



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT KISII**

**Civil Appeal 117 of 2002**

**ALFRED MOMANYI RISASI ..... APPELLANT**

**VERSUS**

**ROBINSON MECHA MABUKA ..... RESPONDENT**

**JUDGMENT**

The Respondent ROBINSON MECHA MABUKA sued the appellant ALFRED MOMANYI ROSASI and two others before Nyamira Senior Resident Magistrate seeking to have them evicted from land No. North Mugirango/Chache/31. He also sought for damages and costs. The appellant filed his defence but his two co-defendants did not do so. The plaint was later amended but no amended defence was filed. Thereafter the suit was set down for hearing on several occasions but for one reason or another did not proceed. On 20th March 2002 when suit was again set for hearing both the appellant and his counsel were absent though served. Hearing proceeded ex parte Judgment was finally delivered on 18th April 2002. It was against the appellant. He filed an application on 7th May 2002 asking the court to set aside the ex parte judgment and hear the case De Novo. This application was heard and in its ruling of 28th May 2002 the court dismissed the application. The appellant appealed to this court.

Mrs. Konucha argued the appeal. She submitted that the appellant's counsel then on record failed to inform him that that case was set for hearing on 23rd March 2003 and that is why he did not attend. The advocate admitted this. The appellant was ready to defend the suit and was let down by his counsel. Mistake of counsel should not be vested an innocent litigant. The court should therefore have allowed the appeal and let the appellant be heard on merit. The appellant have no other avenue once the application was dismissed for he could not appeal against the ex parte judgment.

Further it was argued that appellant has a good defence with high chances of success. The subject matter is land which is sensitive and no amount of compensation would suffice.

Appeal was opposed. Mrs. Asati pointed out that it was not clear which order or decree the appeal was against. There is no decree of the court's ruling of 28th May 2002 filed. The only decree filed is the one extracted from the judgment.

It was further submitted that hearing notice was served on the appellant's counsel. He and appellant failed to attend. The learned magistrate noted that they had failed to attend court on several other previous occasions. Both the appellant and his counsel were not diligent.

As to the defence being good and raising triable issues it was submitted that the appellant's initial

defence was a mere denial. Subsequently the plaint was amended and served but no amended defence filed

.I have thoroughly considered the appeal. As submitted by counsel for the Respondent it is not clear if the appellant is appealing against the judgment delivered on 18th April 2002 or against the ruling of 28th May 2002. In submissions by counsel and in the grounds of appeal it comes out that the appeal is against the ruling of 28th May 2002. The index in the record shows that the appeal against the judgment dated and delivered on 19th June 2002. Of course there was no such a judgment dated that day.

However counsel for appellant stated that that was a clerical error. Still the memorandum of appeal which is Page 1 of the record states the appeal is against the ruling delivered on 19th June 2002. There was no ruling delivered on that date. The ruling was delivered on 28th May 2002. I presume that again this was a typing error. However what is fatal is that there is no decree of that ruling which was even filed. The only decree on the record of appeal is the one at Page 60. This is a decree of the judgment delivered on 18th April 2002 and not of the ruling delivered on 28th May 2002. It is Mandatory that a certified decree of the order appealed against must be filed. Order 41 Rule 1A provides that a decree shall be filed as soon as possible if one is not filed at the time of filing the appeal. Appellant did not file any such decree and his appeal would fail on that score. It does not matter that the court allowed the appeal without the decree.

Above aside the court is satisfied the lower court was right in dismissing the appellant's application filed on 7th May 2002 seeking to set aside the ex parte judgment. The record clearly shows that the appellant never attended court any time the case had been set for hearing prior to 23rd March 2002. His counsel was also absent most of the times. He was not even present on the hearing day. True a mistake of counsel should not be vested to the litigant but in this case both the counsel and the litigant himself were not diligent. As the court said this was not a one time no show. They failed to appear on several occasions and there was no good reason given to make the court exercise its jurisdiction in favour of the appellant. The respondent was in court on all the time the case was fixed for hearing. Justice is not one sided and the court has a duty to be just to both parties. An indolent party should not expect the court to exercise its discretion in his favour.

From the above therefore I find the appeal has no merit. The same is dismissed

with costs.

Dated this 13th day of April 2005

**KABURU BAUNI**

**JUDGE**

cc. Mobisa

N/A for Appellant

Mr. Kamau H/B for Asati for Respondent