is the plaintiffs who were in breach ring hollow. With respect to the status of the plaintiffs, there is no indication at all that this issue was ever raised by the defendant. The letter dated 22<sup>nd</sup> November 2010 was clearly addressed to the 1<sup>st</sup> plaintiff. Whether or nor the plaintiffs complied with the regulations regarding the registration of a self help group is neither here nor there in so far as the transaction for sale of land between the parties here was concerned. There is a further letter dated 13<sup>th</sup> September 2011 written by the defendant's advocates seeking for a 30 days' indulgence. Accordingly the issue of the plaintiff's status is a red herring and I agree with the plaintiffs that it is an afterthought. It is my view that to grant this application would amount to assisting a person who is deliberately seeking by evasion or otherwise to obstruct or delay the course of justice.

In the result the application dated 29<sup>th</sup> August 2012 fails and is dismissed with costs.

Dated at Nairobi this 19<sup>th</sup> day of October 2012

**G V ODUNGA**  
**JUDGE**

Delivered in the presence of Miss Kagai for Plaintiff