

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 552 of 2010

JELIMAR DEVELOPERS LIMITED..... PLAINTIFF

VERSUS

WILSON WAITHAKA GITAU.....DEFENDANT

RULING

This suit was commenced by a Plaint filed on 16th August, 2010. On 27th September, 2010, the Plaintiff's Advocates requested for judgment against the Defendant under **Order IX Rule 3** of the **Civil Procedure Rules** for his failure to enter appearance and/or defence within the prescribed period. Judgment was accordingly entered on 15th October, 2010. Before the matter could proceed to formal proof, the Defendant/Applicant filed this application seeking the setting aside of the ex-parte judgment.

The application is dated 17th November, 200 and is taken out under **Order IXA Rules 10** and **11** of the **Civil Procedure Rules** and **Section 3A** of the Civil Procedure Act. The reasons advanced for failure to enter appearance was that the Memorandum of Appearance was filed and received at the Chief Magistrate's Court Registry, and the anomaly was noticed only when the party went to file the defence and counterclaim.

Order IXA Rule 10 confers the court with a wide discretion to set aside or vary any judgment and consequential decree or order entered for non-appearance and default of defence, upon such terms as are just. In **SEBEI DISTRICT ADMINISTRATION v GASYALI [1968] EA 300**, the court took the view that in an application for setting aside judgment, it is not just the poverty of the Applicant's excuse that is to be considered, but the nature of the action should also be considered; the defence, if one is brought to the attention of the court, however irregularly should be considered; the question as to whether the Plaintiff can be reasonably compensated by costs for any delay occasioned should be considered; and finally it should always be remembered that to deny the subject a hearing should be the last resort of a court.

Taking the above issues into consideration, the Applicant's excuse for delay in entering appearance was that the person who went to file it did so in the Chief Magistrate's Court instead of the High Court. One has to accept that mistakes have been made and will continue to be made. In **SHAH v MBOGO & ANOR [1967] EA 116**, it was held that the court has unfettered discretion to set aside an *ex parte* judgment in the interests of justice and to avoid injustice or hardship which may result from an accident, inadvertence, or excusable mistake or error. I am satisfied that the filing of the Notice of Appearance in the wrong court was an excusable mistake.

Moreover, looking at the draft defence, I note that it raises some triable issues. These include questions such as - did the Plaintiff pay the balance of the purchase price on the final completion date as agreed? Was the Defendant allowed to refund the deposit? Did the Plaintiff have the particulars of the Defendants bank account? Was the completion date 31st March, 2010? If so, did the Plaintiff honour it? Was the Defendant justified in revoking the sale transaction?

In view of the foregoing, I find that the proposed defence does raise some triable issues. In the interests of justice, I exercise my discretion and set aside the judgment entered against the Applicant. The

Draft Defence and Counterclaim shall be deemed properly on court record upon payment of the requisite court fees.

The Applicant shall pay the Respondent's costs of this application in any event.

Orders accordingly.

L. NJAGI
JUDGE

DATED and **DELIVERED** at **NAIROBI** this 21st day of November, 2012.

MUTAVA
JUDGE