

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 25 OF 2001

BASILIO CHABALI.....PLAINTIFF

V E R S U S

1.SUDI KAULI MWATELA.....1ST DEFENDANT

2.M.A. BAYUSUF & SONS LTD.....2ND DEFENDANT

R U L I N G

By application dated 31/10/03 the Defendant seeks to set aside proceedings and judgment entered into on quantum of damages on 15/10/03. The Defendant seeks unconditional leave to be heard in the defence.

The reasons advanced are that there was confusion as to the hearing dates resulting in the failure of Defendant counsel to be present in court (in Malindi) when the case was called for formal proof.

I have considered the supporting affidavit and the reply thereof. It is quite clear that the advocate of the Plaintiff proceeded to serve two different hearing notices and thus confused the Defendants' Advocate who attended court on the wrong date. There is no allegation that the non-attendance was deliberate. The parties had already entered judgment on liability. The Defendant was entitled to be heard as to the assessment of damages. That right cannot be taken away from a party except in most clear cases. I find therefore the Defendant has shown a good reason why he failed to appear in court when the suit proceeded. His failure cannot be visited on his client the Defendant and therefore I am inclined to allow the application.

Orders are granted as prayed in the Chamber Summons dated 31/10/03. Costs shall be in the cause.

Dated at Mombasa this 2nd day of March, 2004.

JOYCE KHAMINWA

J U D G E

Read in presence of:-
Mr. Muthama – H/B
Joyce Khaminwa, J.