



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT**  
**MILIMANI COMMERCIAL COURT, NAIROBI**

**Civil Case 566 of 2003**

**ALBERT GACHERU KIARIE *t/a* WAMAITU PRODUCTIONS.....PLAINTIFF**

**- V E R S U S**

**SIMON MUIRURI KIREHU *t/a* ONE STEP NDUTI MUSIC  
STORE.....DEFENDANT**

**R U L I N G**

Application by defendant dated 29/9/08 seeking to set aside ex parte judgment entered on 23/9/08 by this court. The grounds on which application is based is that the defendant was not aware of hearing date namely, 25/6/07 because he had not been advised by his advocate on record. Hearing date was taken by consent by the advocate's clerk indicated as 25/6/2007 and not 25/6/2008.

The defendant had a strong defence which should be heard. The application is supporting affidavit of Gitau Kariuki, advocate on record for defendant. He says that he saw the matter on Standard Newspaper of 26th September 2008. On perusing his file he found that the hearing date was indicated as 25/6/2007 instead of 25/6/08. There was a mistake which he did not notice resulting in failure to appear in court on 25/6/2008. The failure to attend court on scheduled date was not deliberate. The defendant has a reasonable defence on record.

In reply the plaintiff has sworn affidavit he has narrated the steps he took in order to take hearing date on Wednesday 25/6/2008. He also argues on how it must be impossible to have had that matter fixed on 25/6/2007 and submits the failure by defendant to appear in court on that date was intentional. He further argues that the defendant has no defence to this case, he holds a copyright agreements to all the music complained of and he is producer and recorder of the music. The plaintiff has relied on several authorities the first being Copy Right Act 2001 and HCC No.213 of 1997 – Nicholas R.O. Ombija & Associates vs. National Bank of Kenya. The prayers in that case was to strike out defence. This is not relevant to this application as the defendant wishes to set aside judgment already entered after trial. The other authority is Oxford Advanced Learners Dictionary – and notes from the book -Copinger & Skone James on copy right 13 Edition. These passages deals with defences, whether there are defence to be considered viable when setting aside against judgment.

Then the decision in City Printing Works (K) Ltd. vs. Bailey – in this case it was an

appeal under Order XXXV Rule 1 on conditions of granting leave to defend. Finally, the decision in the case of Maginga General Stores vs. Pepo Distributors Ltd. [1987] 2 KAR the same authority is cited by applicant. The facts are same as in this case the defendant failed to reach court in time. The judge noted his reasons for failure to appear but was of the view the statement lacked merit.

On appeal, the Court of Appeal held that a court on appeal will not interfere with the exercise of discretion on an application for summary judgment unless the exercise was wrong in principle or the judge acted perversely on the facts and also a mere denial is not sufficient defence and that defendant is to show by affidavit or oral evidence that there is a good defence. The applicant relied on the authority in decision of Court of Appeal No.27 of 1982 – Maina vs. Mugeria. On the court's discretion there are no limits on restriction 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.

Upon consideration of all matters that should be considered as indicated in the above authorities, it is my opinion that the failure to attend court by defendant and his advocate was caused by error and mistake and the explanation given is reasonable. It is also my opinion that the defendant has an arguable defence.

In the circumstances, I allow the application and grant orders as prayed. The defendant/applicant shall pay all thrown away costs to the plaintiff to be agreed or assessed by Taxing Master.

It is so ordered.

DATED and DELIVERED at Nairobi this 20th day of May 2009.

**JOYCE N. KHAMINWA**  
**JUDGE**