



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 337 of 2011

JACKSON KARIUKI NDEGWA.....PLAINTIFF

VERSUS

PETER KUNGU MWANGI.....DEFENDANT

RULING

On 23/3/2012, an interlocutory judgment was entered against the defendant/applicant in default of appearance and defence. On 25/9/2012, the matter proceeded to formal proof by the plaintiff/respondent calling four witnesses in support of his claim. The matter was reserved for submissions on 17/10/2012. It seems the defendant/applicant got wind of the matter and on 6/11/2012, he filed the notice of motion dated the same date seeking the following orders:-

2. That there be stay of further proceedings and or arrest of writing the judgment in this matter pending the hearing of this application inter partes;
3. That the interlocutory judgment entered on 22nd March 2012 and all consequential proceedings and orders be set aside;
4. That the defendant's defence be deemed as duly filed.

The application is premised on grounds found on the face of the application and the supporting affidavit of Sammy Kamonjo Kiburi, counsel for the applicant. The application was opposed and Mr. Musyoka Annan, counsel for the plaintiff/respondent swore an affidavit dated 16/7/2012.

It is the case of the applicant that the service of summons was not effected on the defendant but upon one Grace as the defendant was out of the country; that the defendant duly entered appearance on 6/3/2012 and the same was served on the plaintiff within time; that the interlocutory judgment entered against the applicant on 22/3/2012 was irregular; that the applicant filed a defence on 4/12/2012, after failing to trace the court file for a while; that an affidavit of service was filed on 12/4/2012 and on 18/4/2012, Mr. Kiburi received an undated letter from Musyoka Annan Advocate inviting him to take dates on 18/4/2012 (SKK 3) but no dates were taken as he was informed that the diary was full. It was counsel's submissions that the matter should not have proceeded to formal proof. Counsel further stated that he wrote to Mr. Musyoka on 10/10/2012 asking him to quantify the claim for the applicant's consideration and therefore the matter should not have proceeded ex-parte. Counsel relied on the decision in **Chemwolo & Another v Kubende [1986] KLR 492**, where the Court of Appeal held that the court has an unlimited discretion to set aside an ex-parte judgment and the concern of the court should be to do justice to the parties. Mr. Kiburi also urged that the defence raises triable issues of contributory negligence and the case shall be heard on merit. He denied that the applicant was ever invited to and that even in a case where a defence was struck out, the applicant would have been allowed to participate in the formal proof.

In opposing the application, Mr. Musyoka averred that after the suit was filed on 21/11/2012, the pleadings were served on the applicant on 19/1/2012 and there being no response, the respondent filed a request for judgment on 22/3/2012; that by then there was no appearance or defence on the file when the judgment was entered against the applicant; that the matter was then mentioned before J. Emukule on 8/6/2012 and set down for formal proof on 25/9/2012. Counsel urged that the issue of liability was settled when the applicant pleaded guilty and was convicted in Traffic Case No. 34/2008; that the applicant has not appealed against the conviction. Counsel urged that there are no triable issues that would require the consideration by this court and the application should be disallowed.

I have considered the application, affidavits and the rival arguments. I am satisfied that as of 8.2.2012, the applicant had filed an appearance in this matter. The appearance annexure "SKK2" though stamped at Magistrate's court civil Registry, the receipt (SKK2b) clearly shows that the appearance was filed in the High Court in HCC 337/2011. If it was not placed on this file the applicant cannot be faulted for it. The applicant had complied with the law and filed the memorandum before the application for judgment was made on 22/3/2012. It is also noteworthy that by an undated letter from the firm of Musyoka Annan to Kamonjo Kiburi advocate, received by Kamonjo Kiburi on 18/4/2012, the applicant's counsel was being invited to take a hearing date on 18/4/2012. That means that the respondent's counsel was aware that the applicant had filed pleadings in reply to the claim and the respondent should not have proceeded ex-parte on formal proof. I have seen the affidavit of service filed by Kamonjo Kiburi Advocate on 12/4/2012. In the affidavit, it is indicated that the memorandum of appearance was served on the firm of Musyoka Annan Advocate on 10/3/2012 but the certificate of postage that is attached ('KK1') is stamped on 5/4/2012 meaning that, that is when the appearance and defence were served. Although the appearance was served on the respondent after the application for judgment, the appearance had been filed in court and the respondent could not proceed to formal proof without inviting the applicant to take part in the proceedings. Once the applicant had entered appearance he was entitled to be heard. At formal proof, the applicant would have cross examined the witnesses and filed submissions. The request for judgment by the respondent dated 19/3/2012 and filed in court on 22/3/2012 was predicated on the applicant's failure to enter appearance. Having found that an appearance had been duly filed, the ex-parte interlocutory judgment was irregularly entered against the applicant.

The statement of defence was filed on 4/4/2012. At paragraph 8 of the defence, the applicant raises the issue of contributory negligence. The respondent urged that the issue of liability was settled when the applicant pleaded guilty, but that is not the proper position because even if the applicant had pleaded guilty the applicant could still raise the issue of contributory negligence if the facts warranted it. At paragraph 8 of the defence, several allegations of negligence have been leveled against the respondent which can only be proved at the hearing. This is because the standard of proof in civil cases is not beyond any doubt but on a balance of probability. In the **Chemwolo** case (Supra) the court of appeal observed at page 498

"Now, it was correct for the learned judge to refer to Mr. Chemwolos conviction because section 47A of the Evidence Act (cap 80) declares that where a final judgment of a competent court in criminal proceedings has declared any person to be guilty of a criminal offence, after the expiry of the time limited for appeal, judgment shall be taken as conclusive evidence that the person so convicted was guilty of that offence. It follows that in the civil proceedings which are contemplated, Mr. Chemwolos conviction will be conclusive evidence that he was guilty of carelessness. But that does not matter, because it may also be that Mr. Kubende was guilty of carelessness, and if were to be so, then the position would be as explained in Queens Cleaners and Dyers Ltd. V EA Community and others (supra); and despite Mr. Chemwolos conviction, the issue of contributory negligence may still be alive if the facts warrant it. In the present case there was a triable issue in contributory negligence which would affect the quantum of damages."

The court then held:

"4. In a civil case different aspects of evidence emerge which may not disturb a previous criminal conviction of a party to it. Although in the civil proceedings the first appellant's conviction was conclusive evidence that he was guilty of carelessness, that finding did not preclude the appellants as

the civil case could find that the respondent was also guilty of carelessness.

5. It was therefore not for the trial judge to read the proceedings in the traffic case as if the evidence recorded there was the final position in the case. It was premature for the trial judge to come to the conclusion that not even a prima facie case of contributory negligence could be established.

6. As it appeared from the evidence in the criminal case that the respondent had been riding his motorcycle without a crash helmet, a triable issue arose as to contributory negligence which might affect the issues of liability and quantum of damages.”

Again in the case of **Robinson V Oluoch (1971) Ea 377**, the Court of Appeal had this to say

“We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. We accordingly agree that the judge was right in not striking out the defence as a whole.”

From the foregoing authorities, I find that Mr. Musyoka’s submissions that the issue of liability was settled upon conviction is incorrect. The defence raises triable issues at paragraph 8 and the applicant must be allowed to take part in the proceedings.

In the end, I find that the respondent irregularly fixed the case for formal proof, without inviting the applicant to take part. The ex-parte judgment is irregular and must be set aside with all the consequential orders and proceedings herein. The defence be deemed to be duly filed and served and the respondents will bear the costs of this application.

DATED and **DELIVERED** this 18th day of January, 2013.

R.P.V. WENDOH
JUDGE

Present:

Mr. Musyoka Annan for the plaintiff/respondent

Non appearance for the defendant/applicant

Court Clerk - Kennedy