

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1376 OF 1995

AHMED MEERA SHIAB DEEN.....PLAINTIFF

versus

MARY WANGUI.....DEFENDANT

RULING

The defendant/applicant has moved the court by way of Chamber Summons under Order 9A Rule 10 of the Civil Procedure Rules for an order that the ex-parte judgment entered in default of defence on 19th March, 1996 be set aside and that she be allowed to file a defence.

The said application is supported by an affidavit sworn by the counsel for the defendant/applicant to which grounds of objection and affidavit in reply have been filed on behalf of the plaintiff/respondent.

The reasons given for failing to file a defence appear in the affidavit of the learned counsel for the defendant/applicant. It was the mistake of the advocates clerk who was given the documents to file but failed to do so. The mistake of an advocate's clerk is that of the advocate concerned and I note that counsel has not disowned the clerk save that he has left the firm and his whereabouts are unknown. This court has an unfettered discretion to set aside or not the judgment on record. See Joseph Ngunje Waweru - v- Joel Wilfred Ndiga (1982-88) 1 KAR 210. The defendant has annexed the intended defence. I raise triable issues. Further the mistake of the advocate's clerk or the advocate as the case may be should not be visited upon the litigant.

The circumstances of this case have persuaded me to give orders in favour of the defendant/applicant, considering also that the subject matter herein is immovable property.

In the end the application hereby succeeds. The judgment is set aside. The defendant shall file and serve a defence within 14 days of today. The plaintiff respondent shall have the costs occasioned by this application. Orders accordingly.

Dated and delivered at Nairobi this 24th day of March, 1998.

A. MBOGHOLI MSAGHA

JUDGE