



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MOMBASA**

**Civil Suit 325 of 2008**

**COL. JOSIAH LANDY MRASHUI**

**SAMUEL KALEMA MRASHUI (*Suing as a legal***

***Representative of the Estate of LABAN MRASHUI*).....PLAINTIFFS**

**VERSUS**

**JOHNSON MWANDAWIRO**

**CLEMENT MULEMWA RUGHENDO**

**MARIAM WANJALA MWANYEZA**

**GODFREY KIZAKA**

**JOHN MWAWANSA**

**MWAMBURI MWAKANGALU**

**DANSON MWASENGA .....DEFENDANTS**

**RULING**

The suit was filed on 13.11.08. The firm of Opolu & Co. Advocates entered appearance on 19.12.08 but no defence filed. It is not clear whether the memo was served. There was a request for interlocutory judgment to be entered on 23.01.09 for failure to file defence. Interlocutory Judgment entered on 30.3.09. This suggests that the plaintiffs were aware that appearance had been entered irrespective of whether they were served with the memo of appearance or not. It is trite law that once a party enters appearance then there is default in filing defence, that Defendant would still have a right of audience at any formal proof to cross-examine the plaintiff and his witnesses. This is a right that cannot be taken away.

The memo of appearance is on record and cannot be struck out *suo motu*. It can only be struck out if the court is appropriately moved.

I do hold that it was the duty of the plaintiff to have served the defendant with the hearing notice for today's formal proof. Even if they did not know, now they do and this court must adjourn the matter. The Defendants would be entitled to costs.

However, upon perusal of the interlocutory judgment dated 30.3.09 I noted that it was entered on basis of failure to enter appearance. Appearance had been entered on 19.12.08. It follows that the said interlocutory judgment appears to be irregular and invalid and can be challenged.

I therefore do hereby stand over the matter generally. There shall be no order as to costs.

**Dated and delivered at Mombasa this 29<sup>th</sup> day of September 2009.**

**M. K. IBRAHIM**

**JUDGE**