

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2395 OF 1996

TRANS - NATIONAL FINANCE CO.....PLAINTIFF

-versus-

YABESH OMESA MOGALA.....DEFENDANT

R U L I N G

On 12th March 1998, Hayanga J granted the plaintiff's application for summary judgment "in default of attendance by defendant".

The defendant has now moved the court for an order that the orders made on 12th March, 1998 be set aside and vacated and the application be heard inter-partes. The defendant's application is supported by an affidavit sworn by the learned counsel for the defendant. It is brought under Order 50 Rule 1 and Order 35 Rule 10 of the Civil Procedure Rules. The application is opposed and grounds of objection have been filed.

While order 35 Rule 10 provides for the setting aside of a judgment entered under that order, procedure is not provided. Order 50 is therefore applicable. The defendant's application is by way of Chamber Summons. It is a requirement for Order 50 Rule 7 that the grounds of the application shall be stated generally in the summons. The application before me does not comply with that provision. That omission is fatal - see C.A No. 211 of 1996 - National Bank of Kenya -v- Ndungu Njau.

Notwithstanding the finding that the omission was fatal, the court of Appeal in the Njau case asked counsel to argue the application. That was "in the broad interest of justice." I believe the same principle should be applied here.

I have looked at the affidavit. The plaintiff's application was allowed ex-parte. It was not on merits. The learned counsel for the defendant has explained the reasons for her absence when the matter was called out. They sound convincing and above all, the mistake of counsel should not be visited on the litigant especially where the latter has not contributed to the said mistake.

In the broad interest of justice I allow the application and set aside the order of 12th March, 1998 and all consequential orders therefrom. The application for summary judgment shall be listed for hearing on a date mutually convenient to both counsel. The defendant shall however pay the costs occasioned by this application.

Orders accordingly.

Dated and delivered at Nairobi this 12th day of April, 1998.

A. MBOGHOLI MSAGHA

JUDGE