



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL CASE NO. 17 OF 2006

FARMERS CHOICE LTD.....APPLICANT

VERSUS

PETER NJAU MUIGAI.....RESPONDENT

RULING

1. The application dated 6<sup>th</sup> November, 2013 seeks orders that the *ex parte* judgment herein delivered on the 30<sup>th</sup> October, 2009 together with all the consequential orders thereto be set aside.
2. It is stated in the application in support that the Applicant became aware of the Appeal herein following the service of a Notice to Show Cause why execution should not issue. That the Respondents suit was dismissed by the Lower Court and the Applicant was not served with any hearing notice for the Appeal herein nor served with a notice of intention to execute the decree herein after the Appeal was heard and determined. The Applicant has further averred that this court was misled when the decree herein was obtained. The Applicant's contention is that he has an arguable and meritorious case.
3. The Respondent filed a replying affidavit in opposition to the application. The Respondent's case is that all the parties were duly represented by counsel in the case before the Lower Court. That the Applicant herein was represented by the firm of Munene Omwenga & Co Advocates. That after the Respondent's (Plaintiff) case was dismissed by the Lower Court, the Respondent instructed their advocate to Appeal. A Memorandum of Appeal was filed and the same served on the Applicant's counsel, Ms Munene Omwenga & Co Advocates. The firm of Munene Omwenga & Co Advocates subsequently filed a Notice of appointment of advocate.
4. It is further stated by the Respondent that the Applicant's counsel was invited for the fixing of the hearing date but failed to send their representative. The hearing date was fixed *ex-parte* on the 12<sup>th</sup> October, 2009. That a hearing notice was sent but the Applicant's counsel failed to show up in court. The court upon being satisfied that the Applicant was properly served proceeded to hear the Appeal. Judgment was delivered on 30<sup>th</sup> October, 2009 and the Lower Court judgment was set aside and substituted with a judgment in favour of the Respondent. That the Applicant filed this application after he was served with the Notice to show cause, a period of over three years since the delivery of the judgment herein.
5. The application was canvassed by way of written submissions. I have considered the application, the reply to the same and the written submissions.
6. The Respondent has exhibited the notice of appointment that was filed herein by the firm of Ms. Munene Omwenga & Co Advocates on 1<sup>st</sup> February, 2006. In any event, **Order 9 rule 5 Civil Procedure Rule** provides as follows:

**“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered**

**the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”**

7. The firm of Munene Omwenga & Co Advocates was on record for the Applicant up to 26<sup>th</sup> May, 2014 when the firm of Kairu Kimani & Co Advocates came on record. I therefore agree with the Respondent’s counsel that the omissions by the Applicant’s advocates cannot be visited on the Respondent. The same applies to issues between the Applicant and his Insurer.

8. It is abundantly clear from the documents annexed to the replying affidavit that the Applicant was served with the hearing notice for the appeal. I have seen the letters of invitation for the fixing of the hearing date. The Appeal was fixed for hearing on 12<sup>th</sup> October, 2009 as per the hearing notice dated 24<sup>th</sup> February, 2009. The hearing notice was duly served on the Applicant as per the affidavit of service sworn on 24<sup>th</sup> April, 2009. The hearing notice bears a stamp of the Applicant’s advocates, Ms. Munene Omwenga & Co Advocates.

9. On whether the Appeal has merits, the question of proof of special damages is an arguable point. Although this court’s finding is that the Applicant is to blame for non-attendance during the hearing of the Appeal, this court is inclined to give the Applicant a chance to have the Appeal heard *inter-partes* on condition that the Applicant do deposit the decretal sum in court or in a joint interest earning account of both counsels for the parties herein within 30 days from today. In default the application stands dismissed. Orders accordingly. Costs of this application to the Respondent.

Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of July, 2016.

**B. THURANIRA JADEN**

**JUDGE**