



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL CASE NO. 293 OF 1999**

**DUNCAN MWANGI WERU ..... PLAINTIFF**

**VERSUS**

**LAWRENCE GIKARIA ..... DEFENDANT**

**R U L I N G**

Lawrence Gikaria Gikungu hereinafter referred to as the Applicant has come to this court order section 3A and 63 of the Civil Procedure Act and Order IXA rules 10 and 11 and order XXI rules 22, 25 and 91 of the Civil Procedure Rules seeking to have the ex-parte judgment entered against him and all consequential orders set aside and that he be granted leave to defend the suit on merit.

The Applicant also seeks an order for stay of the execution of the decree herein.

The application is supported by an affidavit sworn by the applicant in which he explains the reasons for his failure to file his defence in time. Basically he blames his insurers United Insurance Co. Ltd. who failed to take appropriate action after he forwarded the summons to them through his agent. Secondly he attributes his inability to pursue the matter expeditiously due to injuries that he had suffered in a road traffic accident. The applicant further maintains that he has a good defence to the plaintiff's suit copy of which he has annexed to the application.

The application is opposed. Ms Mwai who appeared for the plaintiff/Respondent submitted that the applicant has not shown that he was under any mental or physical disability as at 5th February 2000 when the medical report on him was prepared by his Doctor, and yet the Applicant took no action to set aside the judgment against him until 15th October 2003 when he was served with a notice to show cause in execution of the decree. She submitted that the contract between the Applicant and his Insurers was independent of the Respondents claim and should not be used to delay the Respondent's claim. Relying on the case of *Njagi Kanyuguti alias Karingi Kanyuguti and 4 others CA 181 of 1994* she urged the court not to exercise its discretion in the Applicants favour.

It is not disputed that the Applicant was served with the summons to enter appearance on 30th October 199. It is clear from the court record that the judgment in default of appearance was entered against the Applicant over 5 months later on 3rd April 2000. Although the Applicant has contended that he forwarded the summons to enter appearance to his insurers through his insurance agents, the Applicant has not provided any document forwarding the same to the insurers, nor does his affidavit indicate how the documents were forwarded, and on what date they were forwarded. There is therefore nothing to convince this court that he actually forwarded the documents to the insurers and that he did so within the required period.

On the Applicants injuries, I am satisfied that the injuries were not so incapacitating as to prevent him from pursuing this matter if indeed he wanted to do so. It is clear that the Applicant has been indolent in pursuing this suit and has now just been spurred into action by the execution process which has been initiated against him.

The application is no more than an attempt to obstruct or delay the execution process. The applicant has not satisfied this court that it ought to exercise its discretion in his favour. Accordingly I reject the application and dismiss it with costs to the Respondent.

**Orders accordingly.**

**Dated signed and delivered at Nyeri this 4th day of December 2003.**

**H. M. OKWENGU**

**JUDGE**