**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 1079 OF 1980**

**SAMMY MAINA..............................................................................PLAINTIFF**

**VERSUS**

**STEPHEN MURIUKI...........................................................RESPONDENT**

**RULING**

This is an application to set aside *ex parte* judgment dated June 30, 1983 and stay of execution of the decree herein. The application is supported by the sworn affidavit of Stephen Muriuki the defendant/applicant.

The plaintiff in this suit, Sammy Maina, filed a suit seeking judgment against the defendant/applicant for special damages amounting to Kshs 28,823.80, damages for trespass, costs of the suit and the usual interest at court rates. The plaint was filed in this court on April 18, 1980. A written statement of defence was filed in this court on May 30, 1980. After the usual application and adjournments the suit was finally set down for hearing on June 29, 1983. Hearing date was fixed by consent of both parties and their counsel. However, on June 29, the plaintiff and his advocate were present in court while the defendant and his advocate were absent. The suit then proceeded to hearing *ex parte*. The court was perfectly entitled to proceed *ex parte* under order IXB rule 3 of the Civil Procedure Rules which provides:

"3. If on the day fixed for hearing, after the suit has been called on for hearing outside the court only, the plaintiff attends, if the court is satisfied:

(a) That notice of hearing was duly served it may proceed *ex parte*;

(b) That notice of hearing was not duly served it shall direct a second notice to be served;

(c) That notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing".

As the suit proceeded *ex parte* an *ex parte* judgment was then delivered on June 30, 1983. It is that *ex parte* judgment that the defendant/applicant is seeking to set aside. He is of course perfectly entitled to make such an application under order IXB r 8 of the Civil Procedure Rules which provides:

"8. Where judgment has been entered under this order the court, on application by summons may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

Hence the court has discretion to set aside the *ex parte* judgment on such terms as are just. The power to

set aside the judgment does not cease to apply because a decree has been extracted (see *Fort Hall Bakery Supply Company v Frederick Muigai Wangoe* [1958] EA 118).

The court has a very wide discretion and there are no limits and restrictions on the discretion of the judge except that if the judgment is set aside or varied it must be done on terms that are just. I would add that before the court can set aside the judgment it must be satisfied there is a valid defence. In the present suit a defence was filed and even third party notice issued and a defence filed by the third party. This discretion for setting aside judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice (see *Shah v Mbogo & Another* [1967] EA 116 at page 123 by Harris J and as approved by the Court of Appeal for East Africa in *Mbogo v Shah* [1968] EA 93).

In *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at page 76, Sir William Duffus P held:

"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a *prima facie* defence and which should go to trial for adjudication."

As I have already stated in this suit there was a valid defence and nobody has suggested that the defence filed was a sham. What happened was that the applicant did not turn up on the day of the hearing. His advocate also failed to turn up. He (the applicant) says that he was not aware that the suit was to proceed and that he was relying on his advocate. Hence the applicant/ defendant should not be penalised due to his advocate's faults (see *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48).

There is also a decision of the late Sheridan J in the High Court of Uganda in *Sebei District Administration v Gasyali* (1968) EA 300 in which he adopted some wise words of Ainley J (as he then was) in the same court in *Jamnadass v Sodha v Gordandas Hemraj* (1952) 7 ULR II namely:

"The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court".

Having considered the explanation given by the defendant/applicant for his failure to attend court on the date set for hearing of this suit and bearing in mind the fact that the applicant is an illiterate person and in a bid to afford opportunity to all parties to state their case, I now allow this application and order that the *ex parte* judgment of this court dated June 30, 1983 be and is hereby set aside but the defendant/applicant is ordered to pay forthwith to the plaintiff/respondent all the costs occasioned by this application. Order accordingly.

**Dated and Delivered at Nairobi this 14th day of March 1984.**

**E.O.O'KUBASU**

**JUDGE**