



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 48 of 2007

JESSEE MWENDA (*Suing with the authority of his mother*

MARY MWANGI) PLAINTIFF

VERSUS

SILAS MUTHETHIA MWITHIGA 1ST DEFENDANT

DAVID NCHEBERE 2ND DEFENDANT

RULING

The 2nd defendant has moved this court by a Notice of Motion dated 20th November 2009. That application seeks to set aside the *ex parte* judgment entered hereof in default of appearance. Although the application is stated to have been brought under Order IX b Rule 3 and 8 of the Civil Procedure Rules, I believe the correct provision should have been Order IXA Rule 10. That Rule provides as follows:-

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

The plaintiff filed this case through a next friend his mother. He sought compensation for injury suffered when he was knocked down by a vehicle driven by the first defendant. Interlocutory judgment was entered in favour of the plaintiff in default of an appearance on 2nd August 2008. The case was set for formal proof and judgment was entered against both defendants jointly and severally. The application to set aside the *ex parte* judgment is filed only by the 2nd defendant and for that reason, judgment against the first defendant will remain intact. The 2nd defendant argued that he was not served with the summons and plaint. The affidavit of service was sworn by Kaume Mukira Advocate. This is what he stated in some of the paragraph in that affidavit:-

“That on 01 August, 2007, at 12.30pm at Laare Market of Meru North District, I served copies of summons to enter appearance, plaint and verifying affidavit to David Nchebere the 2nd defendant herein by tendering copies thereof to him and requiring his signature thereof.

That the said 2nd defendant accepted service but declined to sign.

That I was accompanied by the plaintiff during the time of service who pointed the said first defendant to me.”

The 2nd defendant argued quite correctly that paragraph 5, 6 and 7 of the affidavit of service have a disconnect. Paragraph 7 of that affidavit of service stated that the first defendant was pointed out by the plaintiff. In that affidavit of service, where it can well be assumed that an advocate would have known the 2nd defendant, there is no indication of how he identified the 2nd defendant to effect service on him. In other words, there is no indication in the affidavit of service who pointed out the 2nd defendant to him. That being so, I make a finding that the 2nd defendant was not served with the summons and plaint and accordingly, the interlocutory judgment was entered wrongly against him. The court has wide discretion to set aside interlocutory judgment. This was well stated in the case of **Chemwolo & Another Vs. Kubende** Civil appeal No. 103 of 1984. The court in that case held as follows:-

“The Civil Procedure Rules Order IXA Rule 10 confers upon the Court an unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just.

The concern of the Court is to do justice to the parties and the court would not impose conditions on itself to fetter the discretion. However, where a regular judgment has been entered, the court will not usually set it aside unless it is satisfied that there are triable issues which raise a prima facie defence which should go for trial.”

I therefore hereby set aside the interlocutory judgment against the 2nd defendant entered in this matter on 2nd August 2008 and I also hereby set aside the *ex parte* judgment against the 2nd defendant entered on 30th October 2009 *ex debito justitiae*. As stated before, there being no application on behalf of the first defendant, judgment against the 1st defendant will remain. The 2nd defendant is awarded costs of the Notice of Motion dated 20th November 2009.

Dated and delivered at Meru this 7th day of May 2010.

MARY KASANGO
JUDGE