REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE 103 OF 2000

NATHAN IFEDHA OBERI …….. PLAINTIFF

V E R S U S

ELIKANA ANAYA OBERI
JANE KADES LIBWEGE …….. DEFENDANTS

J U D G M E N T

On the 13th June 2003, the suit herein proceeded to hearing ex-parte and judgment was entered in favour of the Plaintiff/Respondent, Nathan Ifedha Oberi. He had sued the Defendants, Elikana Anaya Oberi and Jane Kedesa Libwege, seeking a declaration "***that the transfer noted in the register as entry Number 4 dated 7.10.98 from the 1st Defendant to the 2nd Defendant and the subsequent issue of Title Deed to the 2nd Defendant noted as entry Number 5 dated 20.11.98 in respect of L.R. KAKAMEGA/LOGOVO/149 are fraudulent, null and void and the same be cancelled by the Registrar of Lands, Kakamega."***

The court noted that "although the Defendants had entered appearance and filed a joint defence denying the claim, neither ……of them nor their advocates, M/S Ashioya & Company, appeared to defend the case on the day set for its hearing". Consequently the court proceeded with the exparte hearing and gave judgment in favour of the Plaintiff/Respondent.

On 22.9.2003, the Defendants/Applicants made an application seeking orders to set aside the exparte judgment and the orders thereof. The application was supported by the affidavit sworn on that date by the 1st Applicant.

It was not in dispute that the exparte hearing was on 14.5.2003, and that judgment was entered on 13.6.2003. It was not also denied that the hearing date had been fixed by consent. On their own admission, the Applicants learned of the exparte judgment on 9.7.2003. They came to court on 22.9.2003 to seek orders to set it aside. It took them about two months and two weeks or about ten weeks to do so. What explanation did they give for failing to attend court on 14.5.2003? What explanation did they offer for taking ten weeks or thereabouts before making the application to set aside the ex-parte judgment?

The Applicants averred that they did not hear from their advocate until 9.7.2003 when the 1st Applicant visited the advocate's chambers in Busia and got the information that the suit had been heard on 4.5.2003 and judgment delivered on 13.6.03. He was unable to get any explanation why the advocate had failed to attend court. If what the 1st Applicant stated is true, should the advocate's fault be visited on the Applicants?

The court's power to set aside judgment entered pursuant to an exparte hearing is donated by Order IXB Rule 8 of the Civil Procedure Rules. The Court of Appeal held in **NJAGI INYAGUTI and OTHERS v. DAVID NJERU NJOROGE – CIVIL APPEAL NO.181 OF 1994** that that power is exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or errors and that the court will not assist a person who has deliberately sought, whether by evasion or other otherwise, to obstruct or delay the course of justice. See also **SHAH v. MBOGO & ANOTHER (1967) E.A. 116 at page 123.**

In the present application, while the applicants could be excused for the negligence of their counsel in not informing

them of the hearing and in not attending court himself, the delay by the Applicants of ten weeks before coming to court after delivery of the exparte judgment was inordinate and clearly showed indolence and lack of diligence on their part. For this reason, the application must fail. It is dismissed with costs to the Respondent/Plaintiff .

Dated at Kakamega this 28th day of October, 2005

G. B. M. KARIUKI

J U D G E