

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO 46 OF 2013

(FORMERLY OF NYERI HC CIVIL APPEAL NO 32 OF 2010)

(Appeal from the Order dated 19/02/2010 in Murang'a SRMCC No 53 of 2006 – J. Gathuku, RM)

FRANCIS B. MANYEKI..... APPELLANT

VERSUS

SOPHIA NYAMBURA KARIUKI..... RESPONDENT

J U D G M E N T

1. This is an appeal against an order of the court below by which a judgment entered after a full trial was set aside upon application by the defendant. The plaintiff's claim was simple enough. He was seeking payment of money lent and advanced. The defendant resisted the claim by filing defence.
2. Trial commenced on 28/11/2006. The plaintiff testified but was not fully cross-examined. Further cross-examination was deferred to see if a consent could be recorded in respect to some partial payment of the sum claimed. Such consent was indeed recorded on 23/01/2008 to the effect that the defendant had paid KShs 66,000/00; it was further ordered that the matter do proceed to further hearing upon the balance of the claim.
3. On 18/02/2009 the plaintiff was fully cross-examined. She then closed her case. Following various adjournments the case was fixed for defence hearing on 25/05/2009. On that date the learned counsel holding brief for the defendant's counsel addressed the court as follows –

“The defendant's counsel has written to the defendant on several occasions to come to court and he has failed to respond. In that case he closes the defendant's case.”

The learned counsels for the parties then agreed to file submissions. A considered judgment dated 16/06/2009 was delivered on 17/06/2009 (G L Nzioka, SPM). Judgment was entered for the plaintiff in the sum of KShs 118,448/00 plus costs and interest. The plaintiff subsequently moved to execute the decree.

4. The defendant then applied by chamber summons dated 08/09/2009 to set aside the aforesaid judgment, and for leave to defend the suit. The application was expressed to be brought under **Order IXB, Rule 8** of the then Civil Procedure Rules. **Section 3A** of the **Civil Procedure Act, Cap 21** was also invoked. The plaintiff opposed the application by replying affidavit. In a considered ruling delivered on 18/02/2010 a different magistrate (J Gathuku, RM) allowed the application. He set aside the judgment and directed that the suit be heard afresh within 30 days. The plaintiff then appealed herein.
5. The appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 23/07/2012 while those of the Respondent were filed on 26/07/2012. The learned counsel for the Appellant orally highlighted his submissions on 10/03/2015. Learned counsel for the Respondent did not appear to highlight his submissions. I have considered the submissions of both parties. No authorities were cited.
6. With the greatest respect the learned magistrate who heard and allowed the application to set aside the judgment was profoundly in error and misdirected himself. Order IXB under which the application was brought dealt with **Hearing and Consequence of Non-Attendance**. There were various consequences under that Order where one or the other or both parties failed to appear at the hearing of the

case. One of those consequences was where the plaintiff proceeds *ex parte* upon failure of attendance by the defendant and obtains an *ex parte* judgment (Rule 3 (a) of the Order). Such judgment could then be set aside or varied upon application under Rule 8 of the Order.

7. But that was not the case in this present matter. The plaintiff (the Appellant in this appeal) did not proceed *ex parte* and did not obtain judgment upon failure of the defendant to attend the hearing. The defendant (the Respondent in this appeal), though himself not in court, was represented by counsel in court who proceeded to formally close his case without offering any evidence because the defendant failed to attend court to testify (not for the first time). Parties then filed written submissions and the court subsequently delivered a considered judgment. It was not an *ex parte* judgment following *ex parte* proceedings. It was, in effect, a final judgment following a full trial. If dissatisfied with the judgment the defendant should have appealed. He could also have sought review under **Order XLIV** of the then Rules; but certainly not to apply under Order IXB, Rule 8 to set aside the final judgment.

8. In the result I have no hesitation at all in allowing this appeal. The order of the lower court entered on 19/02/2010 is hereby set aside. The judgment dated 16th and delivered on 17th June 2009 is hereby restored. The Appellant shall have costs of this appeal. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF JUNE 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 26TH DAY OF JUNE 2015