REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 214 of 2004

KIMANI KAIRU KAHINDI…….....…...……PLAINTIFF

VERSUS

JOHN WANJOHI MAINA…….....…….……DEFENDANT

RULING

This is an application made by the defendant under the provisions of **Order IXB rules 3 and 8 of the Civil Procedure Rules** seeking the order of this court to set aside the exparte judgment delivered on the 3rd of October 2005 together with all the consequential orders thereto. Pending the hearing and determination of the application, the defendant prayed that there be a stay of execution of the decree of this court. The application is supported by the annexed affidavit of Rubua A. Ngure, the advocate for the defendant. The application is opposed. Joseph Nyoike Mutonyi the advocate for the plaintiff has sworn a replying affidavit opposing the said application to set aside the judgment.

The grounds in support of the application as contained in the application and the supporting affidavit are that Mr Ngure, counsel for the defendant was ready to proceed with the case on the 25th of July 2005 at 11.00 am but was held up before Musinga J. where he was conducting the hearing of another suit being Nakuru HCCC No. 396 of 1999. He deponed that he had not deliberately failed to attend court and had infact instructed Mr. Mongeri to hold his brief and asked the court to put the file aside. He deponed that when he attended court at 10.45 a.m. he was surprised to learn that the case had been heard and concluded. He urged this court to allow the application to set aside the said exparte judgment.

Mr. Mutonyi, in his replying affidavit swore that at the time the case came up for hearing neither the defendant nor his counsel were present in court. He submitted that Mr. Mongeri who held Mr. Ngure's brief had indicated to the court that Mr. Ngure would be ready to proceed with the case. However, Mr. Ngure failed to appear in court at the scheduled time. He deponed that the court acted within the law when it proceeded with the suit in the absence of the defendant and his counsel. He deponed that the defendant had properly been served with a hearing notice for the case on the day it was heard. He further deponed that there were no valid reasons why the defendant nor his counsel were not in court when the case came up for hearing.

I heard the submissions which were made before me by Mr. Ngure, learned counsel for the defendant and by Mr. Mutonyi, learned counsel for the plaintiff. The issue for determination by this court is whether the defendant has established a case to enable this court set aside the exparte judgment entered in this case. The principles to the considered by this court in deciding whether or not to set aside an exparte judgment is well settled. In **Chemwolo & Anor –vs- Kubende [1986] KLR 492** at page 496 Platt J.A. held that:

"***Order IXA rule 10 of the rules confers upon the court an unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just. In Patel –vs- E.A. Cargo Handling Services Ltd. [1974] EA 75 (supra), the court of appeal, following its previous decision in Mbogo –vs- Shah [1968] E.A. 93 adopted the opinion of Harris J. in Kimani –vs- Mc Conell [1966] E.A. 547 where he said:***

"In the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside and vary the judgment, if necessary upon terms to

be imposed."

But the court went on to explain (on page 76), that the main concern was to do justice to the parties and would not impose conditions itself to fetter the wide discretion given to it by the rules. On the other hand where a regular judgment has been entered, the court would not usually set aside the judgment, unless it is satisfied that there were triable issues which raised a prima facie defence which would go to trial."

The principles stated in the above case are equally applicable in situations where a party has applied to set aside an exparte judgment in default of appearance in court when the case was scheduled to be heard as provided for under **Order 1XB Rules 3** and **8 of the Civil Procedure Rules**.

In this case, Mr. Ngure has explained the circumstances under which he came to be absent from court when the hearing of the case proceeded exparte. He explained that he was before Musinga J. conducting the hearing of another case and had informed Mr. Mongeri, an advocate of the High court of Kenya to hold his brief and inform this court that he would be available to conduct the defence of this case once he had dealt with the case before Musinga J. Mr. Mongeri informed this court that Mr. Ngure would be ready to proceed with this case at 11.00 a.m. However by 11.30 a.m. Mr. Ngure was nowhere to be seen. This court ordered the plaintiff to proceed with his case the absence of the defendant notwithstanding. It is noteworthy that the defendant was not present in court at the time.

After the plaintiff had testified and closed his case this court saw Mr. Ngure enter the courtroom. At that time it was already well past noon. Mr. Ngure has explained that he was held up longer than he anticipated when he appeared before Musinga J. He has pleaded with this court not to punish the defendant for his mistakes and to that effect he has relied on the decision of **Maina –vs- Muriuki [1984]KLR 407** where a court of concurrent jurisdiction held that the mistake of counsel should not be visited on a litigant who has a good case which should be heard and determined on merits. Mr. Mutonyi for the plaintiff argued that this court should not set aside the said judgment because the defendant failed to attend court on the date which the hearing was scheduled.

I have considered the rival arguments made in this application. This court has unfettered discretion to set aside any exparte judgment entered by this court provided that it would be reasonable and just to the parties to the suit. In this case, I have considered the explanation given by Mr. Ngure and I accept that he was held up when he appeared before my brother Musinga J. This court saw Mr. Ngure enter the courtroom after it had concluded hearing the plaintiff's case. The folly of Mr. Ngure's action is that he scheduled the hearing of two cases before two different courts on the same day hoping that he would be able to juggle his time between the two courts without interfering with the schedules of the two courts. In this case it is clear that Mr. Ngure's folly was exposed resulting in judgment being entered against his client the defendant. It is this court's hope that Mr. Ngure has learnt his lesson. I agree with him that the defendant should not be punished because of his mistakes.

I have also considered the facts that the subject matter of this case is land which dispute should ideally be heard and determined on merits. I will therefore exercise my unfettered discretion and set aside the exparte judgment entered by this court on the 3rd of October 2005. Mr. Ngure and his client will however not escape lightly for their indiscretion. They will compensate the plaintiff by paying him thrown away costs which I assess at Kshs 15,000/=. The said amount shall be paid within fourteen days of today's date or in default the exparte judgment shall be restored. It is so ordered.

DATED at NAKURU this 23rd day of March, 2006.

L. KIMARU

JUDGE