

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

Civil Case 29 of 2000

EDWARD JUMA ONGESO (suing thorough his next friend)

ONGESO OKHATA MULAA.....PLAINTIFF

VS

FRANCIS N. KINUTHIA

SIMON MWANGI.....DEFENDANTS

R U L I N G

The defendant, Francis Njoroge seeks under order IX A rule 10 and Order IXB rule 8 of the Civil Procedure rule to have the ex parte judgment entered against him and Simon Mwangi set aside in a summons dated 15th day of March 2002. The summons is supported by an affidavit sworn by Francis Njoroge Kinuthia.

The summons is opposed by the Respondent. The main ground raised in support of the summons is that the applicant forwarded all the pleadings served upon him to the advocate appointed by his insurance Co. Lakestar Insurance Co. Ltd. He now complains that the advocates appointed by the insurance company did not attend court nor informed him of the hearing dates. This obviously caused this court to proceed for hearing ex parte. The applicant says that he only came to know of the existence of the ex parte Judgment when execution process commenced. He says that he has a good defence which if he is given a chance he will successfully defend the suit. He has pointed out that he will be raising the defence of contributory negligence.

The Respondent did not contest most of the facts and issues raised by the applicant. To be fair to the Respondent's advocate, he only alluded that this application is being urged to deny the Respondent from enjoying the fruits of his Judgment.

I have considered the submissions of both learned advocates. I have also taken into account the material put to my attention. What is clear is that the applicant was not represented by a counsel of his own choice. He was represented by an advocate appointed to represent him by his insurance Company. It is not denied that the advocate abandoned the applicant midstream when the insurance company failed to settle the advocate's fees.

The applicant has also stated that he has a good defence. I agree that the applicant has a good defence. Where a litigant has a good defence with triable issues such a litigant must be given a chance to defend the suit. I am also satisfied that the defendant was let down by an advocate whom he had no role to appoint I am convinced that he should not be allowed to suffer due to the mistake of counsel.

I find that there is no evidence to show that the applicant is hell bent to deny the Respondent from enjoying the fruits of this Judgment.

In the end I think I should which I hereby do allow the summons dated 15.3.2002 with costs of the application awaiting the outcome of this suit.

DATED AND DELIVERED THIS 4th DAY OF March 2005

J.K. SERGON

JUDGE