

REPUBLIC OF KENYA

High Court at Nakuru

Miscellaneous Application 83 of 1997

KAMUMU

KABIA.....APPLICANT

VERSUS

NYAKINYUA NYAKIAMBI WOMEN

GROUP.....RESPONDENT

RULING

The application dated 4th July 2012 is made under **section 3 and 3A** of the **Civil Procedure Rules**, and seeks that the court do re-issue orders of setting aside judgment as per the application dated 26th February 2001, in the alternative, the application dated 26th February 2001 be set aside for hearing.

It is premised on grounds that the said application was not extracted and the original file cannot be traced to confirm issuance of the orders. The plaintiffs have registered a decree which has been set aside and is now disposing of the suit property.

The background to these prayers is that this suit was filed in 1997 and judgment was entered in default of appearance. However the defendants filed an application dated 26/2/2011 seeking that the exparte proceedings and judgment, plus the resultant decree obtained against the defendant, be set aside and the matter be restored for hearing. The applicant's advocate informed them that the application was allowed as per a letter dated 20/09/2001, and that the plaintiff was granted leave to amend the pleadings within 21 days and serve. These orders were however not extracted. Meanwhile, by a letter dated 16th November 1999, the plaintiff presented a decree for registration and has retained a caution while selling and giving way to the Ministry of Water, for the property.

From what is presented before this court, it is difficult to confirm whether orders setting aside judgment were really issued, or whether counsel for the applicants simply wrote the letter of 20th September so as to be paid his fees. I say this because not a single correspondence exists in the file to demonstrate that inquiries were made immediately after obtaining the said orders, regarding the whereabouts of the file. However I recognise that the Deputy Registrar seemed to be aware that the file could not be traced and allowed for construction of a skeleton file. I don't consider it prudent to re-issue orders whose existence I cannot vouch for. The only way out is for the application dated 26/02/2001 to be served afresh on the Respondents for a date to be taken for hearing. The costs of this application shall be borne by the applicant

Delivered and dated this 9th Day of October, 2012 at Nakuru.

**H.A. OMONDI
JUDGE**