



REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 325 of 2010

SIMON KARIUKI GACHOYA.....APPELLANT

VERSUS

DAVID WAIKWA GITONGA.....RESPONDENT

(Being an appeal from the Ruling/Order of Hon. A. B. Mongare, SRM dated and delivered on the 23rd November, 2010 in Nyahururu P. M.C.C. No. 226 of 2010)

JUDGMENT

The Respondent herein sued the Appellant in Nyahururu Principal Magistrate's Court Civil Case No. 226 of 2010 and prayed for special damages (*comprising estimated costs of repair of his motor vehicles*) (*prayer (a)*), and loss of earnings estimated at Shs 2,000/= per day (*ground (b)*), costs of the suit and interest.

The Respondent claims that the Appellant did not enter an appearance and consequently sought entry of judgment by a Request for Judgment dated 28th September 2010 and filed in court on the same day. The Request for Judgment was supported by the Affidavit of Service of Bernard Mwangi, a process server sworn on 28th September 2010 and deponing that the Appellant served on 13th September 2010.

The Appellant denies such service in his Affidavit sworn on 3rd November 2010 in support of the Chamber Summons dated 3rd November 2010, filed on 4th November 2010, seeking an order to set aside the interlocutory judgment made on 29th September 2010 (*the Application*).

In a Ruling delivered on 23rd November 2010, the court granted the Appellant's application conditionally upon the Appellant's depositing a sum of Ksh 200,000/= into court. Aggrieved with that Ruling the Appellant appealed to this court, and by a Memorandum of Appeal dated 17th December 2010 but filed in court on 15th January 2011, the Appellant set out six grounds against the Ruling. The essence of the grounds is that the Appellant ought to have granted unconditional leave to defend the suit.

Counsel for both the Appellant and the Respondent filed submissions for and against the Appeal. I have considered the submissions by both counsel.

The procedure for Requests for Judgment and for setting aside such interlocutory judgment is set out in Order 10 rule 3 and rule 10 respectively of the Civil Procedure Rules 2010. Rule 3(1) permits the entry of interlocutory judgment where a plaintiff makes a liquidated demand only, and the Defendant fails

to appear on the day fixed in the summons.....

The Plaintiff herein as already noted above made a demand for special damages – the cost of repair, and the loss of earnings both of which claims had to be proved. Consequently no judgment could have been entered by the court. The interlocutory judgment entered on 29th September 2010 was irregular and ought to be set aside “*ex debito justitiae*”.

Secondly such judgment may be set aside under Rule 10 on the such terms as are just. A judgment which is entered irregularly ought to be set aside as I have said above. The only just compensation for the Respondent would be costs for his efforts. There was no basis for the arbitrary sum of Ksh 200,000/=. The Respondent had yet to prove his case as he purported to do in the ex parte proceedings of 8th February 2011 in the pendency of the appeal herein.

I grant the Respondent that there was no order for stay of proceedings in the lower court pending the appeal. However, once the Appellant had filed a Memorandum of Appearance together with a draft defence and notwithstanding that he had not raised the exorbitant deposit of Ksh 200,000/=:, the Appellant was entitled to have been served with a Notice of the Hearing Date of the Respondent's case.

It is a requirement of Order 12 rule 2 of the Civil Procedure Rules 2010, that at any time after the entry of interlocutory judgment the plaintiff may upon giving not less than 14 days to every Defendant who has appeared, set down the suit for assessment of damages, or of the value of the goods and damages as the case may be.

It is only a requirement of rule 2 of the said order that if on the day fixed for hearing after the suit has been called out for hearing outside the court, and the plaintiff attends, if the court is satisfied -

- (a) *that notice of hearing was duly served, it may proceed ex parte,*
- (b) *that notice of hearing was not duly served, it shall direct a second notice to be served,*
- (c) *that notice was served in sufficient time for the defendant to attend or that for other sufficient cause the Defendant was unable to attend, it shall postpone the hearing.*

There is no indication in the proceedings of 8th February 2011 that the court satisfied itself with the requirements of the above rules of the said Order IXB. In the circumstances the court proceeded ex parte, and quite contrary to the said rules. The Judgment of the court arising out of those proceedings and delivered on 22nd February 2011 was itself irregular for nothing legal or regular arises out of an illegality or irregularity for what irregular or illegal remains irregular and illegal. The Judgment condemns the Appellant without being heard. That is contrary to rules of natural justice, for no man may be condemned unheard. For those reasons the Appellant's appeal dated 19th December 2010 and filed on 15th January 2011 succeeds and the judgment of 22nd February 2011 is also set aside together with all consequential orders.

The Appellant is granted leave to defend the suit unconditionally. The Appellant shall also have the costs of Appeal herein.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 30th day of November, 2012

M. J. ANYARA EMUKULE

JUDGE