

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 22 of 2008

CORNELIUS WARUTERE.....PLAINTIFF

VERSUS

JUSTUS KIBUCHI GATURUHU.....DEFENDANT

RULING

On 28th July 2009, **CORNELIUS WARUTERE** the Plaintiff herein, was granted leave to proceed for hearing *ex parte*, when this court was satisfied that the Defendant and his counsel were absent despite the fact that the date was taken by consent by representatives from the firms of advocates from both sides. The Plaintiff successfully applied for the dismissal of the Defendant's counter-claim for want of attendance. Judgment was entered in favour of the Plaintiff and against the Defendant on 26th August 2009.

JUSTUS KIBUCHI GATURUHU, the defendant herein, is now before this court seeking to set aside the *ex parte* proceedings and judgment vide his Chamber Summons dated 9th February 2010. The Summons is said to be taken out pursuant to the provisions of *Order IXB rule 8* of the Civil Procedure Rules. The Summons is supported by the affidavit of **CHARLES KAMWENJI** and that of the Defendant. The Plaintiff opposed the Summons by filing the replying affidavit he swore on 12th March 2010.

I have considered the grounds set out on the face of the Summons and the facts deponed in the affidavits filed for and against the Summons. I have also considered the oral submissions made by learned counsels from both sides. The main reason advanced by the Defendant and his counsel for failing to turn up during the hearing of the suit is that the Defendant's counsel inadvertently forgot to note the hearing date in his diary. Mr. Kamwenji deponed that he only came to learn of the entry of judgment when he received the letter dated 13th December 2009. The Defendant averred that his advocate never informed him of the hearing date. The Defendant beseeched this court to visit upon him the mistakes of his advocate.

The Plaintiff on his part urged this court to dismiss the application because he is of the view that he only filed the application to forestall the impending execution of the decree. He annexed to the replying affidavit an affidavit of service to show that the Defendant's counsel was served with a taxation notice on 15th December 2009. I have perused the reverse of the taxation notice dated 24th November 2009 and the same bears the stamp of the firm of M. C. Kamwenji & Advocates acknowledging receipt of the same on 15th December 2009. The affidavit of service of **STEPHEN KAMANGUYA** sworn on 2nd February 2010 indicated that the taxation notice was served on 27th January 2010. It would appear there is a conflict as to when the taxation notice was served. What remains undisputed is the admission by Mr. Kamwenji that he inadvertently failed to note in his diary the hearing date. Under *Order IXB rule 8* of the Civil Procedure Rules, the court is given an unfettered discretion to set aside *ex parte* proceedings and or order or judgment for good reasons. The failure to note in his diary of the hearing date is a mistake which occurs daily in many offices. There is no evidence to show that the Defendant's advocate intentionally refused to inform his client of the hearing date nor refused to attend court. I am satisfied he made a genuine mistake. Consequently the Summons dated 9th February 2010 is allowed as prayed save that the Defendant shall pay the Plaintiff thrown away costs of Ksh.10,000/= within the next 30 days.

Dated and delivered at Nyeri this 11th day of June 2010.

J. K. SERGON

JUDGE

In open court in the presence of
Mr. Kiminda for Respondent
no appearance for Kamwenji
and in the presence of the Applicant.