REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 18 OF 2011

BOARD OF TRUSTEEES

NATIONAL SECURITY FUND ::: APPELLANT

=VERSUS=

ERNEST KURUTO ::: RESPONDENT

JUDGMENT

The Appellant, is the BOARD OF TRUSTEES of THE NATIONAL SOCIAL SECURITY FUND, which was the Defendant in the case before the Chief Magistrate's Court, Eldoret.

The Respondent, **ERNEST KURUTO**, used to be an employee of the Appellant. He had sued the Appellant for failing to provide him with transport to ferry his property from Mwingi to Sotik. His other claim was that the Appellant failed to provide him with transport for his property from Sotik to Narok.

The need for the said transport arose when the Appellant transferred the Respondent from one station to another.

As the Appellant (who shall hereinafter be cited as "the **N.S.S.F**") failed to provide him with transport, the Respondent (hereinafter cited as "**KURUTO"**) incurred expenses when he paid the cost of moving from one station to another. It is in respect to those expenses that **KURUTO** sued the **N.S.S.F.**

The case came up for hearing on 3rd October, 2008. On that date, **Kuruto** testified. However, before he could complete giving his evidence, his advocate, Mr. Kitur, applied to stand down the Plaintiff. The reason given for that development was that the **Kuruto** wished to amend the plaint.

The Court granted an adjournment, to enable the plaintiff make his application for amendment.

On 9th November, 2008, the court granted leave to the plaintiff to amend his plaint. Thereafter, the Amended Plaint was filed in court on 20th January, 2009.

The **N.S.S.F.** Filed its Amended Defence on 17th April, 2009. After that, **Kuruto** filed his Reply to the Amended Defence on 20th April, 2009.

Thereafter, the case next came up for hearing on 9th April, 2010. However, as **Kuruto** was indisposed, the hearing was adjourned.

Shortly after the Court granted the adjournment, the parties attended at the Registry, and they fixed the case for hearing on 4th June, 2010.

When the case came up for hearing on 4th June, 2010, **Mr. Chebii** advocate represented the Plaintiff, whilst the Defendant was not represented.

The record of the proceedings shows that **Mr. Chebii**, the learned advocate for the Plaintiff, addressed the court thus:

> **" I pray that the defence be closed. Date was taken by consent."**

Immediately thereafter, the trial court set the 23rd of August, 2010 as the date for Judgment. That is the date cited in the typed record of the proceedings.

However, a perusal of the hand-written original record of the proceedings indicates that the date that was fixed for judgment was 23rd June, 2010.

Thereafter, the Judgment was delivered on 2nd July, 2010. The Defendant and its advocates were absent when the Judgment was delivered.

On 21st July, 2010, the **N.S.S.F.** applied to the trial court for the setting aside of the Judgment.

On 15th September, 2010, the court dismissed the application by the **N.S.S.F**. It is that decision, to reject the application by **N.S.S.F**, which has provoked the appeal before me.

It is the contention of **N.S.S.F t**hat they were denied their right to a fair hearing. In their view, N.S.S.F would have been accorded a fair hearing if the Judgment had been set aside, so that the parties could, thereafter, have had an opportunity to canvass their respective cases before the trial court.

The **N.S.S.F** feels that the learned trial magistrate was wrong to have rejected its explanation for the absence of its advocates from Court, during the trial.

It was the contention of **N.S.S.F** that its lawyer and the lawyer for **Kurugo** had an understanding that the trial court would not be sitting on 4th June, 2010.

Indeed, the lawyer for **N.S.S.F** said that between him and **Mrs. Wangila** advocate, they had agreed to have the trial proceed on 16th July, 2010. Having reached that agreement, the **N.S.S.F** Lawyer informed his client about the new hearing date.

On the other hand, **Mrs. Wangila,** the learned advocate for **Kuruto,** told the Court that she never agreed with the **N.S.S.F** lawyer about the change in trial dates.

When the parties had made their respective submissions before the trial court, the court dismissed the application for setting aside the judgment.

The court noted that it did sit on 4th June, 2010, which was a date that the two parties had fixed by consent.

As there was no notice altering that hearing date, the trial court held that there was absolutely no reason for setting aside the proceedings of 4th June, 2010.

First, it is noted that the trial date was fixed by consent. Therefore, the parties were afforded an opportunity to be heard, on a date which they had both agreed to. Strictly speaking, therefore, an opportunity to be heard was available to the parties.

The problem is that one of the two parties failed to attend the trial. That party is the **N.S.S.F.**

Mr. Douglas Kipruto Bargorett, the learned advocate for **N.S.S.F.**, swore an affidavit stating that he was at the Chief Magistrate's Court on 4th June, 2010. Whilst at the court precincts, he found a Notice in

writing, indicating that the trial court was not sitting on that date.

Mr. Bargorett, deponed that he phoned **Mrs. Wangila,** the learned advocate for **Kuruto.** After discussing the matter, the two lawyers agreed to have the trial proceed on 16th June, 2010.

Mrs. Wangila advocate deponed that **Mr. Kitur**, the advocate who is said to have fixed the next hearing date, at the Registry, alongside **Mr. Chebi**i advocate, did not talk to the lawyers for **Kuruto**.

It was not the position of **N.S.S.F,** that **Mr. Kitur** advocate talked to **Mrs. Wangila**. **Mr. Bargorett** advocate deponed that it is he who spoke to **Mrs. Wangila.**

Immediately after that, **Mr. Bargoret**t advocate informed the **N.S.S.F** that the case had been re-scheduled to 16th July, 2010 for hearing.

In his letter, **Mr. Bargorett** pointed out that he had been in court on 4th June, 2010, together with the **N.S.S.F** witness, **Mr. Wesley Kipkorir Sigei.**

Mr. Sigei, also swore an affidavit confirming that he had been in court on 4th June, 2010.

On 14th July, 2010, **Mr. Bargoret**t advocate phoned **Mrs. Wangila** advocate to inquire whether or not **Kuruto** would be ready to proceed with the trial on 16th July, 2010. It is then that **Mrs. Wangila** told **Mr. Bargorett** that the trial had proceeded on 4th June, 2010, and that the Judgment had been delivered on 2nd July, 2010.

Mrs. Wangila's Replying Affidavit is completely silent about those averments.

Having perused the record of the proceedings, it was noteworthy that the N.S.S.F had always been ready to proceed with the trial whenever the case came up for hearing. It is **Kuruto** who had been seeking adjournments.

In fact, the court had, on 9th April, 2008, granted the last adjournment to **Kuruto.**

Because of the history of the proceedings and the failure by **Mrs. Wangila** advocate to respond to the specific depositions by **Mr. Bargorett** advocate, I find and hold that it was more probable than not, that the advocate for the Respondent did agree with the advocate for the Appellant, to put-off the trial from 4th June, 2010 to 16th July, 2010.

The Appellant's witness was even ready to testify on 4th June, 2010, but he only left after being told of the adjournment.

This appeal is not about the merits or otherwise of the case between the two parties.

If the Respondent has a good case, he will still be able to prove it against the Appellant.

By setting aside the judgment, the court would simply be making it possible for both parties to put forward their respective cases, before the trial court. Such a course of action would not prejudice the Respondents, nor would it give any undue advantage to the Appellant.

The advocate for **N.S.S.F** may have made a mistake by concluding that the learned trial magistrate was not sitting on 4th June, 2010, before checking directly with the said judicial officer, but that mistake should not bar his client from being heard. His said client was ready to present his evidence.

It would be wrong for this court to turn its back on the **N.S.S.F,** when it has demonstrated a clear and excusable mistake, inadvertence or accident.

The defence put forward was that the Respondent had received a transfer allowance, which he was

supposed to use to pay the cost of transporting his property from where he had been working, to the place where he had been transferred to. That line of defence does not appear to be a sham or a mere denial. The Appellant specified the sums which were allegedly paid to the Respondent, and the sums appear to have some correlation with what the respondent had claimed.

Another issue of concern is that after the Plaintiff's evidence was truncated, through his own request for an adjournment, the plaint was amended.

The Plaintiff testified when his claim was for damages. After that, the plaint was amended to incorporate a claim for Special Damages amounting to Kshs 147,000/=.

The Judgment was for a sum of Kshs 147,500/= with interest at court rates.

There therefore arises a legitimate question whether the plaintiff gave any evidence on the Amended Plaint.

In the final analysis, justice demands that the Appeal herein be allowed. I therefore do now set aside the Ruling dated 15th September, 2010 and substitute it with an order setting aside the Judgment dated 2nd July, 2010.

I also set aside the proceedings of 4th June, 2010 and all orders and proceedings that took place or were made subsequent to the Judgment.

The costs of the Appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT ELDORET

THIS 17TH DAY OF JANUARY, 2014.

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FRED A. OCHIENG

JUDGE