



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 132 of 2007

JOHN NDIRANGU WARIAHE..... APPELLANT

VERSUS

PETER NJARAMBA.....1ST RESPONDENT

JOSEPH MATHENGE.....2ND RESPONDENT

JACKSON MACHARIA.....3RD RESPONDENT

J. K. MUNDIA T/A SPEED HAWK

MAIL CONNECTIONS.....4TH RESPONDENT

(An Appeal against the judgment of L. O. Onyina, Resident Magistrate, Nyeri, in Chief Magistrate's Civil Case No. 435 of 2006 delivered on 15th November 2007)

JUDGMENT

PETER NJARAMBA, JOSPHAT MATHENGE and JACKSON MACHARIA, being the 1st, 2nd and 3rd Respondents herein, had filed a plaint dated 30th June 2006 before the Nyeri C.M.C.C.C. No. 435 of 2006 claiming payment of Ksh.14,900/= from **JOHN NDIRANGU WARIAHE**, the appellant herein. The Appellant filed a defence denying the claim. A third party notice was issued by the Appellant upon one J. K. Mundia T/A speed Hawk Mail Connection, the Respondent herein. On 15th November 2007, the suit came up for hearing before L. O. Onyina, learned Resident Magistrate. The record shows that the Plaintiffs (Respondents) and their counsel were present but the Defendant (appellant) was absent. Mr. Muthui, learned advocate for the Plaintiffs, applied for summary judgment against the Defendant (appellant). The learned Resident Magistrate, having been satisfied that the Defendant had been served with a hearing notice

acceded to the Plaintiff's request. Judgment was promptly entered in terms of the Plaintiff.

The Defendant, was aggrieved by that decision hence this appeal. In his Memorandum of Appeal, the Appellant put forward the following grounds:

1. ***That the Honourable Magistrate erred in law and in fact in purporting to enter judgment in default of attendance when no law allows that in a liquidated claim where a defence has been filed.***

2. ***That the Honourable Resident Magistrate erred in law in failing to call upon the plaintiff to proof his case as required by law.***

3. ***That the judgment/order herein is contrary to law as the plaintiff didn't discharge his burden of proof.***

When the appeal came up for hearing, learned counsels appearing in the matter agreed to file written submissions to dispose of the appeal. I have examined those submissions and the record of appeal. The facts earlier outlined are not in dispute. It is not in dispute that judgment was entered in default of attendance by the Defendant. The question is whether that judgment was entered according to the laid down laws and rules of procedure. The answer can easily be obtained by critically examining the provisions of *Order IXB rule 3 (a)* of the Civil Procedure Rules. That provision expressly provides that if the Defendant fails to attend court despite having been served with a hearing notice, the Plaintiff would be called upon to proceed for hearing *ex parte*. In this matter, the learned Resident Magistrate correctly found that the Defendant was duly served with hearing notice. The Plaintiff's advocate prompted the learned Resident Magistrate to enter judgment. I am convinced that the learned Resident Magistrate fell into error because the provisions of *Order IXB rule 3 (a)* of the Civil Procedure Rules do not prescribe entry of summary judgment. It is a requirement that in such a circumstance, that the Plaintiff will be called upon to tender evidence to prove his claim. At the close of the Plaintiff's case, the Court will as a matter of course dismiss the Defendant's defence for lack of evidence or direct its closure. It is after then that the court will consider the evidence and pronounce judgment. The Respondent has claimed that the Appellant should have applied to set aside the *ex parte* judgment under *Order IXB rule 8* instead of filing this appeal. That is not the correct exposition of the law. *Section 67 (1)* of the Civil Procedure Act expressly gives any party aggrieved by an *ex parte* decision a right to appeal.

In the end I am convinced that the appeal has merit. I allow the same by setting aside the *ex parte* judgment. The suit is restored and I further direct that the same be heard afresh before another magistrate of competent jurisdiction other than that presided by L. O. Onyina. Costs of the appeal is given to the Appellant to be met by the 1st – 3rd Respondent.

Dated and delivered at Nyeri this 19th day of February 2010

J. K. SERGON

JUDGE

In open court in the presence of Mr. Muthui for the Respondent.

Macharia holding brief for Mr. Karweru for the Appellant.