



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL SUIT NO. 146 OF 1997

NATIONAL BANK OF KENYA.....PLAINTIFF

VERSUS

JACKSON MBORO OLWENDA.....DEFENDANT

RULING

The application has been brought through chamber summons under Order IX A R.9, 10 and 11 of the Civil Procedure Rules and all other enabling provisions of the law. The main prayer that the application seeks is:

- That the Honourable Court be pleased to set aside the judgment and decree of the 18th July, 1997 and to consequently grant leave to the applicant to file and serve the defence out of time.

In his submissions, Mr. Ogolla narrated how the applicant had instructed the firm of Momanyi Birundi, Advocate who later filed a Memorandum of Appearance on 20th May, 1997. Unfortunately, the said Advocate was not candid enough and informed the applicant that he had already filed a defence. Consequently, the applicant engaged the firm of Omondi, Waweru Advocates in Mombasa who also failed to file a Notice of Change of Advocate. They also never informed him that the former Advocate had failed to file any defence.

The applicant's Counsel has explained that his client is an employee of Aga Khan Education Service and by then he was based in Karachi before being moved to several parts of the world.

I concur with Hon. Justice Visram in the case of National Bank of Kenya Vs Peter Komen Kima that the power of the Court to set aside an ex-parte judgment entered in consequence of non-appearance and default of defence is set out in Order IX A R.10 of the Rules in the following terms:

“Where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

In the case of Patel Vs E. A. Cargo Handling Services Ltd.

It was held that the discretion of the Court is not limited.

In the case of Maina Vs Muriuki.

Hon. Justice Emmanuel O’Kubasu as then he was deposed:

“The 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 is not designed to assist a party which has deliberately sought or obstruct or delay the court of justice.”

Having considered all the matters before me, I am of the considered opinion that it would be in the interest of justice and fair play for the applicant to fully participate in the trial.

The upshot is that I hereby allow the application. Costs in the cause.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open Court in the presence of Mr. Mwangi for Ogolla for applicant.

MUGA APONDI

JUDGE

24TH FEBRUARY, 2004