



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 1166 OF 2002

ELIJAH GATEHI NDIRANGU..... PLAINTIFF

V E R S U S

EUSTACE GITONGA WARUTERE.....DEFENDANT

R U L I N G

1. On 12th November 2009 the court (Onyancha, J) allowed an application by the Defendant's advocates for leave to cease acting for him in this matter. The court directed that future service be effected on the Defendant personally. The court also fixed the main suit for hearing on 8th February 2010.
2. On 8th February 2010 the Defendant did not attend court. The court was informed that he was served in person. The case was taken out of the hearing list and in effect, stood over generally. The court directed that another hearing date be taken at the registry "on serious priority".
3. The case was subsequently fixed by the Plaintiff for hearing on 1st November 2010. On that date the court noted only the presence of the Plaintiff and his counsel.
4. Hearing proceeded *ex parte*. Only the Plaintiff testified. Judgment was reserved and was delivered, *ex parte*, on 14th December 2010. The Plaintiff succeeded in his claim.
5. The Defendant subsequently filed **notice of motion dated 16th June 2011** seeking the main order that the *ex parte* judgment and consequent decree be set aside and the suit do proceed to hearing *inter partes*. The application is brought under **Order 12, rule 7** of the **Civil Procedure Rules** (the **Rules**). The rule donates to court the jurisdiction, on application, to set aside or vary a judgment or order made under Order 12 (which provides for **hearing and consequences of non-attendance**). It is an unfettered jurisdiction exercisable "upon such terms as may be just".
6. The grounds for the application appearing on the face thereof are -
 - (i) That the *ex parte* hearing and consequent judgment were "born of want of service of hearing notice" upon the Defendant.
 - (ii) That the Defendant learnt of the *ex parte* hearing and judgment only after receiving draft decree sent to him by the Plaintiff's advocates.
 - (iii) That the Defendant has a good defence and counterclaim.

(iv) That in the circumstances the order sought is deserved in the interests of justice.

7. There is a supporting affidavit (sworn by the Defendant) annexed to the application. It is deponed at paragraphs 4, 5, 8 and 9 thereof as follows -

“4. That on the 5th day of November 2010 I received a postal instruction note which was addressed to EUSTACE GATEHI NDIRANGU by registered post through my post office box number 78437, Nairobi (annexed).

5. That I could not collect the above-mentioned letter from the post office since it was not addressed to me though sent through my postal address

6. ...

7. ...

8. That I only came to know of the judgment in the month of April when a draft decree was sent to me by post, from the Plaintiff’s advocates...

9. That I was never served with any hearing notice for ... 1st November 2011 ...”

8. The Plaintiff has opposed the application by replying affidavit sworn by him and filed on 14th July 2011. The following grounds of opposition are raised -

(i) That the application is improperly before the court because there is no notice of appointment filed by the advocates who has filed it.

(ii) That the Defendant was personally and properly served with hearing notice for 1st November 2010 as disclosed by the affidavit sworn by the process-server, one JOSEPH M MWANZI.

(iii) That in addition to the personal service the Defendant was also served by registered post on 18th October 2010, but that the notice was returned unclaimed.

(iv) That the Defendant had a history of not attending court, prompting his advocates to withdraw from representing him, only for them to come back on record.

(v) That the Defendant has no defence to the claim.

9. I have considered the submissions of the learned counsels appearing. No authorities were cited.

10. The main issue to be decided in this application is whether the Defendant was duly and personally served with hearing notice for 1st November 2010 as directed by the court after his advocates were granted leave to withdraw from representing him. It is necessary to address this issue because the trial judge (Muchelule, J) does not appear to have addressed the issue at the hearing, though the Plaintiff’s learned counsel stated that the court was addressed the issue. The notes of the learned judge are completely bereft of this issue. The judgment itself merely states -

“The Defendant did not attend the hearing of this case.”

There was no finding by the trial court that the Defendant had been duly and personally served with hearing notice.

11. I will state at the outset that I am not satisfied that there was personal service for the simple reason that if there was, why was there then attempt at service by registered post? As to that service by registered post, the Defendant has stated that he received in his postal box a letter addressed to ‘EUSTACE GATEHI NDIRANGU’, and that he did not open it as his name is “EUSTACE GITONGA

WARUTERE”. He says he returned it to sender.

12. Apart from the common first name “EUSTACE”, the other two names are completely different. The Plaintiff has not denied that the envelope by which the hearing notice was sent was addressed to “EUSTACE GATEHI NDIRANGU”. It is thus not unreasonable that the Defendant would have returned to sender unopened a letter that was clearly not addressed to him.

13. There is thus no clear evidence that the Defendant was duly served with hearing notice for 1st November 2010, and I am not satisfied that he was, an issue that the trial judge did not investigate on record that day.

14. In the circumstances, I will allow the Defendant’s notice of motion dated 16th June 2011 and set aside the proceedings of 1st November 2010 and the judgment (and decree) entered on 14th December 2010. The case shall proceed to hearing in the normal course of events. Costs of the application shall be in the cause. It is so ordered.

15. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully recovered my health.

DATED AT NAIROBI THIS 11th DAY OF OCTOBER 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER 2012