

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 96 OF 1992

MUNICIPAL COUNCIL OF MERU.....APPELLANT

VERSUS

HARRIET N. MARIENE.....RESPONDENT

**(From the original decision in Civil Suit No 264 of 1992 of the Resident Magistrate's Court at Meru
– JE Ashioya Esq RM)**

JUDGMENT

By plaint dated 27th May, 1992 the respondent sued the appellant in the court below claiming Shs 57,074/-. Service was effected on the appellant's Town Clerk on 28th May, 1992 at 10.30 am. No appearance or defence was filed and on 15th June, 1992 an interlocutory judgment was entered for the respondent against the appellant.

The matter came up for formal proof on 1st July, 1992 but was adjourned as it appeared that counsel for appellant had filed an application dated 29th June, 1992 seeking to set aside the *ex parte* judgment. The learned magistrate listened pensively to the reasons adduced why no appearance or defence were filed. One of them was difficulties in tracing the file in time.

Delivering his ruling on 22nd July, 1992 the learned magistrate considered all the submissions made before him with utmost care. He considered whether the appellant had a defence on merit and the reasons for the delay in filing the defence. He found no good reasons for setting aside the *ex parte* judgment.

The learned magistrate was faced with an exercise of discretionary power. I echo the words of Lord Mansfield in *Ret v Wilkes* (1770) 4 Burr 2527:

“A discretion when applied to a Court of justice means sound discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague and fanciful, but legal and regular.”

Nearer to home it has also been held that a Court on appeal will not interfere with the exercise of a discretion on an application for setting aside summary judgment unless the exercise was wrong in principle or the judge acted perversely on the facts, and that a mere denial is not a sufficient defence – *Mugunga General Stores v Pepco Distributors Ltd* 2 KAR 89.

The learned magistrate in the exercise of his discretion considered the issues before him meticulously. He enunciated correct principles and properly evaluated whatever material had been placed before him.

I am unable to find any fault with the reasoning of the learned magistrate. I am satisfied he correctly exercised his discretion according to law.

For these reasons I dismiss this appeal with costs. The rate of interest was similarly within his discretion.

Dated and Delivered at Meru this 7th day of December 1994.

H.I.ONG'UDI

JUDGE