

of Arunga Opiyo Masese & CO advocates ceased to act for the defendant. On 31st May 2007 this suit proceeded for hearing *ex parte* before Lady Justice Kasango and judgment delivered in favour of the plaintiff on 20th July 2007. That is the judgment the defendants are now seeking to upset. It is the submission of the defendants that they were not aware of the hearing date. They also claim that at the time of hearing they were not aware that the firm of Arunga Opiyo Masese & CO advocates had ceased acting for them hence the judgment should be set aside to allow them vindicate their case. The plaintiffs are of the view that the defendants had deliberately acted to delay the finalization of this case. It is said that they were served with the hearing notice and they failed to attend court and that the filing of this application is a further delaying tactic to frustrate the finalization of this case.

I have considered the grounds set out on the face of summons and the facts deponed on the affidavits filed for and against the application. I have further considered the oral submissions of the learned counsel who appeared for both sides. It is not in dispute that the suit proceeded for hearing in the absence of the defendants. The question is whether at the time of hearing the defendant had notice of the hearing date. The record shows that this suit was fixed for hearing on 31st May 2007. The date was taken *ex parte* by the plaintiff on 18th October 2006. It is noted on record that the plaintiff was to issue a hearing notice upon the defendant. When the suit came up for hearing on 31st May 2007 the same proceeded to hearing in the absence of the defendant. There is no indication that the plaintiff's advocate indicated to the court that the defendant had been served with the hearing notice. I am convinced that the applicant was served with hearing notice. I have perused the judgment of Lady Justice Kasango and it is clear that she made a finding on the issue of service of a hearing notice. On page 3 of the aforesaid judgment Lady Justice Kasango stated as follows;

“The defendant had been served with a hearing notice for the hearing of this case on 31st May 2007. He was served with that hearing notice on 10th May 2007. The defendant failed to attend court to defend this suit.”

It is obvious that the Hon. Lady Justice Kasango made a finding on the issue of service. I cannot overrule my colleague.

The Defendants' remedy, if well advised, available to the applicant lies elsewhere. In sum the motion lacks merit. It is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 23rd day of April 2010.

J.K. SERGON
JUDGE