

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 176 OF 1998

MUCHIRI KARANJA.....PLAINTIFF
VERSUS
ZIPPORAH WANGUI.....DEFENDANT

RULING

This is an application under Order IX B Rule 8 and Order XXI Rule 22 of the Civil Procedure Rules. In it, the Defendant seeks, in pertinent part, the following orders:

“3. THAT the decree herein and the subsequent ex parte judgment be set aside.

4. THAT the Defendant be granted leave to tender evidence and call witness es.”

In her affidavit sworn on June 4, 2003 in support of the application, the Defendant said that the matter proceeded ex parte as her *“Advocate inadvertently omitted to diarise the (hearing) date.”*

I agree with Mr. Mburu for the Plaintiff that no mistake of the Advocate was established before me. Nothing would have been easier in this case than to have the Advocate who made the alleged mistake swear an affidavit to establish the same. From the Replying Affidavit of the Plaintiff sworn on July 3, 2003 it is evident that the Defendant’s Advocates who made the alleged mistake knew that the Plaintiff had obtained a decree in the case way back on April 4, 2002 when they rejected the Plaintiff’s Advocate’s draft decree when it was sent to them presumably for approval. Further rejection was made by the Defendant’s Advocate’s letter of April 29, 2002.

If those Advocates had indeed made a mistake, they would have noticed it when the Plaintiff’s Advocates forwarded to them the draft decrees aforesaid which they rejected to approve. They would have communicated that fact to the Defendant and taken whatever step last year. Nothing has been shown before me why it took the Defendant over a year to make this application. If she did not know of the decree against her, that is the folly of her Advocates and she may be advised to pursue the matter with them.

This Court cannot allow the Plaintiff to be put out of the seat of Judgment without sufficient cause. I am, therefore, not satisfied that the Defendant has established good cause to entitle her to the discretion sought.

I, therefore, dismiss the Defendant’s application dated June 9, 2003 with costs.

Dated and Delivered at Nakuru this 30th day of July, 2003.

ALNASHIR VISRAM

JUDGE