IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Potter, Kneller JJA & Chesoni Ag JA)

CIVIL APPEAL NO 27 OF 1982

BETWEEN

PITHON WAWERU MAINA...APPELLANT

AND

THUKU MUGIRIA...RESPONDENT

JUDGMENT

This is another case concerning the exercise of the judicial discretion under order IXA, rules 10 and 11 and under order IXB rule 8 (which are in the same terms) of the Civil Procedure (Revised) Rules 1948, to set aside an *ex parte* judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing. As regards the exercise of that discretion, certain principles are now well established in our law.

Firstly, as was stated by Duffus P in *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E:

> "There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... 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."

Secondly, as Harris J said in *Shah v Mbogo* [1967] EA 116 at 123B:

> "This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

That judgment was approved by the Court of Appeal in *Mbogo v Shah* [1968] EA 93. And in *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48 Briggs JA said at 51:

> "I consider that under order IX rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner

in which the discretion should be exercised.”

Thirdly:

> “ … a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

See per Newbold P in *Mbogo v Shah* [1968] EA 93 at 96 G.

The facts are simple enough. In January 1978, the respondent filed a plaint in the resident magistrate’s court at Murang’a seeking the eviction of the appellant from a parcel of land of which the plaintiff was by then the registered proprietor. In February 1978 the appellant filed a defence in which he admitted that the suit land was currently registered in the name of the plaintiff. But he alleged that the land was, prior to the transfer to the plaintiff, registered in the name of one Mukuhi Kamau, and he further alleged that by agreement with Kamau he went into occupation of the land in 1964, and had completed the purchase of the land in 1964, but that Kamau refused to transfer the land to him. On October 6, 1978, the defendant and his advocate being absent, the case was set down *ex parte* for hearing on March 29, 1979 by the resident magistrate. On March 29, 1979 the plaintiff and his advocate were present, but neither the defendant nor his advocate were present, and after proof that hearing notice had been served the learned resident magistrate proceeded to hear the case *ex parte* and gave judgment for the plaintiff/respondent. On May 10, 1979 the defendant’s advocate filed a summons for the setting aside of the *ex parte* judgment and filed an affidavit in support. In that affidavit the advocate explained that he had received instructions from the defendant and consequently filed a defence on his behalf and that he was served with the hearing notice on January 5, 1979 that the case was fixed for hearing on March 29, 1979. It does not appear that the advocate informed his client of the hearing date. He further deponed that on March 29, 1979 he was engaged in another hearing in the High Court which had been fixed earlier and that he could not therefore attend the magistrate’s court in Murang’a. On the morning of March 29, he wrote a letter which was filed in the court the same morning requesting that the case be adjourned, that it was copied to the plaintiff’s advocate. A copy of the letter was annexed to the affidavit. Following the letter he made a telephone call to the court and spoke to a court clerk who assured him that he would pass on the message to the magistrate. After a few days he telephoned the court and was told that *ex parte* judgment had been entered against the defendant.

It is evident that the learned resident magistrate was not made aware of this letter when he was sitting at 11.15 am. The facts deponed in this affidavit have not been challenged.

When the summons to set aside was heard on August 2, 1979 by the resident magistrate the record shows that the plaintiff was present as was his advocate. The defendant was present but not his advocate. The learned magistrate’s record is then as follows:

> “Defendant: I bought the piece of land. Order: Affidavit of defendant’s advocate is not satisfactory as it does not contain sufficient reasons to set aside the *ex parte* judgment in this case. Even today the counsel for the defendant is absent. This application is dismissed with costs.”

The defendant appealed to the High Court and the appeal was heard on March 13, 1981. The appeal was dismissed.

The learned judge’s reasons would appear to be set out in the last paragraph of his judgment, which is as follows:

> “The memorandum of appeal attacked the learned trial magistrate’s decisions outlined above. Procedurally however I cannot find any error on the part of the learned trial magistrate. He was entitled to proceed as he did after satisfying himself that the hearing notice was served and that

> neither the learned counsel for the defendant nor the defendant himself attended court when the application to set aside the *ex parte* judgment was for hearing. In the result I dismiss this appeal with costs."

There the learned judge misdirected himself. It is clear from the record that the defendant was present in person for the hearing of the summons to set aside and that the defendant spoke and stated the essence of his defence, namely "I bought the piece of land." In my view the learned judge considered the appeal on the footing that, as the defendant and his advocate had not attended the original hearing or their own application to set aside the *ex parte* judgment, the learned resident magistrate had no alternative but to have proceeded as he did. Had the learned judge not made this error of fact I think that he would have considered the decision of the resident magistrate in a different light. It appears clearly from the resident magistrate's record that he acted entirely upon what he thought to be the inadequacy of the defendant's advocate's affidavit. The resident magistrate evidently did not consider the defence nor did he take any notice of the defendant when he said "I bought the piece of land." In my view, if the learned resident magistrate had not felt able to examine the justice of the defendant's application and whether there was a triable issue by questioning the defendant and examining the pleadings, he should have at least offered the defendant the opportunity of an adjournment, subject to being penalised in costs of course, so that the matter could be properly reviewed.

In my view, applying the legal principles which are summarised above, the resident magistrate was wrong in refusing to set aside the *ex parte* judgment, and the learned judge was wrong in not allowing the appeal. Accordingly, I would allow this appeal with costs in this court and in the High Court and in the resident magistrate's court, but not the costs of the *ex parte* hearing before the resident magistrate on March 29, 1979. I would set aside the decision of the High Court and the resident magistrate; I would set aside the *ex parte* judgment in favour of the respondent and I would order that the case be remitted to the Senior Resident Magistrate at Murang'a to be dealt with in accordance of the provisions of the Magistrate's Jurisdiction (Amendment) Act, No 14 of 1981.

As Kneller JA and Chesoni Ag JA agree, this appeal will be allowed and the order will be as stated by me above.

Mr Bhasker Sheth, who appeared for the appellant, objected to the appearance of Mr Muraguri for the respondent, on the ground that Mr Muraguri had not complied with rule 78(1) of the Rules of this court, in that no notice of address for service had been lodged in the registry or served on the appellant as required by that rule. In my view the appropriate way to deal with a submission of this kind is to allow the offending party an extension of time in which to comply with the rule subject to a penalty in costs where appropriate. As in this case no prejudice has been caused, and as we have found against the respondent, no further action is necessary.

Kneller JA. Pithon Waweru Maina, the appellant, asks this court to reverse the decision of the High Court (Masime J) in Nairobi, set aside the judgment of the Murang'a resident magistrate, order the suit to go forward for trial in an appropriate subordinate court or refer the issues to the clan elders for arbitration and award all the costs of this litigation to him.

Thuku Mugiria, the respondent, on the contrary, asks this court to uphold the result which the learned judge reached in the High Court. On

October 26, 1981 Masime J dismissed the appellant's first appeal from the decision of the resident magistrate with costs. He said the facts in the matter before him were very simple. The same parties were the defendant and plaintiff, respectively, in the court of the resident magistrate and the respondent obtained a hearing date from the magistrate's clerks and served a hearing notice upon the advocate for the appellant who never told the appellant about it. On the day itself the advocate was engaged in a matter before the High Court and he did not attend the hearing of the action in the court of the resident magistrate and nor did the appellant.

The advocate wrote a letter to the magistrate asking for the appeal to be adjourned to another date because

he was appearing for someone in the High Court but the magistrate did not read this letter because it was not shown to him and, instead, he called upon the advocate for the respondent to call his witness. The respondent testified and the magistrate delivered what he called a ruling declaring that he believed the respondent and found that he had proved his claim against the appellant on the balance of probabilities so he gave judgment for the respondent with costs. This was on March 29, 1979.

The appellant and his advocate made an application to the magistrate by summons in chambers under order IXA rule 10 of the Civil Procedure Rules asking him to set aside the judgment which he had entered against the appellant on March 29, 1979 and make some suitable order about the costs of the application. It was accompanied by an affidavit of the advocate whom the appellant had employed and in which he endeavoured to explain why he and the appellant were not present in the court when the action was called for hearing.

Now when this application was heard on August 2, 1979, the respondent and his advocate were present and so was the appellant but again his advocate was not there. The magistrate seems to have asked the appellant what he had to say in support of the application and the appellant dealt with the merits of his case rather than the application. He said "I bought the piece of land". The magistrate thought the affidavit of the appellant's advocate was unsatisfactory because it did not have sufficient reason for setting aside the judgment against the appellant. He did not mention the appellant's contribution. He noted that the advocate was absent even when he was supposed to be applying for the judgment to be set aside.

The learned judge said he could not find any error on the part of the learned trial magistrate who was entitled to proceed in the manner in which he had after he had made sure that the hearing notice had been served.

He observed that the appellant and his advocate had not been in court for the application to set aside the judgment.

Pausing there for a moment, it is not clear which hearing notice the learned judge is referring to and he made a mistake when he wrote that the appellant was not before the resident magistrate when the application to set aside the judgment was heard because the record shows that he was and he made a submission of sorts.

Returning now to the facts behind this appeal, I come to the pleadings in the suit in the court of the resident magistrate and they are a plaint filed by the respondent on January 14, 1978 and the written statement of defence of the appellant which is dated February 24, the same year.

The parties live in Kiawambogo which is in Location 19, Kangema Division of Murang'a District. The respondent claims he is registered proprietor of a parcel of land Location 19/Kiawambogo/852 and the appellant admits this is true. The respondent alleged that in 1976, the appellant, without cause, entered upon this land and remained there without his consent and although he has been asked to go, and notice of intention to sue has been given to him, the appellant refuses or neglects to leave the respondent's parcel. Consequently, the respondent asked for judgment against the appellant in the form of an eviction order and the costs, and interest on the costs, for having to bring this into court.

The appellant claims that the same land was registered in the name of Mukui Kamau who allowed the appellant entry upon it in 1964 (which is twelve years before the respondent says the appellant trespassed on this land) and the appellant goes on to say that he has lived on it ever since, put up a house on it and planted tea there.

He then has a paragraph alleging he purchased this land in 1964 but the plaintiff refused to transfer it to him and I think that when he used the word plaintiff in that paragraph he does not mean the present respondent but, instead, Mukui Kamau.

The appellant goes on to say that Mukui Kamau transferred the same land to the respondent in 1976, although he had already sold the same to the appellant twelve years before, but the appellant is in

occupation of the land.

He concludes his defence by saying that he is going to claim that the respondent now holds the land in trust and for the use of the appellant and he asks the magistrate to dismiss the respondent's suit with costs.

It may seem from all this that the pleadings were drafted by the parties themselves but in fact they were drawn and filed by advocates.

Attached to one or either of these plaints is a photocopy of an abstract of the title to this parcel in the land registry. It is about 1.9 hectares in area and there is an entry with the name of Mukui Kamau as proprietor on May 29, 1963 which seems to support the appellant's written statement of defence. On July 1, 1974 the appellant registered a caution claiming a purchaser's interest. Then on October 1, 1976 there is an application to remove this which is effected on October 19 and then the proprietor's name is Mukui Mutura (not Mukui Kamau) but it is cancelled and replaced by that of the respondent and the consideration for the transfer is put down as Kshs 1,150.

The issues in this suit, if the matter had been heard, would have included whether or not Mukui Kamau sold this land to the appellant in 1964, whether or not consent to this transaction was necessary and, if it were, was it obtained, did Mukui Kamau transfer it to the appellant and, again, was consent necessary and, if so, was it obtained?

There is also an affidavit of the advocate briefed on behalf of the appellant dated July 25, 1979 for consideration. He reveals that he is a partner in a firm of advocates and that he had notice of the hearing date of the suit as early as January 5, 1979. He was in another hearing on March 29, 1979 in the High Court, which is a superior court to that of the magistrate, and the hearing in the High Court had been fixed before that in the court of the resident magistrate. Yet, it was not until the morning of March 29, that he wrote the letter to the magistrate, and copied it to the advocates for the respondent, asking for the hearing to be adjourned to another date which would suit both advocates. The letter is exhibited to the affidavits and it really adds nothing one way or another. He swears he made a telephone call to someone called Nyoike at the court who said he would pass the telephone message to the magistrate which would relay the reason for the absence of the advocate for the appellant.

The advocate went on with the hearing in the High Court and a few days later he telephoned the magistrate's clerk who told him that judgment had been entered against the appellant.

There is no explanation in the affidavit or given to the magistrate or the judge later as to why another partner in the firm could not do this rather simple defence for the appellant or why it took three months for the firm to realise that the hearing date in the magistrate's court clashed with that in the High Court if they only have one partner to deal with litigation.

When the appeal came on before the learned judge on March 13, 1981, the appellant had a third advocate and the respondent had been faithful to the one he chose at the beginning. The submissions for the appellant were that it was not his fault but that of his first and second advocates that he was not before the magistrate when the case was heard and one advocate wrote this letter to the magistrate before the hearing of the summons in chambers asking for the judgment in default to be set aside which asked for it to be adjourned.

Some of the arguments we heard included the effect of the learned judge misdirecting himself when he said that the appellant, as well as his advocate, was absent from the hearing of the summons to set aside the judgment and his failure to take into account the letter from the appellant's advocate to the magistrate explaining why he could not be at the hearing of the suit and asking for an adjournment. The submission of the appellant when he was present in the court of the resident magistrate for the summons asking for the judgment to be set aside reveals he was not told what the application was all about and so all he said was Mukui Kamau sold him the same land before he sold it to the respondent. Another point is whether or not it was right for the magistrate and or the learned judge to punish the appellant because his advocate was offhand or lax in any way?

There is a reference to another High Court Suit 772 of 1981 begun by way of originating summons which is between the same parties in which there is a claim for the same land by the appellant asking for registration as its owner. It is based on adverse possession and it has not been heard.

Now, taking this in stages, it is clear that the resident magistrate was right to call upon the respondent and his advocate to begin their case when he made sure that the date of the hearing was known to the other side and the appellant and his advocate were not there. This is a matter for the discretion of the court and there is enough material here on which it could be found that the magistrate had exercised his discretion correctly. Order IXB rule 3.

When it comes to the summons in chambers asking for the judgment to be set aside the learned magistrate had to exercise another discretion. Order IXB rule 8 (and not order IXA rule 10).

What is the law about this? Order IXB rule 8 is in these terms:

> "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 may be just."

The former relevant order and rules were order IX rules 10 and 24.

The court has no discretion where it appears there has been no proper service; *Kanji Naran v Velji Ramji* (1954) 21 EACA 20: and the power to set aside the judgment does not cease to apply because a decree has been extracted: *Fort Hall Bakery Supply Company v Frederick Muigai Wangoe* [1958] EA 118.

The court has a very wide discretion under the order and rule and there are limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: *Patel v EA Cargo Handling Services Ltd* [1974] EA 75, 76 BC.

This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: *Shah v Mbogo* [1969] EA 116,123 BC Harris J.

The matters which should be considered, when an application is made, were set out by Harris J in *Jesse Kimani v McConnel* [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been *ex parte* and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in *Mbogo v Shah* [1968] EA 93, 95 F.

There is also a decision of the late Sheridan J in the High Court of Uganda in *Sebei District Administration v Gasyali* [1968] EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in *Jamnadas Sodha v Gordandas Hemraj* (1952) 7 ULR 7 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."

And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainslie in *Smith v Middleton* [1972] SC 30:

> "... in a selective and discriminatory manner, not arbitrarily or idiosyncratically," f

or otherwise, as Lord Diplock said in his speech in *Cookson v Knowles* [1979] AC 556:

> "...the parties would become dependent on judicial whim..."

So the magistrate should have recalled these points. The respondent has a judgment which was not obtained by consent or as the consequence of a trial. The nature of the action is one that concerns land and who purchased it first and whether or not consent of the local Land Control Board to the transaction was necessary and obtained by either of them and, altogether, it is not a trivial matter. A defence was before the court in time which was not dealt with at the trial. The respondent could have been compensated by costs for the delay occasioned by his advocate's dilatoriness and the appellant should not have been denied a hearing because of his advocate's mistake even if it amounted to negligence, in the circumstances of this case. *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48,51 and Hancox J (as he then was) in *Gurcharan Singh s/o Kesar Singh v Khudadad Khan t/a Khudadad Construction Company* Nairobi HCCC 1547 of 1969.

The magistrate did not take these matters into consideration when he exercised his discretion. So the learned judge was entitled to interfere with the decision of the magistrate although it was a discretionary one. See Brandon LJ in *The El Amria* [1981] 2 Lloyd's Rep 539.

This is a second appeal so only a point of law may be taken. Section 72 Civil Procedure Act. If the High Court has upheld a resident magistrate on a question of whether or not he exercised his discretion judicially it is a question of law whether he was right or wrong to do so.

The learned judge did not, with respect, refer to the matters which, on the authorities, the magistrate should have considered but failed to do so, he took into account his advocate's mistake, which was in the circumstances irrelevant, and he erred when he upheld the magistrate.

The appellant's advocate served the memorandum of appeal on the advocates for the respondent and set out their correct address on it. The advocates for the respondent did not give a full and sufficient address for service to the registry or the appellant as rule 87 of the Court of Appeal Rules requires him to do. The consequence caused the appellant no prejudice and the point should not have been taken by the appellant's advocate.

Accordingly, in my judgment, this appeal should be allowed with costs in this court and the other two courts, after March 29, 1979. It follows that the decision of the High Court should be reversed, the judgment of the Murang'a resident magistrate must be set aside and the suit sent back to him to deal with in accordance with section 9 of the Magistrates' Jurisdiction (Amendment) Act (No 14 of 1981).

Chesoni Ag JA. I fully agree with the draft judgments of Potter and Kneller JJA which I have had the opportunity of reading.

The respondent sued the appellant in the resident magistrate's court at Murang'a for eviction, from the respondent's land. The appellant was represented by the firm of Munoru and Njugi Advocates. On the date fixed for hearing counsel for the appellant did not attend court and although he had written to the court giving reasons for his absence, the letter was not placed before the trial magistrate before the hearing. The suit was heard *ex parte* and judgment pronounced against the appellant.

The application to set aside the *ex parte* judgment was made under order IXA rule 10 which deals with *ex parte* judgment entered in default to enter appearance or file a defence. The *ex parte* judgment in this case was entered under order IXB rule 3 for non-attendance in court by the defendant. The application to set aside the judgment should therefore have been made under order IXB rule 8 and the application was heard on that assumption. The appellant's counsel, Mr Timan Njugi, swore an affidavit in support of the application and stated that he wrote to court on March 29, 1979, the hearing day, and explained that he was engaged in another case in the High Court. He also spoke to a Mr Nyoike on the telephone on the same day explained to him his difficulty in attending court on March 29, 1979 and Mr Nyoike promised to pass on the message to the resident magistrate. Mr Njugi did not say who this Nyoike was. Be that as it

may, the application was dismissed by the resident magistrate; an appeal to the High Court was also dismissed by Masime J. This second appeal is from the order of the High Court and it is based on seven grounds. It is worth mentioning that the appellant's counsel again was absent on the day of hearing the application for setting aside the *ex parte* judgment, but the appellant was present in court on August 2, 1982. Whether or not the appellant attended the resident magistrate's court on August 2, 1982, may not of itself be a strong ground for setting aside the *ex parte* judgment since the case was conducted by an advocate and change of advocates' notice was not filed under rule 6 of order III of the Civil Procedure Rules.

The appeal before the learned judge was against the resident magistrate's refusal to set aside his *ex parte* judgment of March 29, 1979. In his judgment the judge said:

> "He was entitled to proceed as he did after satisfying himself that the hearing notice was served and that neither the learned counsel for the defendant nor the defendant himself attended court when the application to set aside the *ex parte* judgment was for hearing."

The resident magistrate's court's record of August 2, 1979 shows that the appellant who was the defendant attended court on that day for hearing the application to set aside *ex parte* judgment, and, even addressed the court when he said "I bought the piece of land." It is, in the circumstances, apparent that the learned judge misdirected himself on that point as alleged in the first ground of appeal. Had the judge appreciated the fact that the appellant was in court on August 2, 1979 and told the court what he said, the judge might have considered whether or not the resident magistrate should have inquired into the appellant's defence and whether any triable issues were raised and in the result seriously considered further whether the *ex parte* judgment should not have been set aside. As to the second ground, even if the letter of March 29, 1979 had been placed before the resident magistrate, it was a matter for the court's discretion whether or not the case was to proceed *ex parte* or be adjourned. But it may be said that the fact that Mr Njugi was appearing in the High Court might have solicited an adjournment. The failure by the appellant's counsel to inform the appellant about the hearing date on March 29, 1979 was a matter between the appellant and his counsel, but had the appellant known of that date he possibly would have attended court and changed the course of events on March 29, 1979. It also showed that the appellant's absence on March 29, 1979 was not deliberate.

Mr Bhasker Sheth who appeared for the appellant in this appeal relied on the cases of *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48 and *Gurcharan Singh s/o Nesar Singh v Khudadad Khan t/a Khudadad Construction Co* HCCA No 1547 of 1969. Shabir was decided under the old order IX whereas this application is under the new order IXB rule 8 of the Civil Procedure Rules. The old rule required the applicant for setting aside an *ex parte* judgment to satisfy the court that there was sufficient cause for non-appearance. But even then in the *Shabir* case it was held that:

> "the mistake or misunderstanding of the plaintiff's legal adviser, even though negligent, may be accepted as a proper ground for granting relief under order IX rule 20 ... the discretion of the court being perfectly free and the words 'sufficient cause' not being comparable or synonymous with 'special grounds'. Whether the grounds for granting relief will be accepted, depends on the facts of the particular case, it being neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."

Rule 8 of the order IXB reads as follows:

> "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."

The court's discretion is now much wider than when *Shabir* was decided. In *Gurcharan Singh* (supra) Hancox J (as he then was) agreed that the advocate's mistake (or that of his clerk) should not weigh unduly, and in my view that should be the correct approach to an application of this nature. As I said in Eldoret HCC Appeal 14 of 1980 (*The Municipal Council of Eldoret v James Nyakeno*):

> "the court goes by the principle that such an *ex parte* judgment having been entered neither upon merits of the case nor by consent of the parties is subject to the court's power of revocation at its discretion."

It is unfortunate that advocates' sins and omissions are sometimes visited on their clients, who are left without the remedy they sought, but to sue the advocate for professional negligence but where a litigant shows that his default has been due to the party's advocate's mistake in an application of this nature, unless injustice would be occasioned the other party the court should consider the applicant's case with broad understanding.

Although in the *Municipal Council of Eldoret* case I said that it should be borne in mind that a judgment entered by the court against a party for failure to observe a rule of procedure is an expression of the court's coercive power intended to cause the defaulting party to follow the particular rule of procedure, I cannot say that the learned judge by dismissing the first appeal did so as a penalty to the appellant. All the same once the appellant had expressed willingness to follow the rule of procedure and subject to the facts and circumstances of this case, he should have been given a chance to correct his default. As to the seventh ground the appellant was given an opportunity of being heard when the case came up for hearing on March 29, 1979 and at the application to set aside the *ex parte* judgment on August 2, 1982, but on the first occasion he failed to utilise the opportunity through his counsel. On the second occasion he said something, but it may be said that had the resident magistrate fully explained to the appellant what was going on August 2, 1982 and asked him how he wished to conduct his application, the appellant might have chosen to argue the application on August 2, 1982, and one cannot say what the court's view would have been after fully hearing the appellant.

It was not a question of being denied the opportunity to be heard, but his case being properly presented and considered as it should have been. The appellant may not have appreciated the difference between the case and the application of August 2, 1982.

Before Mr Muraguri for the respondent addressed us, Mr Bhasker Sheth raised an objection whether Mr Muraguri was properly before the court since he had not complied with rule 78(1)(a) of the Rules of this Court. The rule provided as follows:

> "78(1) Every person on whom a notice of appeal is served shall:
> (a) within fourteen days after service on him of the notice of appeal lodge in the appropriate registry and serve on the intended appellant notice of a full and sufficient address for service."

The notice is to be in the Form E in the first schedule to the Rules and according to that form service is to be effected by the court. It is difficult to see the purpose of this rule where there has been no change of advocates in a case where parties have been represented in the lower court. Mr Muraguri admitted that his firm had not complied with rule 78(1)(a) but contended that the respondent's address remained the same as it was in the resident magistrate's court and the High Court and no purpose would have been accomplished by serving on the appellant a notice under the rule. I, notwithstanding the provision of the rule, agree with Mr Muraguri's observation more so in the light of order III rule 6 which provides that unless a change of advocates' notice has been filed, the parties' advocates on the record remain the same until the conclusion of the suit including review and appeal. We allowed Mr Muraguri to address us *de bene esse*.

The failure to comply with rule 78(1)(a) has caused no injustice to the appellant. If it had been necessary to comply with the rule in this case, this could be done by granting the defaulting party leave to comply with the rule upon a suitable order for costs occasioned by the omission. I would, for the aforegoing reasons, allow the appeal, set aside the High Court and resident magistrate's court orders, set aside the *ex parte* judgment entered on March 29, 1979 and remit this case to the resident magistrate's court at Murang'a for that court to take action under the Magistrates' Jurisdiction (Amendment) Act, No 14 of 1981. I would award the costs of this appeal, in the High Court and in the resident magistrate's court from March 29, 1979 to the appellant.

Dated and delivered at Nairobi this 19th day of May , 1983.

K.D POTTER

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JUDGE OF APPEAL

A.A KNELLER

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JUDGE OF APPEAL

Z.R CHESONI

………………………

Ag JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR