



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL SUIT NO. 347 OF 2011**

**MUTHOKA KYENGO & 2 OTHERS .....PLAINTIFFS**

**VERSUS**

**ATTORNEY GENERAL .....DEFENDANT**

**RULING OF THE COURT**

1. The Notice of Motion application before the Court is dated **11<sup>th</sup> November, 2013**. The application is filed pursuant to **Order 10 Rules 8 and 11, Order 12 Rules 2 and 7** of the **Civil Procedure Rules**. The application seeks the following orders;

- a. That this application be dispensed with on priority basis when the matter is listed on the cause list.*
- b. That the judgment entered on 16<sup>th</sup> October, 2012 be set aside.*
- c. That the ex-parte proceedings heard on 7<sup>th</sup> June, 2012 to be set aside.*
- d. That the defendant be given leave to file its defence out of time.*
- e. That the costs of this application be in the cause.*

2. The application is premised on grounds set out therein, and is supported by the affidavit of **Janet Kung'u** sworn on **11<sup>th</sup> November, 2013**.

3. The applicant's case is that the Senior State Counsel attached to the Attorney General's Chambers who is in conduct of this case on behalf of the defendant/Applicant was allocated this matter on the **3<sup>rd</sup> March, 2013** to handle on behalf of the defendant. Prior to that, the matter was being handled by another State Counsel. The present counsel then prepared the Memorandum of Appearance and Defendant's Statement of defence both dated **13<sup>th</sup> day of May** together with a memo which was forwarded to a clerk to file at the same time to peruse the court and establish the status in the court file, when they established that the file was not in the Court Registry. The clerk was informed that there was judgment in place after the defendant failed to enter appearance and the matter was slated for hearing on **10<sup>th</sup> April, 2013**. The Applicant's case is that the Plaintiff has never sought the leave of the court to enter judgment in default of appearance or pleading nor serve defendant with the application for leave as required by the law. The failure to enter appearance and file defence on time was solely the mistake of the office of the defence counsel and the innocent litigant should not be punished. The defendant has a strong defence that raises serious triable issue, and if the order sought is not granted the defendant will suffer irreparable damage as the plaintiffs will proceed to execute the judgment. The plaintiffs shall not suffer any loss not capable of

being compensated by costs if this application is allowed. The Applicant's case is that in the interest of justice, the orders sought herein ought to be granted.

4. The Applicant submitted that the Notice of hearing of the application was served upon the Respondent's advocate **M/S Nates & Co. Advocates on 15<sup>th</sup> August, 2016** pursuant to affidavit of service filed herein on **21<sup>st</sup> September, 2016**. However, the Respondent, who has never replied to the application, never attended the court.

5. Interlocutory Judgment was entered for the Plaintiff in the sum of **Kshs. 75,000** special damages and general damages was to be subject to formal proof. It is that Interlocutory Judgment that the applicant seeks to have set aside.

6. I have considered the application. The same was served upon the Respondent who has chosen not to respond to the same. Further, in the absence of any such response the application appears merited and I have no reason to deny it.

7. The application is allowed in the following terms;

*a. The Interlocutory Judgment entered herein is hereby set aside.*

*b. The ex-parte proceedings which took place on 7<sup>th</sup> June, 2012 are hereby set aside.*

*c. The defendant is given leave to file its defence out of time and within twenty one (21) days from the date of this ruling.*

*d. Costs to be in the cause.*

Orders accordingly

**DATED AND DELIVERED AT MACHAKOS THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2016.**

**E. OGOLA**

**JUDGE**

**In the presence of:**

No appearance for the parties.

Court Assistant – Mr. Munyao