



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

Civil Appeal 36 of 2006

WILSON MURIITHI KURUTA.....APPELLANT

VERSUS

ESTHER KABUI KURUTA.....1ST RESPONDENT

JEMMIMAH WAMBUI KURUTA.....2ND RESPONDENT

JUDGMENT

This appeal arises out of ruling by Trial Magistrate made on 18/5/2006 in **RMCC No. 67 of 2004**. The Appellant has set out 8 grounds of appeal. The suit relates to rice holding No. 2061 Thiba Section. The Trial Magistrate entered Judgment against the Appellants on 15/3/2005 and thereafter the Appellants filed an application dated 14/4/2005 seeking to review and set aside that Judgment and it is the ruling on that application which was delivered on 18/5/2006 that is subject of this appeal. The trial Magistrate found that the provision of Civil Procedure Rules invoked Order IX Rule 8 was non existent. The Trial Magistrate made a finding that since it was the defendant who had taken the hearing date exparte and no notice was given to the plaintiffs there was no irregularity in proceeding in absence of the defendant but in presence of Plaintiff who had come to know of the hearing date. The provisions of Order IX B is applicable in case where on the day fixed for hearing only plaintiff attends. If the court is satisfied that hearing notice has been duly served, it may proceed exparte. In this case there was no issue of hearing notice not having been served. The party absent is the one who had taken the hearing date. He knew the date of hearing. He should have been in court on that date. There was no irregularity or injustice done to the defendant The Trial Magistrate also made a finding that the defence had raised no triable issues. The Defendant was attempting to make nonsense of a clearly unambiguous order of the court. The authorities relied on which were offered to the court are:-

1. **Shah -Vs Mbogo & another 1967 EA 116**. It was held that the principle that the court's discretion to set aside an exparte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable error but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.

In the present case there are no circumstances which warrant a Judgment to be set aside. The Appellant just failed to turn up when he should have done so. In the court of Appeal decision in the appeal of **Magunga General Stores - Vs – Pepco Distributors Ltd (1987) 2 KLR 89** holding (2) a mere denial is not sufficient defence, a defendant has to show either by affidavit, oral evidence, or otherwise that there is good defence. This decision was relating to Order 35 CPC on application for summary Judgment. The principle should be the same where the issue of defence is raised. In the case of **Ruaha Concrete Co. Ltd and Jafin Patel** where hearing notice was received late occasioning hearing exparte, it was held that defence had not shown triable issues. The Trial Magistrate correctly looked at the defence and found it without merit.

Upon considering all the above, I find that the Trial Magistrate was correct in his ruling. The appeal is therefore dismissed with costs.

Dated this 16th January, 2008.

J. N. KHAMINWA

JUDGE

16/1/2008

Khaminwa – Judge

Njue – Clerk

Mr. Kahiga for Respondent.

Read in open court.

J.N. KHAMINWA

JUDGE