



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANICOMMERCIAL COURTS)**

**Civil Case 381 of 2010**

**AGNES NDINDA MALUNDU..... PLAINTIFF  
VERSUS  
FAMILY FINANCE BUILDING SOCIETY LIMITED.....DEFENDANT  
R U L I N G**

1. On 16<sup>th</sup> June 2010 the Plaintiff's prayers in the application dated 31<sup>st</sup> May 2010 were granted. The Respondent who had been served with that application did not attend court. On 23<sup>rd</sup> June 2010 the Respondent filed a Chamber Summons application under **Order IXB rule 8** and **Order XXI rule 22** of the **Civil Procedure Rules** seeking for *inter alia*, the order of 16<sup>th</sup> June 2010 be set aside and the Applicant's application dated 31<sup>st</sup> May 2010 be set down for hearing *inter partes*. This application is supported by the grounds stated on the body of the application and the matters deposed to in the supporting affidavit sworn by Dominic Njuguna Mbigi on 23<sup>rd</sup> June 2010, as well as a further affidavit sworn on 8<sup>th</sup> July 2010.

2. It was argued that due to a mistake/omission on the part of the Defendant's Advocate, they omitted to diarize the hearing date, thus the Defendant was not represented in court. The hearing proceeded *ex parte*. It was on 16<sup>th</sup> June 2010 at about 10.30 a.m. when Mr. Mbigi saw the correspondence but by the time they filed a notice of appointment and made their way to court, the matter had already been disposed of. This was a mistake by the Advocate which counsel urged the court to pardon and allow the Defendant to defend their application. Moreover, the Defendant stands to suffer great loss if the orders which were issued are executed. The Plaintiff's claim had already been dealt with fully in **High Court Civil Appeal No. 596 of 2009**.

3. The Defendant who is an innocent party should not be made to suffer. The Applicant annexed copies of the order in Civil Appeal No. 596 of 2009 in which the Plaintiff had agreed to pay a sum of kshs.569,923.00 and costs of Kshs. 127,000/- and the mode of payment was agreed upon. However the Plaintiff paid the 1<sup>st</sup> installment of Kshs. 100,000/- and purported to withdraw the appeal and filed the present suit. Reference was made to the case of **Maina v Mugiria [1983] KLR page 79** where the court of Appeal set out the principles governing the exercise of judicial discretion to set aside an *ex parte* judgment obtained in default of either party to attend the hearing as follows:

***“(a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.***

***(b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”***

4. This application was opposed Miss Nungo learned counsel for the Respondent; she relied on the replying affidavit sworn by Agnes Ndinda Malundu on 24<sup>th</sup> June 2010. Counsel submitted that although non attendance by counsel for the Defendant may have arisen due human error, the Defendant did not move to court within a reasonable time to make the present application. If the orders were prejudicial to the Defendant, it should have moved to court early. The Defendant has also not demonstrated that they have a good defence. The case which was withdrawn was already acknowledged in this suit, thus the issue of *res judicata* does not arise. Moreover, the suit premises were not subject of the appeal. The respondents annexed a copy of the Plaintiff which was withdrawn. The dispute was in respect of a motor vehicle KAQ 494 H. The suit also involved a dispute of a termination of a contract of employment.

5. As set out in the case of *Maina vs Mugiria* this Court has a wide discretion to set aside an *ex parte* order on such terms as are just so as to avoid injustice or hardship resulting from an accident, inadvertent or excusable mistakes. The court has however to guard against attempts by the Applicants who seek to deliberately obstruct, delay or derail the course of justice. Thus the court has to satisfy itself that there is valid defence or a defence that raises triable issues. (See the case of **Ceneast Airlines Ltd v Kenya Shell Ltd East African Law Reporting [2000] 2EA 362 (CAK)** The Court of Appeal cited with approval a passage by Dufus Re in the case of **Patel v East Africa Cargo Handling services 1974 EA** as follows:

***“The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to 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 the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it ‘a triable issue’ that is an issue which raises a prima***

**facie defence and which should go tot trial for adjudication.”**

6. Applying the above principles to the present application, counsel for the Defendant has offered an explanation why he failed to attend court during the hearing of the application. This was due to an oversight due to a human error on his part. This application was filed on 23<sup>rd</sup> June 2010 that is after seven days which in my humble view cannot be said to be inordinate delay. Going by the averments in the supporting affidavit, and the attached documents regarding previous dealings between the Plaintiff and the Defendant in a previous suit, I am of the view that the defendant has a valid defence which should entitle them a day in court. I have also considered the Plaintiff will not suffer any prejudice apart from the delay and the thrown way cost. Am prepared to compensate the plaintiff for the inconvenience by awarding her costs assessed at Kshs. 10,000/- to be paid forthwith by the defendant.

7. Accordingly the Defendant’s application is allowed. The order of this court made on the 16<sup>th</sup> June 2010 is set aside. The application dated 31<sup>st</sup> May 2010 should be heard *inter partes* on a date to be given on priority basis.

**RULING READ AND SIGNED ON THE 1<sup>st</sup> OCTOBER 2010.**

**M. K. KOOME  
JUDGE**