

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO 235 OF 1995

KENINDIA ASSURANCE COMPANY LTDPLAINTIFF

VERSUS

BHAI O M AL-AMIN.....DEFENDANT

RULING

The Defendant seeks to set aside an ex-parte judgement entered against him in default of appearance. He does not deny that he was served with summons to enter appearance but failed to do so. His excuse for the default is that the Plaintiff's Advocate also happened to be his own advocate and that he was made to believe by the said Advocate that no action would be taken against him and that he should find ways of settling the matter. He also says he has a good defence and a sound set-off against the said Advocate. This application is opposed by the Plaintiff. The Advocate who is alleged to have misled the Defendant has deponed that there was no communication between him and the Defendant until after the Defendant's goods were attached in execution of the ex parte decree. The said Advocate has also deponed at length that the Defendant has no arguable defence on the merits.

This court has an unfettered discretion to set aside an ex parte judgement. The discretion must however be exercised judicially in the best interests of even handed justice. The discretion exists in order that justice may not be sacrificed as a result of inadvertence or accidental slip or excusable mistake particularly where the Applicant has an arguable defence on the merits. The discretion is not to be exercised to assist a party who seeks to delay or obstruct the course justice.

Applying those principles to the facts here, I say that although I am unable to decide on the basis contradictory affidavit evidence whether the Defendant was misled by the Plaintiff's Advocate as alleged, I am of the view that such excuse is a poor one and if true entitles the Defendant to a remedy against the said Advocate. And as regards the possible defence on the merits, suffice it to say that on the material before me I find the proposition that Defendant has a good defence untenable. Even his alleged set off is not against the Plaintiff but against the Plaintiff's Advocate. On the whole, I am of the view that this application merely seeks to delay the course of justice. I dismiss it with costs to the Plaintiff.

Dated and delivered at Mombasa this November 28, 1995

A.G RINGERA

JUDGE