

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 335 OF 1997

NATIONAL BANK OF KENYAPLAINTIFF
VERSUS
PETER KOMEN KIMADEFENDANT

RULING

This is an application under Order IXA Rule 8 of the Civil Procedure Rules (hereinafter referred to as “the Rules”) and Sections 3A and 63(e) of the Civil Procedure Act (Cap 21). In it, the Defendant seeks, in pertinent part, the following order:

“3. This Honourable Court be pleased to set aside the ex parte Judgment and decree of this Court of 16 th January, 1998 and to grant leave to the Defendant to enter appearance and file defence out of time.”

The substance of the Defendant’s case is that he was not served with Summons to Enter Appearance and a copy of the Plaintiff. There is, however, on record an affidavit of service sworn on September 17, 1997 by one Wilson K. Sang, a process server of this Court to the effect that Summons to Enter Appearance and a copy of the Plaintiff were served on the Defendant on September 16, 1997 at 10.30 a.m. at the Defendant’s home at Moi’s Bridge for which he refused to sign.

The power of this Court to set aside ex parte Judgments entered in consequence of non-appearance and default of defence is set out in order IXA Rule 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.”

As was pointed out in **Shah v. Mbogo** [1967] EA 116, this power is exercised to obviate injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. It is a wide power which, as was pointed out in **Patel v. Cargo Handling Services Ltd** [1974] E. A. 75, has no limitation.

Considering the case before me, I am of the view that there is a likelihood of greater danger in shutting out the Defendant from presenting his case than can be suffered by the Plaintiff were the ex parte Judgment set aside. In view of this conclusion, it shall not be useful to go into the other matters agitated before me.

I, therefore, allow the Defendant’s application dated March 4, 2003 and order the costs thereof and costs thrown away to be in the cause.

Dated and Delivered at Nakuru this 18th day of June, 2003.

ALNASHIR VISRAM

JUDGE