



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 12 OF 2014

FRANCIS WAMBUA NZOKA.....APPELLANT

VERSUS

ROSE MUENI MUSYOKA.....RESPONDENT

*(From the ruling delivered on 3rd June, 2014 in Kyuso Principal Magistrate's Civil Case No. 2 of 2014
– B. M. Mararo Ag. PM)*

JUDGMENT

The appellant was sued in the subordinate court by the respondent. The suit was for general damages, permanent injunction against defaming the respondent and a public apology, as well as costs and interest. The suit was filed by the respondent through counsel Ms. Kulecho & Company of Nairobi.

A memorandum of appearance was filed on 4th February 2014 on behalf of the appellant by C.K. Nzili & Company advocates. However, no defence was filed.

On 25th February 2014 a request for judgment was filed. There is no record that judgment was entered however. Thereafter a Notice of Motion dated 6th March 2014 was filed by the appellant on 11th March 2014 requesting to set aside judgment entered in default of entering appearance and filing defence. No copy or extract of the said judgment was annexed to the application, nor the date of the judgment disclosed.

The application was opposed through a replying affidavit sworn by the respondent on 10th April 2014, which contended that the default judgment was entered on 23rd February 2014. Again the default judgment was not annexed to the affidavit, nor were its contents.

The application was argued through written submissions and a ruling delivered on 3rd June 2014. The subordinate court dismissed the application to set aside judgment unless the appellant paid costs of Kshs. 30,000/= within 10 days. The ruling elicited the present appeal. The appellant (who was defendant in the trial court) has filed this appeal listing the following grounds:-

1. That the learned trial magistrate erred and misdirected himself in law and fact in entering default judgment prematurely and irregularly.
2. That the learned trial magistrate erred and misdirected himself in law and fact in failing to unconditionally set aside the default judgment.
3. The learned trial magistrate erred in law and fact and misdirected himself in condemning the defendant to pay punitive costs as a condition to being heard without any jurisdiction in law.
4. The learned trial magistrate erred in law and in fact in imposing unlawful deadlines for

compliance.

5. The learned trial magistrate erred in law and fact in being biased against the defendant.

The appellant's counsel Mr. Nzili made oral counsel in the appeal. Counsel contended that the default judgment was entered on 25/02/2014, and that the learned magistrate erred in the ruling and urged this court to allow the appeal.

Learned counsel for the respondent Mulinga Mbaluka filed written submissions. Mr. Nyaga who appeared for the respondent relied on the written submissions filed. Counsel submitted further that as the appellant had defaulted or delayed in filing defence, the judgment in default was correctly entered. Counsel also argued that the ruling of the magistrate appealed from was a correct determination of the matter. In addition, in view of the circumstances of the matter and since counsel for the respondent had to travel all the way from Nairobi to Kyuso a distance of about 300km, the awarded costs of Kshs. 30,000/= was justified.

I have considered the appeal and arguments of the parties counsel. I have also considered the authorities cited to me. I have perused the record of the subordinate court.

Indeed, a trial court has powers to enter judgment in default of filing a defence or entering appearance. Under Order 10 rule 11 of the Civil Procedure Rules, the court can also set aside such default judgment on conditions that are in the best interests of justice.

In the present matter, no party has shown to me the default judgment which was purportedly entered by the trial court. I have perused the record. What has been referred to by the parties counsel as the default judgment is a request for judgment dated 18th February 2014 and filed in court on 25th February 2014. I was also referred to an order of the court dated 4th February 2014 but issued on 25th February 2014.

From the contents of the above two documents, it is apparent to me that after the request for judgment was filed on 25th February 2014, the court did not enter a default judgment. The orders made on 4th February 2014, which was an earlier date to 25/02/2014 when the request for judgment was filed, had nothing to do with the request for entry of default judgment. They were restraining orders pending the hearing of the suit.

In my view, therefore, both the parties and the lower court were misled by wrongly assuming that the orders made on 4th February 2014 and issued on 25th February 2014, were a default judgment. They were not. They were actually restraining orders. No default judgment was entered by the court. In effect, this appeal will have to succeed, as there was no default judgment entered by the court in this matter. It must be emphasized that a request for default judgment is not itself a default judgment.

Since no default judgment was entered by the court, the application to set aside default judgment was misplaced. The ruling of the trial court therefrom was therefore made in error. It was a mistake and has to be corrected. It is the ruling that has been appealed from.

I thus allow the appeal and set aside the ruling of the trial court herein appealed from. In the broader interests of justice, I order that the appellant will be at liberty to file and serve their defence within fourteen (14) days from the date of this ruling. In the circumstances of the matter, I order that costs of the appeal will be in the cause.

Dated and delivered at Garissa this 14th day of May, 2015

GEORGE DULU

JUDGE