REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 96 OF 2008

JOHN KIMANI GITAU ..... APPELLANT

V E R S U S

ANTONY NYAGAH ..... RESPONDENT

J U D G M E N T

This is an appeal from the ruling of the Chief Magistrate Court, Kakamega in CMCC 535 of 2006 delivered on 19th November 2008. The main grounds of appeal are that the trial magistrate failed to address her mind to the law and facts and instead addressed extraneous matters, that the appellant's case was not considered, that there was a stay of execution and proceedings vide Kisumu HCCC no. 108 of 2008 and that the trial magistrate erred in law and fact by holding that the ex-parte judgment could be set aside yet the application had been dispensed with.

Parties agreed to file written submissions. Only the appellant managed to do so and no submissions were filed by the respondents. The appellant contends in his submissions that the trial court having found that the application before it was incompetent having been filed by a firm that was improperly before the court, the only avenue available to the court was to dismiss the application and stop there. However, the trial magistrate veered off course and started fishing for evidence which the appellant had no opportunity to react to. According to the appellant, there was no error apparent on the face of the record.

The proceedings before the trial court show that the appellant's suit was heard and judgment granted to the appellant for KShs.2 million plus costs and interest. Ex-parte judgment was entered by the court on 8th November 2006 and the suit proceeded by way of formal proof. The defendant entered appearance on 4th September 2007.

The respondent made two applications before the trial court. first application was dated 3/10/2008 which sought the release of his motor vehicle and lifting of a warrant of arrest against him. The court delivered a ruling on 29/10/2008 and lifted the execution including the warrant of arrest. By another application dated 1st April 2008, the respondent sought to set aside the ex-parte judgment and that he be allowed to file his defence. In her ruling, the trial magistrate held that M/S A.M. Momanyi Birundu Advocate was

improperly on record as it came on board after judgment had been entered and that was contrary to the provisions of order III rule 9 of the Civil Procedure Rules. The proceedings show that the appellant testified on 28th February 2007. He was stood down and continued with his evidence on 28th March 2007. PW2 testified on 17th September 2007 and the appellant closed his case. Judgment was delivered on 11/12/2007.

After dismissing the respondent's application seeking to set aside the judgment, the trial court found that the case proceeded ex-parte yet the respondent had entered appearance. The trial magistrate exercised her discretion and set aside the ex-parte judgment as she found that the respondent had been denied the opportunity to cross-examine the witness and also put in submissions. The court found that to be a serious omission.

The appellant herein contends that the trial magistrate should have just stopped at dismissing the application to set aside the judgment and no more. On the grounds of appeal listed by the appellant, I do find that the third ground relating to the proceedings in Kisumu HCCC No. 108 of 2008 is misplaced. The issue was not raised before the trial court. The application to set aside the judgment was heard on 5/11/2005 and Mr. Kamau Advocate responded to the application. The advocate did not mention the Kisumu suit and I do hold that that ground is misplaced.

The main issue is whether the trial court could on its own motion set aside the ex-parte judgment. The respondent's memorandum of appearance was filed on 4th September 2007. This was after the appellant had testified on 28/2/2007 and 28th March 2007. PW2 testified on 17th September 2007. By that time the respondent was officially on record. The appearance was entered after judgment had been entered and one witness testified. Did the late appearance automatically exclude the respondent from participating in the proceedings. The then Order IXA rule 8 allowed plaintiff to set down his suit for hearing in the event that the defendant fails to enter appearance. The plaintiff suit was for both special and general damages. The special damages involved expenses incurred in burying the plaintiff's wife. The general damages were being claimed as the appellant's wife died of a road traffic accident on 21/8/2005. The trial magistrate in setting aside the ex-parte judgment had this to say:-

"What about the failure to serve the defendant for proceedings? Though this was not raised, this court in exercise of its inherent powers is duty bound to correct any errors causing injustices to parties. This is a clear error on the face of the record and it is only fair and in the interest of justice that the judgment entered on 11/12/207 plus all consequential orders be set aside."

I do find that having entered appearance on 4th September 2007 and the suit having been part heard, the respondent was entitled to be served with a hearing notice and participate in the proceedings. The respondent could have opted to either leave the ex-parte judgment and continue cross-examining the witness and later make submissions or opt to apply at that time and have the ex-parte judgment set aside. This could have been the case after being served with a hearing notice. I do wish to state that the respondent's counsel was also not vigilant in that he did not peruse the court file when filing the memorandum of appearance.

Given the above background, I do find that it was proper for the trial court to exercise its inherent jurisdiction and set aside the judgment and all consequential orders. The overriding object of any dispute is to have parties heard and final decision made. The road accident was self involving and the respondent's case could have been heard by now. It is unfortunate that it has taken about five years to have an appeal on a ruling to be heard. This was enough time to have had the main suit re-heard and fully determined.

In the end, I do find that the trial court exercised its discretion properly and could not simply dismiss the application and stop at that. I do hereby disallow this appeal with no orders as to costs. The suit pending before the subordinate court shall proceed to full hearing.

It is so ordered.

Delivered, dated and signed at Kakamega this 28th day of March 2012

SAID J. CHITEMBWE

J U D G E