REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 6 OF 2007

EUNICE MUTHONI KARUGA.....)
AGNES MUMBI KARUGA…….)…….……PLAINTIFFS
DISHON KARUGA MBURIA……)

VERSUS

NATIONAL IRRIGATION BOARD……..DEFENDANT

R U L I N G

The 2nd plaintiff herein one Agnes Mumbi Karuga is one of the 3 plaintiffs who filed this suit on 1st February 2007. The 1st plaintiff was her mother while the 3rd plaintiff was her father. The 1st and 3rd plaintiffs have since passed on during the pendency of this matter. After the suit was filed, the Defendant, National Irrigation Board was served with the plaint and summons to appear.
In response to the said summons, it filed a notice of appearance on 12.02.07. No defence was filed within the prescribed time and the Plaintiff requested for judgment to be entered in default of filing a defence. Interlocutory judgment was entered and the matter proceeded to hearing by way of formal proof. Since the defendant had entered an appearance, the plaintiff's advocate took out a hearing notice and served them notifying them of the hearing date. Such a hearing notice was taken out on 25.04.08 and served on the defendant. The copy returned to court shows that the defendant was served on 24.06.08 and it stamped the copy of the hearing notice.
The defendant did not appear on the hearing date and after the court satisfied itself that it had been duly served not just for that date but even on the earlier date when the matter had been scheduled for hearing allowed the plaintiff to proceed ex-parte.

The 2nd plaintiff therefore testified and called one witness. The matter was reserved for judgment on 1.10.08. The same was not delivered then as there was no attendance by the parties and the same was subsequently delivered on 15.10.08. All this time the defendant did not concern itself to what had happened to the suit in which they had entered an appearance.

After I year 5 months, the defendant moved the court vide the application dated 16.03.2010 for orders of setting aside the said judgment and extending time for it to file a defence. That application is the subject of this ruling. It is premised on the 4 grounds on its face and an 18 paragraph supporting affidavit sworn by one Simon Mwangi Kamundia who is the Senior Scheme Manager of Mwea Irrigation Scheme. He admits that he indeed received the summons to enter Appearance on 9.02.07 and forwarded the same to an Administration Officer by the name Naomi. He says that the said Naomi was transferred and the matter was taken over by another person.

He has nonetheless denied having received the hearing notice in question. He has deponed that they have a good defence and the judgment should therefore be set aside so that they can file a defence and the matter be heard de novo.

The Application is opposed by counsel for the Plaintiff/Respondent. She contends that the defendant was the author of its own misfortune and its acts of omission and indeligence should not be visited on her. She also deposes that the 1st and 3rd plaintiffs have since died and reopening the matter will therefore be very prejudicial to her case.

I have considered the application along with the rival affidavits and the annextures thereto. I have also given a brief history of the matter prior to the formal proof. In cases such as this, it is important to look at the history of the matter as this will determine whether the applicant acted diligently, or whether he was just indolent. In this case, the defendant cannot say that it was not served with the summons. Indeed service is admitted and the memorandum of appearance was filed. The allegation that the officer who was given the summons left the station is in my view neither here nor there. The plaintiff should not be involved in the defendant's house keeping rules. All the plaintiff needed to do was serve the summons and that was done. Indeed even the subsequent hearing notices were served and acknowledged by appending the defendant's stamp. It was the duty and responsibility of the defendant to ensure that the suit was defended. The fact that the defendant's officers were not responsible enough to ensure that the court process was given the attention it deserves cannot by a long shot be termed as inadvertence or excusable mistake. It is trite law that setting aside an Exparte judgment is at the discretion of the court. The said discretion must nonetheless be exercised fairly and judicially. It should not be used to prejudice the innocent party or to aid a party who is otherwise indolent and undeserving of the favourable exercise of such discretion. To quote the words of **HARRIS J. in the locus classica of SHAH – MBOGO**

"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice"

As stated earlier, failure to file a defence or respond to the hearing notices, have in my considered view not been explained. It is also noted that it took the applicant 1 year 5 months to file this application. That in my view is indolence. Equity does not assist the indolent and the applicant must therefore face the consequences of its conduct.

I also hold that in circumstances where parties cannot revert to their original position if the judgment is set aside, the court must be very careful. This is so because if the party which already has the judgment in its favour will be unredeemably prejudiced if the judgment is set aside, then in the interests of just, such a judgment should be allowed to stay particularly if the disadvantaged party is faultless. In this case, 2 plaintiffs have died. They cannot be brought back to life to testify if the said judgment is set aside. There is no way the Respondent herein can be returned to her original position as at the time she filed the plaint. Her case would be dead without the evidence of her 2 deceased parents - yet she played no part in the defendant's failure to defend its case. Setting aside this judgment will therefore be very prejudicial to the respondent and will amount to travesty to justice.

I have perused the draft defence, it raises issues that cannot be competently contested in the absence of the 3rd plaintiff who has since died.

My finding therefore is that setting aside the ex-parte judgment herein will be oppressive and seriously prejudicial to the 2nd Plaintiff/Respondent. It will be unjust to set it aside. I must therefore disallow the application dated 16.03.2010 which I hereby do, with costs to the respondent.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 14th day of October 2010.

In presence of:- 2nd Plaintiff/Respondent.