



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

**Commercial Civil Case 269 of 2005**

**HASHIM MOHAMED .....PLAINTIFF**

**VERSUS**

**CAPTAIN JAMA MOHAMED**

**JAMA NOOR .....DEFENDANT**

**R U L I N G**

On the 19<sup>th</sup> day of February 2007, this court entered summary judgment against defendant in terms of the notice of motion dated March 2006. The aforesaid motion proceeded for hearing *ex parte* when the defendant and his legal advisers failed to attend court for the interpartes hearing of the motion. They also failed to file any grounds of oppositions nor a replying affidavit as required despite having been served with the motion with a hearing notice. The defendant has now come before this court via the notice of motion dated 29<sup>th</sup> March 2007 in which he seeks to have the summary judgment set aside on the ground that his advocate then, failed to attend court with no apparent reason. He has beseeched this court not to allow him suffer for the mistake of his erstwhile Counsel.

The motion is strenuously opposed by the plaintiff who filed grounds of opposition dated 2<sup>nd</sup> May 2007. It is the argument of the plaintiff that no good reasons have been given to enable this court set aside the order entering summary judgment.

I have considered the arguments tendered by learned advocates appearing in this matter. I have also perused the motion plus the supporting affidavit and the grounds of opposition.

What comes out of the defendant's motion and the submissions of his learned counsel is that the advocate or firm of advocates who represented him at the time of entry of judgment did not attend court because the hearing date of the application for summary judgment was not noted in the advocate's diary. It is said that this was an accidental mistake occasionally made by learned counsels. The defendant however does not give reasons as to why his erstwhile advocate did not file any response to the motion for summary judgment dated 7<sup>th</sup> March 2006. Even if the defendant's learned advocate had attended court for the interpartes hearing of the aforesaid motion, I do not think his presence would have made any difference because this court would still have allowed the motion to be prosecuted *ex parte* pursuant to the provision of order in rule 16(3) of the Civil Procedure Rules. In any case no affidavit has been secured from the defendant's erstwhile advocate to explain why he did not attend court for the interpartes hearing of the motion dated 7<sup>th</sup> March 2006. From the sequence of events detailed in the motion, the subject matter of this ruling, it is clear that the defendant's erstwhile advocate intentionally failed to file the defendant's responses to the application seeking for summary judgment and that he also without any good excuse failed to attend court for the interpartes hearing of the same. In such circumstances it cannot be said that there was a genuine mistake on the part of the defendant's counsel. The only available remedy for the defendant is to pursue his erstwhile advocate for indemnity and not to disturb the plaintiff from enjoying the fruits of his lawfully acquired judgment. In the end I dismiss the motion dated 29<sup>th</sup> March 2007 with costs to the plaintiff.

**Dated and delivered at Mombasa this 28<sup>th</sup> day of March 2008.**

**J.K. SERGON**

**JUDGE**

In open court in the presence of Mr. Ndegwa for the plaintiff and Mr. Mabeya h/b brief for Kabiru for the defendant.