

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2808 of 1998

MUDHIHIRI MOHAMMED & 2 OTHERS.....PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL.....DEFENDANT

R U L I N G

The defendant has applied by way of Chamber Summons for orders that the ex-parte judgment entered herein on 11th February, 1999 and all orders/decrees consequential therefrom be set aside.

The grounds upon which the application is based are that the defendant has not been served with summons to enter appearance and that, failure to file defence in time was not deliberate as the defendant believed that summons had yet to be served.

There are two affidavits in support of the application while the plaintiffs have filed grounds of opposition alongside the replying affidavit.

The title of Order cited by the defendant, that is Order 9A reads “ CONSEQUENCE OF NON-APPEARANCE AND DEFAULT OF DEFENCE”. Rule 10 thereof reads as follows:- “10. 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.”

The court has been given a very wide discretion. The underlying principle for the exercise of such a discretion. The underlying principle for the exercise of such a discretion was well set out in the Judgment of A.A. Kneller J.A. in Civil Appeal No. 27 of 1982 Pithon Waweru Maina -v- Thuku Mugiria at p.8 where the learned Judge citing Shah -v- Mbogo (1969) E.A 116 said:-

“ This discretion is intended to be exercised to avoid injustice or hardship resulting from accident in advertence, 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 course of justice.”

The record before me shows that the summons to enter appearance were served together with the plaint and Chamber Summons Application. There is an affidavit of service sworn by one Nazario M. Kabutu a process server whose contents have not been disputed. In any case the defendant was at liberty to cause the said process server to be summoned for purposes of cross-examination on the contents of his affidavit.

Further, a copy of the summons to enter appearance has been annexed to the replying affidavit sworn by Muhidhiri Mohammed which clearly show at the reverse that Mr. Rashid Mwakiariari received the same on 18th December, 1999. He signed and stamped the same. How can he now swear on oath that he did not see the same and that he honestly believes that the summons were not served?

The learned counsel for the defendant entered an appearance on 29th December, 1999. If it is true that only the Chamber Summons was served, why did he enter an appearance instead of filing a Notice of appointment of advocate alongside the said appearance.

With profound respect, both deponents of the two affidavits in support of the application should have

been candid enough to admit inadvertence or excusable mistake or error on their part instead of denying what is clearly demonstrable by documentary evidence.

Having found that summons to enter appearance was served and that the defendant actually entered an appearance but failed to file a defence within the prescribed time, I am unable to fault the interlocutory judgment entered on 11th February, 1999 and dated 23rd February, 1999.

Consequently, the defendants application is hereby dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 14th day of March 2000

A. MBOGHOLI MSAGHA

JUDGE