



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 449 of 2003**

**PIONEER GENERAL ASSURANCE SOCIETY LTD .....**  
**PLAINTIFF**

**VERSUS**

**JOSEPH NDUNGU t/a WANJASI GEMSTONES.....**  
**DEFENDANT**

**RULING**

By my ruling of 23rd September 2004 I proceeded to strike out the defence and entered judgment as prayed for in prayer (2) of the application dated 7th October, 2003.

The defendant was dissatisfied with that order, and moved the court under a Certificate of Urgency, urging the court to set aside its orders granted on 23rd day of September, 2004. He also prayed for a stay of execution, pending the hearing and determination of the application.

The defendant's advocate Daniel Kioko Musyoka swore an affidavit contending that though they were served with a hearing notice for the 23rd September, 2004, the case was not listed. He attached a copy of the Daily Cause list which showed the applications listed before me in the afternoon of that day (2.30 p.m.) as Nos 8,9,10,11,12 all chamber summons applications, and only one Notice of Motion application listed as No. 13.

Counsel for the plaintiff, swore a replying affidavit and annexed a copy of the hearing notice served on the defendant's counsel, as well as an affidavit of service. Also annexed was a copy of the day's Cause List which showed that before me in the afternoon of the same day were the following applications i.e. Nos. 8,9,10 and 11 (Chamber Summons) and the Notice of Motion applications appeared as numbers 13,14,15 and 16. The application which I heard on that day relevant to this case was listed as No.16 in the afternoon.

The 2 advocates consented to dispose of this application by way of written submissions which they filed in court. Submissions of counsel for the defendant show that he dwelt mostly only on what he described as 2 different Cause Lists, and submitted that he obtained his from the court registry, so it must be the authentic one. He urged the court to exercise a discretion and set aside the ex parte judgment. He relied on the case of MAINA MUGIRI, CIVIL APPEAL NO. 27 OF 1983 [K.L.R 183 pg. 78].

For reasons which were not resolved by both advocates in their submissions, there are 2 different cause lists for the 23rd September 2004. This is most unusual and mysterious, in the circumstances!

My handwritten notes in the court file, have the date 24th September, 2004, which could have been a mistake, because I have checked the cause list of 24th September 2004 which was a Friday, and found that this case does not appear on that day. I also called for the cause list of 23rd September, 2004 from the Civil Division Registry, and found that it tallies with the one produced by counsel for the defendant. The Ruling I wrote that day however, reads 23rd September 2004.

Because of these confusions and or mistakes in the listing of this case on 23rd September 2004 I find that I must set aside my order of 23rd September 2004, to enable the parties to take fresh dates in the registry,

when the application dated 7th October, 2003, should be heard and determined on merit by ANOTHER JUDGE in the Civil Division. I make no order for costs as to this application.

Dated at Nairobi this 14th day of April, 2005.

**JOYCE ALUOCH**

**JUDGE**