

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 3868 of 1991

NATIONWIDE FINANCE COMPANY LTD.....PLAINTIFF

VERSUS

GERSEN MICHENI MUSA.....1ST DEFENDANT

MARIBA OMUNGATIA.....2ND DEFENDANT

RULING

This is an application to set aside an ex parte judgment and decree under Order IXB Rule 8 of the Civil Procedure Rules. The application is supported by an affidavit sworn by Genson Muchemi Musa. In the said affidavit it is deponed that failure to attend court when the suit was heard was due to the fact that service was effected on the former advocate on record who was at the time sick and has since passed away. He gave his name as the late R.O. Onyimbo.

It is also deponed that there is a good defence on record to the plaintiffs' claim.

The application is opposed on the grounds that there is really no good excuse for failure to appear in court during the hearing. There is no evidence that the said advocate is dead or when he died. Further that there is inordinate delay in bringing this application.

The advocate who was representing the applicant is dead. The hearing proceeded ex parte because he did not appear. He was the one who was served with the hearing notice so that he could inform the applicant which never happened. The applicant only became aware that the suit had been decided when he was arrested by the court bailiff whose name he has given as Kamau pursuant to a decree issued by this court on 11th February 2005. He was not aware of all this.

The applicant is seeking the exercise of this court discretion.

Applying the principle that the court's discretion to set aside ex parte judgment is intended to be exercised to avoid injustice, or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice the motion should be allowed.

The ex parte judgment entered by this court in favour of the plaintiff on 11th February 1994 is set aside. The defendant will pay the plaintiff costs of this application to be agreed and if not to be taxed by the deputy Registrar.

Dated and delivered this 19th day of October 2005.

J.L.A. OSIEMO

JUDGE