



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Civil Case 99 of 1988

EDWIN HENRY KIPKORIR PLAINTIFF

-VERSUS

**ABSOLOM SEBWE1ST
DEFENDANT**

**RISPA INGABO2ND
DEFENDANT**

**JOHN SHIYEYE3RD
DEFENDANT**

**MUSA ALULU4TH
DEFENDANT**

RULING

This is a Chamber Summons dated 5th March 2002 purported to be brought under Order IXB Civil Procedure Rules, and section 3 and 3A of the Civil Procedure Act (Cap.21). It was brought by Messrs. Birech and Company Advocates on behalf of the applicant/plaintiff. It seeks for four orders, one of which has already been spent, that -

(a) Spent.

(b) This honourable court's orders dated 27th February 2002 dismissing the plaintiff's suit for non-attendance be set aside.

(c) The plaintiff's suit be reinstated and the plaintiff be allowed to prosecute his case

(d) Costs be provided for.

The application has grounds on the face of the Chamber Summons. It is also supported by the affidavit of the applicant Edwin Henry Kipkorir sworn on 5th March 2002. The application is opposed and grounds of opposition were filed on 11th July 2002 by the then counsel for the respondents/defendants Messrs. Amayamu and Company Advocates. The application was fixed for hearing for 8th June 2005. The hearing notice was served on Obura Obwatinya and Company Advocates on 17th May 2005. They received it, but under protest, on the ground that they had already fixed another case at Kitale High Court. On the date of hearing they did not attend court. They also did not send any body to hold their brief, so the application proceeded for hearing exparte.

In terms of Order IXB rule 8 of the Civil Procedure Rules, this court has powers to set aside a judgement entered in default of attendance of a plaintiff, on such terms as the court deems fit.

The applicant/plaintiff herein has stated that the reason why he did not come to court on the date the case was dismissed for non-attendance of the plaintiff, was that he was attending the funeral of one of his children. The respondents' grounds of objection are that the application was lodged after 30 days. That the application is incurably defective, and that the application is frivolous, vexatious and an abuse of the due process of court.

I have considered the application and the grounds of opposition. In my view, there is no law that requires such days. However, such an application has to be made without undue delay. The court's order striking out the plaint was made on 27th February 2002. The application, though dated 5th March 2002 was actually filed on 30th April 2002.

I observe that the subject matter of these proceedings is land that is NANDI/KAPKANGANI/1392. In my view, this application is not frivolous, vexatious or an abuse of the process of the court. No particulars of those allegations were provided to this court. There was also no inordinate delay in making this application. I am of the view that parties should, as far as possible, be given a chance to be heard so that matters can be determined on the merits.

On the facts before me, I am persuaded to set aside the orders of the court made on 27th February 2002. However, the respondents will have costs of the attendance in court on 27th February 2002, as well as costs of this application.

For the above reasons, I allow the application and grant prayer (b) and (c) respectively. I however, order that the applicant should take a hearing date for the main case by 31st December 2005, failure to which the judgement of the court dated 27th February 2002 will be automatically reinstated.

The costs of attendance in court on 27th February 2002 and costs of this application are to the respondents. It is so ordered.

Dated and delivered at Eldoret this 19th day of July 2005.

George Dulu

Ag. Judge

In the Presence of: Mitei for applicant