



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 1932 of 1987**

**SAMUEL GATHU KAMAU.....PLAINTIFF**

**VERSUS**

**PETER KANIU GATHUNGU.....DEFENDANT**

**RULING**

The Chamber Summons dated 1<sup>st</sup> July 2004 in respect of which this Ruling is delivered is expressed to have been filed for the Defendants although it states in ground 6 that the 2<sup>nd</sup> Defendant has died. The 1<sup>st</sup> Defendant is not said to have substituted the 2<sup>nd</sup> Defendant for the purposes of the suit and/or the execution of the decree sought to be set aside in the application. The challenged judgment was entered against both Defendants on 28<sup>th</sup> July 1998 as follows:

“Consequently I enter judgment for the Plaintiff against the Defendants for Kshs 282,050/= with costs of the suit and interest.”

Clearly from the above the court entered a joint judgment and not a joint and several judgment as had been prayed in the Plaint dated 13<sup>th</sup> March 1987. The 1<sup>st</sup> Plaintiff is sued as the driver and the 2<sup>nd</sup> Defendant the owner of the motor vehicle involved in the accident in which the Plaintiff was injured leading to the filing of this suit and the award of the damages stated above. The application before me seeks orders for the stay of execution of the decree passed herein, the setting aside of the judgment and for the suit to be tried afresh. The reasons or grounds upon which the application is made are that

1. The 1<sup>st</sup> Defendant was not served with a hearing notice
2. The 1<sup>st</sup> Defendant was not aware of what was happening
3. The 1<sup>st</sup> Defendant has a good defence to the claim
4. That the 1<sup>st</sup> Defendant is likely to be committed to Civil jail if execution is not stayed.
5. The 1<sup>st</sup> Defendant will suffer irreparable damage if the execution proceeds
6. The 2<sup>nd</sup> Defendant has passed away.

In his supporting affidavit as well as in submission made on his behalf by counsel the 1<sup>st</sup> Defendant says

that he came to learn of the outcome of the suit when a Notice to Show Cause was slipped under his door on 28<sup>th</sup> June 2004. He says that the 2<sup>nd</sup> Defendant had assured him that the insurer of the subject motor vehicle had taken over the matter and were “**handling the issue**”

The 1<sup>st</sup> Defendant also says that he was never served with a hearing notice prior to the suit being heard in his absence and judgment being delivered against him and the 2<sup>nd</sup> Defendant. He challenges the Affidavit of service relied upon by the presiding judge on the grounds that although the same states that service was effected upon his wife at the matrimonial home he was not at the time living with her but visited her periodically. The 1<sup>st</sup> Defendant’s wife has also filed an affidavit denying such service. The 1<sup>st</sup> Defendant has not asked for the swearer of the affidavit to be examined on oath which makes it difficult for this court to make a finding on the truth of the facts deposed therein. The 1<sup>st</sup> Defendant also contends that notice ought to have been served upon M/S Waruinge & Waruinge Advocates who were then on record for the two defendants on the appointed by the Insurers of the 2<sup>nd</sup> Defendant’s vehicle. The 1<sup>st</sup> Defendant in his affidavit filed in support of this application swears to the fact that he is not certain that the 2<sup>nd</sup> Defendant was served with the hearing notice either. I consider this deposition to be contrary to Order XVIII Rule 3 since the applicant is incapable of his own personal knowledge to prove the said fact.

Order XIB Rule 8 under which the application is brought (alongside Order XXI Rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act) empowers this court to set aside or vary a judgment and any consequential orders thereto. The provision reads as follows:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such term(s) as (are) just.”

The suit herein was heard *ex parte*, the judge having satisfied himself that notice of hearing was duly served as is required under Order IXB Rule 3. As stated in the leading Court of Appeal decision of *SHAH VS MBOGO* [1968] E.A. 93, the discretion given to the court under Order IXB Rule 8 is very wide with no limits (save that there must be a valid Defence to the suit). However the exercise of such discretion is intended to the intention is to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error but not to assist a party which has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

The 1<sup>st</sup> Defendant’s contention that he knew nothing of the suit is doubtful particularly as he has not sought for the oral examination of the process server who has sworn to have served the hearing notice. Suffice it to say that service upon the 1<sup>st</sup> Defendant’s wife as who is an adult member of the Defendant’s family was proper whether or not the 1<sup>st</sup> Defendant was an infrequent visitor to the matrimonial home. The two of them have not denied that to be the 1<sup>st</sup> Defendant’s home.

The 1<sup>st</sup> Defendant was aware that following the accident in which he was involved a suit had been filed against him as the driver of the vehicle. He had advocates on record who must have told him either directly or through the 2<sup>nd</sup> Defendant the requirement to present himself in court as a witness. He says that the 2<sup>nd</sup> Defendant assured him that the Insurers were dealing with the matter yet even after the 2<sup>nd</sup> Defendant’s death in March 2003, the 1<sup>st</sup> Defendant did not bother to find out the outcome of the suit and to perhaps apply for the 2<sup>nd</sup> Defendants substitution in view of the fact that he did not seem aware of the outcome of the suit as to conclude that the same had been dismissed or settled one way or another. I am unable to exercise my discretion in the applicant’s favour being guided by the legal principle that although Equity follows the law, it does not aid the indolent. The 1<sup>st</sup> Defendant appears not to have cared at all how the suit would end. I have my doubts that he was never served or that he was unaware of hearing date. It is twenty years since the accident giving rise to the cause of action herein arose, nineteen years since the suit was filed and close to eight years since the judgment sought to be set aside was entered against the Defendants.

Clearly a fresh hearing of the suit as sought by the 1<sup>st</sup> Defendant would not be possible in view of the long time lapses and also because the 2<sup>nd</sup> Defendant has since died. Great prejudice would accrue to the Plaintiff if the execution of the decree herein was to be stayed and judgment set aside.

The grounds upon which the judgment herein is challenged have not been proved to my satisfaction as is required under Order XXII Rule 22 which allows for a decree to be stayed or set aside upon sufficient cause being shown.

In the premises, I disallow the application and dismiss the same with costs.

Dated and Delivered at Nairobi this 23<sup>rd</sup> day of June 2006

**M.G. MUGO**

JUDGE

Mr. Gachihi for Applicant

Mr. Chege for Respondent