



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

**CIVIL CASE NO. 13 OF 1996**

M'RUKUNGA M'MBOROKI ..... PLAINTIFF  
VERSUS  
JUSTUS M'INOTI M'MWAMBA .....1<sup>ST</sup> DEFENDANT  
ATTORNEY GENERAL .....2<sup>ND</sup> DEFENDANT

**RULING**

This is an application dated 30<sup>th</sup> April, 2010. The applicant seeks the following orders:-

1. ***That the Honourable Court do certify the application urgent and direct that same be heard on priority basis.***
2. ***That the Honourable court do set aside the interlocutory judgment and final judgment entered against the 1<sup>st</sup> defendant herein and all consequential orders thereto.***
3. ***That the Honourable court be pleased to grant the 1<sup>st</sup> defendant unconditional leave to defend the court.***
4. ***That the Honourable court do issue an order of inhibition against LR.NYAKI/THUURA/1911 currently registered in the names of the plaintiff until further orders of the Honourable court.***
5. ***That the Honourable court be pleased to issue such other or better orders as may meet the ends of justice.***

The application is supported by affidavit of Justus M'Inoti M'Mwamba the defendant/applicant. The application is grounded on the following grounds:-

- (a) ***The 1<sup>st</sup> defendant has belatedly discovered his advocate then on record(now deceased) never filed defence.***
- (b) ***The Advocate on record never informed the 1<sup>st</sup> defendant of the progress of the case herein.***
- (c) ***The 1<sup>st</sup> defendant has always been in the belief that the case was still pending in court.***
- (d) ***The 1<sup>st</sup> defendant's land NYAKI/THUURA/1911 has been alienated as a result of orders issued herein.***
- (e) ***The 1<sup>st</sup> defendant has been condemned unheard due to mistake not of his making.***
- (f) ***Delay in bringing this application explicable.***
- (g) ***1<sup>st</sup> defendant's counsel on records then to blame***
- (h) ***Mistakes of counsel cannot be heaped upon a party***
- (i) ***No prejudice will be occasioned the parties.***

The plaintiff M'Rukunga M'Mboroki opposed this application through a replying affidavit dated 10<sup>th</sup> February, 2011. The plaintiff filed this suit on 31/1/1996 against Justus M'Inoti M'Mwamba and the Attorney General for a declaration that the transfer of land parcel NYAKI/THUURA/1911 to the 1<sup>st</sup> defendant was illegal and null and void. Further for an order that 1<sup>st</sup> defendant's name be cancelled from land Parcel NYAKI/THUURA/1911 register and that an order for 1<sup>st</sup> defendant to transfer back the said parcel NYAKI/THUURA/1911 to the plaintiff or in the alternative the Executive Officer Meru do execute all necessary documents to effect transfer.

The 1<sup>st</sup> defendant as per return of service of Mr. Moses N. Kirima, Advocate, was served with a copy of summons to enter appearance and copy of plaint on 9<sup>th</sup> February, 1996. The service was acknowledged. The Attorney General was also served with summons to enter appearance on 20<sup>th</sup> February, 1996.

The 1<sup>st</sup> defendant had appearance entered on 9<sup>th</sup> February, 1996 by firm of M/S Mwirigi M'Inoti & Co. Advocates who did not file defence thereafter. The firm of M/S Meenye & Kirima for the plaintiff applied for interlocutory judgment against the 1<sup>st</sup> defendant.

Through a letter dated 10<sup>th</sup> March, 1997. That Deputy Registrar accordingly entered interlocutory judgment. The suit was set down for hearing and court was perfectly entitled to proceed *ex-parte* as against 1<sup>st</sup> defendant under OIX rule 3(now 10 Rule 7) of Civil Procedure Rules.

The suit proceeded against the 1<sup>st</sup> defendant and the Attorney General in absence of 1<sup>st</sup> defendant on 30.06.2004 and on 14.7.2004. Court made judgment in favour of the plaintiff/respondent on 15<sup>th</sup> September, 2005. It is that *ex-parte* judgment against the 1<sup>st</sup> defendant which he is seeking to set aside. He is entitled to make such application under Order 10 Rule 11 of Civil Procedure Rules but not under Order 1XA Rule 10 of the repealed Civil Procedure Rules.

I would quickly like to point out that the quoting of the wrong provisions of the rules is not fatal to party's case as under Article 159(2), (d) of the Constitution it is provided as follows:-

***“ Justice shall be administered without undue regard to procedural technicalities and.....”this article comes to the aid of the defendant at the right time.***

Further under order 51 Rule 10(1) and (2) of Civil Procedure Rules it is provided:-

***“ (1) Every order, rule or other Statutory Provisions under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.***

**(2). No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”**

Though the applicant has not complied with the provisions of Order 51 Rule 10(1) of Civil Procedure Rules the court is under obligation to determine the application on merits but not to refuse it by failure to comply with the rule.

The counsel for Applicant in this application relied on applicant’s affidavit dated 30<sup>th</sup> April, 2011 and on grounds set out in the Chamber Summons dated 30<sup>th</sup> April, 2010. The applicant in his affidavit admit that summons to enter appearance were served upon him on 9<sup>th</sup> February, 1996.

That he passed the same to his advocates M/S Mwirigi M’Inoti & Co. Advocates with instructions to defend. He states he rested assured all was well. He claimed he made several visits to his advocates who would assure him everything was under control though he did not state the dates and times he was visiting his advocates. He averred that M/S S. Mwirigi M’Inoti was sole proprietor and on learning of his unfortunate demise he visited the chamber in November, 2009 and had his case file released to him as per Annexure “JMM1”. That is when he realized and discovered the determination of the suit and his registration had been canceled. He did not in his affidavit explain how he discovered the determination of the suit and what made him to know of cancellation of his registration. He then sought services of his current Advocates. He later visited land registry office, carried search and confirmed that his names had been removed from the register of L.R NYAKI/THUURA/1911 as per annexure JMM2. He claimed the land to be his and that he is aggrieved by the judgment.

He stated the error and/or failure to file defence herein was a mistake of his counsel on record by then and that he is not to blame. He further stated that he feared the plaintiffs may deal with the property in a manner that may waste the land and as such prayed the land to be preserved by issuing an inhibition order.

The applicant did not in his affidavit disclose the nature of intended defence nor did he bother to attach any intended draft defence for court’s perusal. The applicant’s counsel mainly relied on applicant’s affidavit as he argued the failure to file defence was a mistake of the applicant’s counsel and the applicant should not be punished due to his advocate’s faults.

The counsel further stated contrary to respondent’s allegation that he is not properly on record he is properly on record and referred to annexure “JMM1” showing that the applicant was at liberty to take his case file from his former advocate’s firm. He stated that the former counsel for the applicant passed on and there is no need of filing an application to come on record.

He prayed for application to be allowed for applicant to exercise his constitutional rights to be heard. The counsel as he concluded his submissions he did not bother to disclose the nature of the applicant’s defence (if any) nor did he quote any guiding authority to the court.

Mr. Kirima Advocate for the plaintiff/respondent opposed the applicant’s application. He averred that the applicant had failed to comply with Order 9 Rule 9 Civil Procedure Rules which provides:-

**“ When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intentions to act in person shall not be effected without an order of the court:-**

- (a) upon an application with notice to all parties or**
- (b) Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”.**

The court’s understanding of the above-quoted Rule is that for parties to comply with the same it is assumed that none of the parties is dead; as parties are supposed to be given notice or served or make a consent between the outgoing advocate and the proposed incoming advocate or party intending to act in person.

The court’s view is therefore when an advocate is dead order 9 Rule 9 Civil Procedure Rules cannot be effected and the party needs not seek court’s order to either appoint another advocate or act in person. The appointed advocate needs to file notice of appointment of an advocate or if party wants to act in person, he should file notice to act in person. In view of the foregoing, I do not find merits in the submission that the Applicant’s counsel is not properly on record. I hold that the applicant’s counsel is properly on record and the application before court is competent.

The respondent’s counsel challenged the applicant’s delay in filing the application since he got the file in November, 2009. The delay is of six (6) months. The delay may be inordinate but the Civil Procedure has not set down the period within which the application ought to be filed. Order 10 Rule 11 of Civil Procedure Rules provides:-

**“ Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.**

The counsel for the respondent stated that no explanation for delay was given since November, 2009 to April, 2010. The court agrees that no explanation was given for failure to file the application promptly. He further stated judgment given had been satisfied and the respondent has been owner of the land and is in possession. He stated the title cancelled,(that is the plaintiff’s title) was cancelled following a court’s judgment in which he was not a party to the suit nor was title of the plaintiff subject of dispute in that case. That the respondent obtained judgment in 2005 and proceeded to subdivide his land amongst his sons. He asserted that the late M’Inoti advocate could not file any defence because there was none. He said the applicant has never been in occupation of the land in dispute and claims it fraudulently. He prayed for the suit to be dismissed.

Mr. Maroro for State associated himself with submissions of Mr. Kirima stating the matter has been determined and annexure by the applicant do not support his case.

I have considered all submissions by counsel and diligently perused all the affidavits and annexures in this matter.

The applicant has blamed his former advocate for failure to file defence. Be as it may, I would like to point out that any party who appoints an advocate do not cease to have an obligation to ensure that all pleadings are filed in time and cannot afford to sit down and relax without seeking to know the actual position of his matter. It is not enough for a party to say since I appointed an advocate I decided to rest assured that the appointed advocate would do the necessary. In this case the applicant did not say what nature of defence he gave his late advocate. He said on very many occasions he could visit his advocate firm and had no reason to worry or doubt him. What were these several visits for?

In case of **Sabir din – VS – Ram Parkash Anand(1955) 22 EACA 48** where the applicant had stated that he was not aware that the suit was to proceed and that he was relying on his advocate, who had failed to turn up at the hearing, the court held that the applicant would not be punished due to his advocate’s fault.

I agree with the above-mentioned case but in this case the applicant did not to my assessment establish that the failure to file defence or seek leave(if any) was necessary to file defence out of time was due to his advocate’s faults.

In applications of this nature the court has wide discretion to set aside the ex-parte judgment on terms as are just. The power to set aside the judgment does not cease to apply because a decree has been extracted (see **The Fort Hall Bakery Supply Company – VS – Frederick Muigai Wangoe(1958) EA 118 at Page 119.**

The court in exercise of its wide discretion has no limits and restrictions on the discretion except that if judgment is set aside or varied it must be done on terms that are just. Further

before court can set aside the judgment it must be satisfied that there is a valid defence. In this suit no defence was filed nor was there draft defence to the applicant's application. The court is left in total darkness as to the nature of defence (if any) or as submitted by respondent that there may be no defence at all. The discretion for setting aside judgment is intended 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 whether by evasion or otherwise to obstruct or delay the cause of justice.

In case of **Shah – VS- Mbogo and Another (1967) EA.116 on Page 123** which is a High Court decision which means it is only persuasive in application Harris J stated:-

**“ I have carefully considered in relation to the present application the principles governing the exercise of the court's discretion to set aside a judgment obtained exparte. This discretion is intended 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 cause of justice”.**

**In Patel – VS- Cargo Handling Services Ltd (1974) 75** at Page 76 Sir Williamson Duffus P held:-

**“ The main concern of the court is to do justice to the parties, and will not to impose conditions or itself to fetter, the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on merits. In this respect defence on merits does not mean, in my view, defence that must succeed. . It means as Sheridan J put it “ a triable issue” that is an issue which raises prima facie defence and which should go to trial for adjudication”.**

I have already noted that in this suit there is no valid defence and the applicant has not disclosed the nature of his defence. It is doubtful if there is any defence. His former advocate failed to file defence. The applicant's advocate on record has not disclosed what defence the applicant intends to put. This court is left in total darkness as to the nature of defence and as such I doubt if there is any defence. In absence of valid defence or disclosure of the intended defence, the applicant cannot be heard to blame his former advocate. He cannot be heard to say that he should not be penalized due to his advocate's fault to file defence. The advocate cannot be found to be at fault when the nature of defence has not been disclosed since the filing of the claim on 31<sup>st</sup> January, 1996. I have considered the test laid down in setting aside an exp-parte judgment i.e. whether there is a defence on merit, whether there would be prejudice and lastly the explanation for delay be in filing defence.

I have found there is no valid defence on record nor is there disclosure of the intended defence. I have perused the court record and the exparte judgment and I have found that there cannot be any prejudice in the ex-parte judgment. That failure to file defence or delay in doing so is unexplained.

Taking everything into account in this matter, I find that the applicant has failed to justify the setting aside of the perfectly regular judgment dated 15<sup>th</sup> September, 2005 and accordingly the motion dated 30<sup>th</sup> April, 2010 must fail.

The application is therefore dismissed with costs to the plaintiff and 2<sup>nd</sup> defendant/respondent.

Right of Appeal.

DATED AND DELIVERED AT MERU THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2011

**J. A. MAKAU**

**JUDGE**

**Delivered in Open Court In presence of .....**

- 1. Mr. Murithi hb for Mr. Kirima**
- 2. Mr. Mogaka for State**
- 3. Ogoti for applicant**

**J. A. MAKAU**

**JUDGE**