



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

**AT ELDORET**

**Civil Suit 140 of 1999**

**MAWJI PATEL ..... PLAINTIFF**

**VERSUS**

**TONY KETER ..... DEFENDANT**

**R U L I N G**

This is an application under the provisions of Order IXB, Rule 8 Civil Procedure rules for the following orders:-

- That the Judgement entered against the Defendant on 4<sup>th</sup> December, 2002 be set aside together with all consequential orders made in pursuance of the said Judgement.
- There be a temporary stay of execution pending inter partes hearing.
- The Court's Order of 02.10.2002 disallowing application for adjournment by the Defendant be set aside and the Defendant be allowed to tender his defence before a final judgement is given on the full merits of the case.
- Costs be provided for.

The Respondent/Plaintiff/Decree-holder opposed the

application. He took out a Notice of Preliminary Objections on the following points of law; that:-

1. This Honourable Court does not have jurisdiction to hear both applications.
2. The application dated 15<sup>th</sup> February, 2008 is improperly before the Court and ought to be struck out.
3. The applications are an abuse of the court process.

Judgement was delivered by the Honourable Justice

Omondi Tunya on 4<sup>th</sup> December, 2002 after a full trial. The Plaintiff called three witnesses while the Defendant called one witness. The Defendant did not testify as he did not attend the hearing. He

allegedly could not attend Court as he missed his flight to Eldoret. His Counsel, Mr. Rutto applied for adjournment. However, the Court rejected the application for adjournment and the Defendant's Counsel proceeded to close the Defence case. Both parties filed written submissions before judgment was delivered.

The Defendant filed a Notice of Appeal which was subsequently struck out by the Court of Appeal.

The main question now is whether this Court has jurisdiction to set aside the Judgment delivered on 4<sup>th</sup> December, 2002.

I have considered the points of law raised and the submissions by Counsel. Order IXB of the Civil Procedure Rules provides, inter alia, for what should happen when only the Plaintiff attends Court.

“.....

**3. If on the day fixed for hearing, after the suit has been called on for hearing outside the Court, only the Plaintiff attends, if the Court is satisfied -**

**(a) That notice of hearing was duly served, it may proceed ex parte;**

.....”

In the present case, the Plaintiff and his Counsel attended Court. The Defendant's Counsel attended Court with one witness. The Defendant did not attend Court. However, his Counsel proceeded with the Defence case and called the witness he had come with. After the witness testified, Counsel applied for adjournment. It was refused. As indicated earlier the Defence Counsel proceeded to close the case.

Rule 8 provides that:-

**“Where under this order, Judgment has been entered or the suit has been dismissed, the Court on application by summoning may set aside or vary the Judgment or order upon such term as are just”.**

One of the issues in the application is whether the hearing was heard ex parte and whether the Judgment is an ex parte Judgment. The other issue is whether the Court exercised its discretion properly in refusing the application for adjournment.

It is my view that the application before this Court is not challenging the Judgment on its merits. That is an issue for the appellate Court in case an appeal may be preferred. What is before this Court is a matter of due process and fair hearing. Under Rule 8 aforesaid this Court has, inter alia, the jurisdiction to revisit the question as to whether a Defendant ought to have been allowed to be given an opportunity to attend Court to testify on the hearing date. In such a situation, the Court is not sitting an appeal on the merits but is only to consider whether a party should have been heard. Rule 8 is underpinned on the principles of natural justice.

The Court would consider all the circumstances and exercise its discretion. In the case of **CMC HOLDINGS LTD –V- NZIOKI (2004) 1 KLR 173** the Court of Appeal held that in an application for setting aside an ex parte Judgment, the Court must consider not only the reasons why the defence was not filed or why the Appellant failed to turn up for hearing, but also whether the defence if filed already or if a draft defence is annexed raised triable issues.

From the foregoing, this Court certainly has jurisdiction to consider the application herein. Whether the judgment was an ex parte Judgment or one delivered after a full trial involving both parties (inter parties) is a matter of merit to be decided by the Court.

In such hearing I will not be sitting an appeal of the decision of my brother Judge.

I therefore do hereby dismiss the Preliminary Objection with costs to the Defendant.

**DATED AND DELIVERED AT ELDORET ON THIS 13<sup>TH</sup> DAY OF JUNE, 2008.**

**M. K. IBRAHIM**

**JUDGE**

In the presence of:-

Mr. Muruka for the Plaintiff/Respondent

No appearance for the Applicant/Defendant