

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 661 of 2008

PETER GAKUNGI KURIA.....PLAINTIFF

VERSUS

JOHN WACHIRA MUGO.....DEFENDANT

RULING

By this application, the Defendant prays for, *inter alia*, orders for a temporary stay of execution of the *ex parte* judgment entered herein; that the said judgment be set aside and the Defendant be allowed to unconditionally defend this claim. The application is made by a Chamber Summons dated 30th March, 2010 and taken out under **Order IXA Rules 10 and 11** of the **Civil Procedure Rules**, and **Section 63(e), 1A and 3A** of the **Civil Procedure Act**.

The application is supported by the annexed affidavit of Johnson Wachira and is based on the grounds that, *inter alia*, the said *ex parte* judgment was obtained irregularly as the summons to enter appearance was never effected on the defendant; there is a pending application to strike out the Plaintiff; the orders and directions issued by the court on 8th July, 2009 have not been complied with; the Defendant has an arguable case, and that the Plaintiff will not suffer any prejudice if the judgment is set aside.

After considering the pleadings and the submissions of the rival parties, I hasten to observe that this application is made under **Order IXA Rules 10 and 11** of the **Civil Procedure Rules**. **Rule 11** in particular gives the court a wide discretion to set aside any judgment entered under this order and any consequential decree upon such terms as are just. Although the rule does not set out the circumstances which ought to be considered in the exercise of that discretion, the Applicant contends that the judgment herein was entered irregularly as the summons to enter appearance was never served on the Defendant. Furthermore, there is on record an order of the court made on 8th July, 2009 consolidating this case with **HCCC No. 23 of 2008**. It was therefore premature to request for final judgment in this matter two weeks after that order for consolidation.

In the draft defence which is attached to the application, I note that the Defendant raises an issue of the suit being *res judicata*. I think that it is imperative for such an issue to be allowed to be ventilated because if it succeeds, it has the potential to have the case struck out altogether.

For these reasons, I find that the application is merited. Prayers (2), (3) and (5) of the application by Chamber summons dated 30th March, 2010 are accordingly granted as prayed. Costs in the cause.

L. NJAGI
JUDGE

DATED and DELIVERED at NAIROBI this 5th day of November, 2012.

ODUNGA
JUDGE