SETTING ASIDE EXPARTE JUDGMENT

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.41 OF 2008

THE ATTORNEY GENERAL…….....1ST APPLICANT/DEFENDANT
THE CHIEF LAND REGISTRAR….....…...2ND APPLICANT/DEFENDANT

VERSUS

NATIONAL BANK OF KENYA…….....……RESPONDENT/PLAINTIFF

RULING

The respondent, National Bank of Kenya instituted this action against the Attorney General on behalf of the Chief Land Registrar seeking indemnity and/or special damages in the sum of Kshs.8,844,702.80 with interest.

The suit was set down for hearing on 15th October, 2009 and the office of the Attorney General duly notified. But on that day, only the respondent was represented and the hearing proceeded *exparte w*ith the respondent calling two witnesses.

The court (Maraga, J) rendered his judgment on 1st December, 2009, in favour of the respondent as prayed. Two months later on 18th February, 2010 the office of the Attorney General learnt from a draft decree served on it by the respondent of the judgment and the following day on 19th February, 2010 brought the present application in which the following orders are sought:

(i) stay of execution;
(ii) setting aside of the *exparte* judgment;
(iii) reinstatement of the matter and hearing *de novo;*
(iv) costs of the application.

It is the applicant's contention that failure of counsel to attend court on 15th October, 2009 was due to inadvertence, unintention but largely to pressure of work; that the defendant has a good defence; that it is only fair, just and in the public interest to allow the application.

The respondent has opposed the application arguing that the respondent cannot blame anybody for failing to attend court; that the defence did not disclose any plausible or reasonable defence being a general denial; that even if the applicant was to be given a chance to present evidence, the decision of the court is not likely to change; that the original title having been extinguished and new ones issued no purpose will be served by opening up the case.

I have considered these submissions and the authority of **Shah** Vs. **Mbogo** (1967) E.A. 116 cited

by counsel for the applicant. That authority was cited for the proposition that the question whether or not to set aside an *exparte* judgment is a matter of judicial discretion, which discretion will be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. It will not, however, be exercised to assist a party who intends to obstruct or delay the course of justice.

Much earlier, Ainley, J (as he then was) in **Jamnadas Sodha** Vs. **Gordhandas Hemraj** (1952), 7 U.L.R. at pg.11 observed:

"Though I have the greatest sympathy with a busy magistrate who no doubt has a great deal to put up with in the way of belated applications and requests for adjournments, though two views can no doubt be taken of this matter, I yet think that insufficient attention was paid by the lower court to the fact that the appellant had a defence to put forward and to the fact that no great hardship would have been likely to result to the respondent if an appropriate order for costs have been made. I may be doing the learned magistrate an injustice, but from a reading of his ruling of June, 19 it seems to me he has concentrated solely upon the poverty of the appellant's excuse. In my view that is not the sole matter which must be considered in case of this kind. The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregular, should be considered, the question as to whether the plaintiff can reasonably be 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 court."

From these principles, it is abundantly clear that only in exceptional cases will the court shut out a litigant. The strength or weakness of a party's case can only be tested at the trial. Learned counsel for the applicant has made candid admissions. Confusion and even forgetfulness are bound to occur in any busy office and the Attorney General's chambers is no exception. As the Court of Appeal observed:

Finally, Goudie, J in the case of **Girado** Vs. **Alam and Sons (u) Limited** (1971) EA 448 was faced with a situation where no sufficient cause for non appearance at the hearing was shown but he nonetheless and in order that there be no injustice to the applicant, set aside judgment in the exercise of the court's inherent jurisdiction. With the promulgation of the Constitution, the enactment of **sections 1A and 1B** of the **Civil Procedure Act** and the overhaul of the **Civil Procedure Rules**, the courts must be guided by substantial justice.

It has not been suggested that the applicant's aim is to obstruct subvert or delay the course of justice. Indeed, as demonstrated by the prompt manner in which this application was brought, it is evident that the applicant is keen to have the matter determined on merit.

No doubt the respondent will suffer inconvenience as a result of delay but inconvenience cannot be equated with the hardship the applicant will suffer if the relief sought herein is not granted. The inconvenience can and will be compensated by an award of costs.

For all the reasons stated, the application is allowed, judgment entered on 1st December, 2009 and all consequential orders set aside. The applicant to set down the case for hearing before the close of next term.

Costs of this application is awarded to the respondent.

Dated, Delivered and Signed at Nakuru this 10th day of June, 2011.

W. OUKO
JUDGE