



IN THE REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.3374 OF 1994

LALI SWALEH LALI

(Suing through his Legal Administrator FAQIK KHAHALE SKEKUWE) & 3

OTHERS.....PLAINTIFFS

V E R S U S

STEPHEN MATHENGE WACHIRA & 12 OTHERS.....DEFENDANTS

R U L I N G

Applicant has moved this Court by way of Chamber Summons dated 12.5.2003 under Order 9A Rule 10 of the Civil Procedure Rules for orders that *ex parte* judgement entered on 4.1.2002 be set aside. The supporting affidavit sworn by Kelvin Mogeni on 13.5.2002 in support says that he received instructions on 30.10.2001 to file appearance and that he managed to file defence on 22.2.2002 and that as at that time, he did not know that the Plaintiff had obtained judgement. He says the 6th Defendant has a good defence.

The Plaintiffs opposed the application through affidavit of FAQIK KHAHALE SKEKUWE sworn on 26.5.2003 saying that the 6th Defendant knew that the land in question was not that of the Government yet supported the theory that it was not. In his submissions the Respondents Advocate said that the defence ought to have been filed in November 2001 and that Advocates lacked diligence and deserved no discretion in their favour and that he has no good defence.

I have looked at the defence and feel that it raises *prima-facie* defence. In it, 6th Defendant denies fraud and states that whatever he did he acted on behalf of the Government.

Normally, where the act of the Advocate without the concurrence of the client is negligent the Courts do not allow the client to suffer for the negligence of the Advocate. Here, it is shown that the Advocate received instructions by 30.10.2001 but has not shown how he missed to file defence. It appears the Advocate was negligent.

As was said by Harris J., in *SHAH V. MBOGO* (1967) EA 116 this Court has jurisdiction to set aside *ex parte* judgement using his discretion on these terms that: -

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.”

Applying this principle, here I think whatever happened seems to be excusable mistake and I can exercise my discretion to allow the application.

Applicant to file and serve copies of defence on all the parties to the suit in 7 days. The Plaintiff to file any amended reply if necessary within 7 days of being served.

Cost in the cause.

DELIVERED at Nairobi this 11th day of July 2003.

A.I. HAYANGA

JUDGE

Read to -

Ritho for Plaintiff

Macharia for Defendant

A.I. HAYANGA

JUDGE