



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Civil Suit 41 of 2002

MERCY WANJIKU NJERU.....PLAINTIFF

VERSUS

PAUL MUTUGI GITARI.....DEFENDANT

RULING

The Plaintiff filed a suit herein on 9/5/2002. Summons to enter appearance was issued upon the Defendant named Paul Mutugi Gitari on 21/5/2002. There is on record Affidavit of service sworn on 16/4/2003 confirming that the summons to enter appearance was served on the defendant who acknowledged service on 26/2/2003 at 11.00 a.m. The Defendant took no action and on 13/5/2003 an application was filed on behalf of the Plaintiff requesting Interlocutory Judgment against the defendant.

On 3/3/2004 the suit was heard by this court in the absence of the defendant who had by then filed no appearance or defence. Judgment was pronounced on 5/5/2004 in favour of the Plaintiff.

After judgment on 4/6/2004 the defendant made application to set aside judgment for the reason that he was not served with summons to enter appearance and that he had strong defence.

This application has never been prosecuted. In the meantime the Defendant did appoint advocates on 20/2/2006 and by application dated 20/2/2006 he made this application seeking orders similar to these sought in the earlier application. He blames his previous advocates for not taking action but shows no effort on his part to have the application prosecuted. He says the said judgment was irregularly obtained but offers no evidence in this regard. The issue that he did not sign acknowledgement of service is not proved it his mere allegation. It is clear he runs to court only when the auctioneer is at his door. This is clear abuse of court process.

I have considered the submissions of advocates and the authority cited by Mr. Kahiga for Applicant on page 236 at letter (e) –(f) which sets out the broad equitable approach enunciated hearing **Apaloo J.A** “ *I think a distinguished equity judge has said “Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or fault that cannot be put right by payments of costs. The court as is often said, exists for the purposes of deciding the rights of the parties and not for*

the purpose of imposing penalties”

At this stage the evidence shows that the defendant/ applicant was served with summons to enter appearance. There is no evidence to the contrary other than his own word. There is inordinate delay in coming to court to prove that he was not served.

In the present case this court is merely being asked to delay the execution of decree to enable the applicant to pursue application to set aside the judgment. The above quoted case has not relevance herein. There has been no evidence on how the judgment was irregular. It is clear the Applicant wants to pursue that application some other time when auctioneer are at his door.

I do not see any merit in this application. The same is dismissed with costs to the Respondent. The exparte order granted is hereby discharged.

Dated this 7th day of June, 2006.

J.N. KHAMINWA

JUDGE

7/6/2006

Khaminwa –Judge

Njue Court Clerk

Mr. Kathungu

Mr. Ngigi H/B for Kahiga comes in when Ruling is being read.

J.N. KHAMINWA

JUDGE