

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 532 of 1996

CANNON ASSURANCE (K) LTD.PLAINTIFF

VERSUS

FREDRICK GATHITHI KABUEDEFENDANT

R U L I N G

On this Notice of Motion dated the 11th May 2004, Fredrick Gathithi Kabue, the Defendant, seeks two orders, namely, to set aside the *ex-parte* judgment given by Mbiti, J on the 16th July 2003 and for stay of execution of the decree. The application is supported by the affidavit of the Defendant sworn on the 11th May 2004.

The Motion was filed on the 11th May 2004, some ten months after the judgment the Defendant wishes to set aside. The grounds upon which the Defendant seeks to set aside the judgment are, *inter alia*, that his Advocate was not present at the hearing of the suit because he had been hospitalized after an accident. The Applicant also says that the Advocate had re-located to a new address.

The application is opposed on the ground, *inter alia*, that the Applicant's Advocate was served with the hearing notice but did not bother to attend court. I have read the said judgment of Mbiti, J and as regards the Applicant's failure to attend court the learned Judge said —

“The defendant has since defaulted and the plaintiff now seeks possession. Although the defendant was duly served with the hearing notices, the defendant did not attend the hearing.”

In view of that express finding by the learned Judge, I have no reason whatsoever to find otherwise. Apart from that, however, there is no affidavit from Mr. Mwititi, the Advocate who was then acting for the Defendant, to support the averments contained in the Applicant's affidavit dated the 11th May 2004.

As I have already observed, this Application was brought some ten months after the judgment was delivered. I consider that delay to be inordinate and inexcusable. The Applicant has not made out a case for setting aside the judgment. Once this limb of the Application fails as it does, there is no need to deal with the second prayer, namely stay of execution.

Accordingly, the Notice of Motion dated and filed on the 11th May 2004 fails and it is ordered that it be and is hereby dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this Tenth day of March 2006.

P. Kihara Kariuki

Judge