



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
MISC. CIVIL APPLICATION NO. 37 OF 2010

JOHN KIMOI SANG ::::::::::::::: APPLICANT/DEFENDANT
V E R S U S
CALEB SEMO ::::::::::::::: RESPONDENT/PLAINTIFF

R U L I N G

1. The Applicant herein John Kimoi Sang by his chamber summons dated 30.6.2010 seeks orders under Order IXA Rule 10 of the Civil Procedure Rules that the following orders be granted;
 1. ***“That service of this Application be dispensed with in the First instance.***
 2. ***That the exparte judgment entered herein against the Defendant/Applicant be set aside and that he be allowed to file his defence out of time.***
 3. ***That there be temporary stay of execution of the decree herein against the Applicant pending hearing and determination of this application interpartes.***
 4. ***That there be stay of sale of motor vehicle registration no. KAC 181D Toyota Saloon pending hearing and determination of this application.***
 5. ***That the motor vehicle registration No. KAC 181 D Toyota Saloon be released to the Applicant.***
 6. ***That the Plaintiff/Respondent be condemned to pay the Auctioneers charges***
 7. ***That KShs.10,000/= paid to Kuronya Auctioneers be refunded to the Applicant.***
 8. ***That the Plaintiff be condemned to pay costs of this application.”***
2. In the Supporting Affidavit sworn on 30.6.2010 by the Applicant, it is his case that he did not know about the existence of the suit against him until 14.1.2010 when M/S Kuronya Auctioneers seized motor vehicle registration number KAC 181 D at Kapkerer market and on following up the matter, he was shown a notice of attachment and a proclamation by the Auctioneers. He denied that he was served with any notice of entry of judgment and he had never been served with any court process by one Albert Washika Kataka. He denied the information given by the said Kataka that the Applicant had a brother called “Amos” and he added that knew no one called “Oliver”. He also contended that he had a good defence to the claim and had he been served with the summons, he would have filed it in time.
3. In a Replying Affidavit sworn on 20.7.2010, the Respondent’s answer to the Applicant is that on 14.5.2010, the Applicant was granted leave to file a statement of defence and he did so on 27.5.2010 and it was served on the lawyers for the Respondent. That the Applicant was also asked to pay KShs.5,000/= throw away costs but he refused to pay the same.
4. Further that the Application was incompetent and was merely meant to delay the enjoyment of a judgment lawfully obtained.
5. Parties relied entirely on their Affidavits on record and my opinion is as follows;
6. Firstly, it is clear that the issue to address is whether there is a good reason to allow the Applicant to file his appeal out of time. I have read the Ruling in contest and I deem it appropriate to reproduce the final orders issued. They are as follows;
“For this reason I will allow the application dated 20.1.2010 and set aside the exparte judgment entered against the defendant on 28.5.2008 and all consequential orders. The defendant is allowed to file his defence out of time. Motor vehicle registration KAC 181 D to be released to the defendant upon the defendant paying to the plaintiff throw away costs of KShs.5000/=. The auctioneers charges to be

shared equally by the plaintiff and the defendant. As the alleged payment of KShs.10,000/= to Kuronya Auctioneers was not proved, decline to order a refund of the same. Each party to bear its own costs of this application. The defendant to file and serve his defence within 14 days from the date hereof and thereafter the suit be heard and concluded within ninety (90) days. It is so ordered.”

7. The orders were issued on 14.5.2010 but the order was only extracted on 6.7.2010, close to two months after they were initially granted. In the draft Memorandum of Appeal, the appeal is against principally the two orders for payment of KShs.5,000/= and KShs.10,000/=. I say so because the learned magistrate exercised discretion and granted the Applicant the opportunity to file his statement of Defence but on set conditions. This court has not been told why that exercise of discretion should be interfered with. All the issues raised in the Applicant’s Affidavit in support do not touch on the question; why was their delay in filing the appeal within time?

8. Without the above question being answered, and it has not, it is very difficult for this court to determine whether the doors of justice should be opened for the Applicant. Granted, one has the right of appeal but that right must be exercised timeously and within known legal processes. Once the prayer for leave to appeal is wanting, then all other prayers must fail as they would be predicated on nothing.

9. The Application dated 30.6.2010 is to my mind completely misguided and has no merit. I will quickly dismiss it with costs to the Respondents.

10. Orders accordingly.

Delivered, dated and signed at Kakamega this 14th day of October, 2010

**ISAAC LENAOLA
J U D G E**