



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

**AT MOMBASA**

**CIVIL SUIT NO. 159 OF 2012**

**EAGLES SELF HELP GROUP..... PLAINTIFF**

**VERSUS**

**1. BOARD OF TRUSTEES AFRICA INLAND CHURCH**

**2. REVEREND BISHOP JOHN MBUTI.....DEFENDANTS**

**RULING**

Before court is the Notice of Motion dated 3<sup>rd</sup> June, 2013 by which the defendant/applicant seeks *inter alia* the following orders:

**“3. THAT the Honourable Court be pleased to set aside the final judgment herein and/or any other adverse orders and set down the matter for hearing afresh.**

**4. THAT the Honourable Court be pleased to grant the 1<sup>st</sup> defendant leave to Enter Appearance, file and serve a statement of Defence.”**

This application was opposed by way of a Replying Affidavit dated 19<sup>th</sup> June, 2013 sworn by one **MR. ZACHARY MAINA MWANGI** the chairman of the plaintiff/respondent, Eagle Self Help Group (hereinafter referred to as ‘ESHG’). By consent of all parties the application was disposed of by way of written submissions. Both parties did file their respective submissions and ruling was reserved for 26<sup>th</sup> February, 2014. However, due to several intervening factors and due to pressure of work the ruling has been much delayed a fact for which I sincerely apologize.

The basis of this application is a ruling of this court delivered on 16<sup>th</sup> April, 2013. The court found in favour of the plaintiff/respondent in the sum of Kshs. 4.7 million plus interest and costs. A brief background will suffice at this point. The plaintiff/respondent ESHG had loaned to the defendant/applicant a sum of Kshs. 1.0 million to put up stalls for rent at Kongowea market in Mombasa. A repayment plan was agreed upon. The defendant/applicant defaulted in making repayments as agreed. The plaintiff/respondent filed the present suit to recover the arrears due to them. The defendant/applicant did not file any defence to the suit and the matter proceeded for formal proof. After hearing evidence from the plaintiff/respondent the court reserved its judgment for 16<sup>th</sup> April, 2013.

At this point a comedy of errors of sorts took place. Whilst the judgment slated for 16<sup>th</sup> April, 2013 was still pending the defendant/applicant having gotten wind of the existence of this suit filed under certificate

of urgency an application dated 4<sup>th</sup> April, 2013 seeking *inter alia* the following orders

**“3. THAT there be a stay of the judgment scheduled for delivery on the 16<sup>th</sup> of April, 2013 pending the inter-partes hearing and final determination of this application.”**

The matter was certified as urgent and a stay of execution on the judgment scheduled for delivery on 16<sup>th</sup> April, 2013 was granted. Further directions were given that the matter be mentioned on 16<sup>th</sup> April, 2013. On that day the miscellaneous file containing the Notice of Motion was mentioned before **MUYA J** in High Court No. 4 whilst myself sitting in High Court No. 1 with the original file proceeded to deliver the judgment. On 27<sup>th</sup> May, 2013 the plaintiff/respondent extracted decree and warrants for Kshs. 5,513,875. This then moved the defendants/applicants to file this present application seeking to set aside the judgment of 16<sup>th</sup> April, 2013. It must be conceded by all that the proper procedure would have been to stay the ruling scheduled for 16<sup>th</sup> April, 2013 and first hear and determine the defendant/applicant's Notice of Motion of 4<sup>th</sup> April, 2013. Unfortunately due to the reasons enumerated above this did not happen.

This present application seeking the setting aside of the judgment of 16<sup>th</sup> April, 2013 is based on two main grounds

1. That there was no proper service of summons and original plaint on the defendant/applicants. As such their failure to enter appearance and defence was inadvertent and therefore excusable.
2. The defendant/applicant has a defence which raises proper triable issues which defence ought to be considered.

I propose to deal with each of these issues individually.

### **SERVICE OF SUMMONS**

The affidavit of service sworn on 18<sup>th</sup> September, 2012 by one **ALEX PHILLIP NZUKI** a licensed process-server indicates that on 13<sup>th</sup> September, 2012 he served copies of the summons and plaint on one **MR. MWIKYA** the accountant of the defendant/applicant at Kongowea - Kengeleni where the African Inland Church Board is located. The said Mr. Mwikya received the summons and signed on the reverse on 19<sup>th</sup> September, 2012 at 2.30 p.m. The defendant/applicant contends that this service was not proper. They submit that since the registered offices of the AIC are in Nairobi then by virtue of Order 5 Rule 3 of the Civil Procedure Rules, service ought to have been effected in Nairobi. I do not however accept this proposition that service was not proper. Order 5 Rules 7 and 8 require that summons be served on each defendant in person **or upon an agent empowered to accept service**. Mr. Mwikya who was served did receive the summons and signed to acknowledge receipt. I find that in the circumstances there was proper service upon the defendant. It was alleged that service of the summons was not brought to the attention of the 1<sup>st</sup> defendant. Indeed it is alleged that active steps were taken to conceal the existence of the suit from the 1<sup>st</sup> defendant. It is only later when the 2<sup>nd</sup> defendant left office that the suit papers were found. This is the explanation given for the defendants' failure to enter appearance leading to interlocutory judgment against it. Upon discovering the existence of the suit the 1<sup>st</sup> defendant acted immediately by engaging counsel to represent them and by filing the Notice of Motion dated 4<sup>th</sup> April, 2013

### **DOES THE INTENDED DEFENCE RAISE TRIABLE ISSUES**

The defendant/applicant in their Notice of Motion dated 4<sup>th</sup> April, 2013 indicated that they intend to challenge the lease agreement on the basis of fraud as well as on the question of the identities of the parties to the agreement. In order to succeed the defendants would of course be required to tender proof of any such alleged fraud. It must be remembered that in the ordinary course of things this Notice of Motion dated 4<sup>th</sup> April, 2013 ought to have been heard and determined by the court before a judgment

was delivered. The failure to do this cannot in any way be blamed upon the applicant. The problem arose due to some confusion in the court registry. In the case of **SHAH VS. MBOGO** it was held that

**“applying the principle that the court’s discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.....”**

This is a case where excusable mistake and error led to the reading of my judgment on 16<sup>th</sup> April, 2013 when an order of stay had already been sought and obtained against such delivery by the applicant. The applicants had come to court seeking to be heard and they ought not be turned away due to no fault of their own. The mandate of courts is to deliver justice to all parties. I find that the issues raised by the defendant/applicant are crucial matters which can only be determined on a hearing of the case on its merit. As such I am persuaded to and I do hereby set aside my judgment of 16<sup>th</sup> April, 2013 as well as the ex-parte judgment entered against the defendant/applicant. The defendant/applicant is given leave to enter appearance and to file and serve their defence to the suit within seven (7) days of today’s date. Each party to bear its own costs.

**Dated and delivered in Mombasa this 1<sup>st</sup> day of September, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Waithera for Plaintiff/Respondent

Mr.Koech for Defendant/Applicant

Court Clerk Mutisya