



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 290 of 2005

**HASSTINGS SAMUEL OTIENO OKANJA.....1ST
PLAINTIFF**

**MASTELLA BAHATI OTIENO.....2ND
PLAINTIFF**

VERSUS

**STEPHEN OWINO t/a S. O. OWINO & ASSOCIATES.....1ST
DEFENDANT**

**FREDRICK OKEYO t/a OTIENO OKEYO & COMPANY.....2ND
DEFENDANT**

R U L I N G

On 30th December, 2005 this court gave judgment to the Plaintiffs upon their originating summons dated 31st May, 2005 brought under Order 52, rules 4 and 7 of the Civil Procedure Rules. The Plaintiffs had proceeded *ex parte* on 1st December, 2005, the 1st Defendant's application for adjournment having been refused and the learned counsel briefed to seek adjournment having no further instructions in the matter. There was no appearance for the 2nd Defendant who had been duly served with hearing notice. It is also to be noted that neither Defendant had filed any papers in response to the application.

The 2nd Defendant has now come to court by chamber summons dated 2nd February, 2006 seeking two main orders. One, that the judgment of 30th December, 2005 and all consequential orders as against him be set aside, and secondly, that his name be struck out from the proceedings with costs. The application is stated to be brought under section 3A of the Civil Procedure Act, Cap. 21 and also under Order 9B, rule 8; Order 21, rule 22; and Order 1, rule 10 of the Civil Procedure Rules. The grounds for the application as they are set out on the face thereof are:-

- (a) that the 2nd Defendant has never at any time traded as Owino Okeyo and Company, Advocates nor has he ever become a partner with the said firm;**
- (b) that the 2nd Defendant has never had any fiduciary relationship with the Plaintiffs;**
- (c) that the 2nd Defendant has never received nor held any money on behalf of the Plaintiffs; and**
- (d) that failure by the 2nd Defendant to attend court on 1st December, 2005 was inadvertent and**

excusable.

There is a supporting affidavit sworn by the 2nd Defendant. To it are annexed some documents. There is also an affidavit sworn by the 1st Defendant and filed on 21st February, 2006 which supports the application. To it is annexed a copy of a judgment in Nairobi HCCC 637 of 2000.

The application is opposed by the Plaintiffs upon the grounds set out in the replying affidavit sworn by the 1st Plaintiff on 9th February, 2006 and filed on the same date (there are some documents annexed to that affidavit). Those grounds are, inter alia, that the 2nd Defendant was at all material times a partner in the firm of Owino Okeyo and Company, Advocates; that the reason given for failure to attend court on 1st December, 2005 is not credible and cannot be true; and that the application otherwise lacks merit.

I have read the affidavits sworn in support of and in opposition to the application. I have also given due consideration to the submissions of the learned counsels appearing. Looking at the grounds of the application as set out elsewhere above, it is clear that the first three grounds actually constitute the 2nd Defendant's defence to the Plaintiffs' claim. I need not consider them in this application, except in so far as they may have a bearing on ground no. (d), considering the provisions of rule 10 (2) of Order 52 of the Civil Procedure Rules which states:-

“10(2) No appearance need be entered to the summons and no affidavit in reply need be filed and all parties may be heard without entering an appearance.”

What I must consider is ground no. (d). If I set aside the *ex parte* judgment of 30th December, 2005 the 2nd Defendant will then have a chance to urge his defence as set out in grounds (a), (b) and (c).

The reason that the 2nd Defendant has given for failure to attend court on 1st December, 2005 is set out in paragraphs 7, 8 and 9 of the supporting affidavit. That reason is that the 2nd Defendant went to the Central Registry downtown where he thought the matter was instead of coming to this division, and that by the time he realized his mistake the suit had been heard *ex parte* and reserved for judgment. The Plaintiffs say that that is an unlikely story in view of the fact that the 2nd Defendant filed a memorandum of appearance in this division on 16th (not 7th as stated) June, 2005. The 2nd Defendant is an advocate of this court. I prefer to think that he would not lie to court as is suggested by the Plaintiffs. He may well have thought that the matter was at the Central Registry and not in this division as he has stated under oath. The court's jurisdiction under rule 8 of Order 9B is unfettered, subject only to the dictates of justice. The court will not lightly shut out a litigant. The 2nd Defendant has put forward in the documents exhibited in the supporting affidavits a serious defence to the Plaintiffs' claim. It is only just that he be given a chance to be heard. For that reason I will allow the application and grant the order as sought in prayer no. 3.

Regarding prayer no. 4, the grounds put forward in support of it are in effect the 2nd Defendant's defence to the Plaintiffs' claim. I do not think it can be properly said that the 2nd Defendant has been misjoined in these proceedings. The documents exhibited in the replying affidavit tend to show that the 2nd Defendant was practicing law in the firm of Owino Okeyo and Company Advocates, though the judgment in HCCC No. 637 of 2000 exhibited in the affidavit of the 1st Defendant held that the partnership existed in name only. This is not a matter that could have been in the knowledge of the Plaintiffs. I therefore hold that the 2nd Defendant was properly joined in the action. I must refuse prayer no. 4 of the application.

In the event, prayer no. 3 of the application is allowed. The judgment dated 30th December, 2005 (and all consequential orders) as against the 2nd Defendant be and is hereby set aside. Prayer no. 4 is refused. Costs of the application shall be in the cause. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF JUNE, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 9TH DAY OF JUNE, 2006.