



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL CASE NO. 80 OF 2008

JOEL KIMITHU MWANGI.....APPELLANT/RESPONDENT
VERSUS

SHADRACK KUIRA.....RESPONDENT/APPLICANT

(Being Appeal from the Judgment and order of S. Ndambuki, Ag. Principal magistrate in Murang'a

Civil Case No. 103 of 2006 dated 28th September 2007)

RULING

This ruling is the result of the Motion dated 16th June 2010 in which **SHADRACK KUIRA**, the Respondent herein has sought for the following orders:

1. ***THAT this application be certified as urgent and heard ex-parte in the first instance.***
2. ***THAT there be a stay of execution/proceedings/taxation of the judgment entered herein pending the hearing and final determination of this application.***
3. ***THAT the Court be pleased to set aside the exparte judgment entered herein and all consequential orders.***
4. ***THAT the Court be pleased to strike out the memorandum of appeal.***

The Motion is supported by the Affidavit of the Respondent/Applicant. The Appellant/Respondent filed a replying affidavit to oppose the Motion.

The Respondent/Applicant argued that the Memorandum of appeal was filed, proceedings conducted and delivered during the pendency of the moratorium declared by the Statutory Manager on 1st March 2008 and stay orders given pursuant thereto. It is further argued that the firm of Kinyanjui Njuguna & Co. Advocates had no instructions to get on the appeal hence the Appellant should have served the Respondent in person instead. On the basis of the above reasons, the Respondent is of the view that the judgment arising out of such flawed process is void *ab initio*. The Respondent urged this Court to set aside exparte judgment.

The Appellant on the other hand is of the view that he followed due process leading to the judgment. It is said that on 11th March 2009 the Respondent was served with the record of appeal. He was even served with application for directions dated 19th March 2009 and was in fact invited to participate in taking a convenient hearing date at this Court's registry. The Appellant also alleged that a hearing notice was served upon the Respondent plus a notice for delivery of Judgment and a notice for taxation. The Appellant alleged that the Respondent was only jolted when he was served with a notice of delivery of

judgment and a taxation notice hence the current motion. The Appellant is of the view that *Order XLI rule 18* of the Civil Procedure Rules cannot apply because the judgment was not *ex parte*.

I have keenly taken into account the oral submissions made by learned counsels from both sides and the material placed before me. The history of this Appeal began at Murang'a Principal Magistrate's Court where the Appellant herein had sued the Respondent claiming both special and general damages for the injuries he sustained while he was on board motor vehicle No. KAP 456 H, the property of the Respondent. It is said the Appellant alighted at a place called Kaweru, but he was in the process of disembarking when the Respondent drove off before the Appellant was safely out of the vehicle. The Appellant got injured when he fell off. He filed an action claiming for damages vide Muranga P.M.C.C.C. No. 103 of 2006. When served with the Plaint and the Summons to enter appearance, the Respondent filed an appearance and a defence. In that defence the Respondent denied ownership of the aforesaid motor vehicle and the fact that the Appellant was a lawful passenger. The case proceeded for hearing before S. Ndambuki, learned Ag. Principal Magistrate. The Respondent through his counsel offered no evidence defence. The learned Ag. Principal Magistrate proceeded to dismiss the suit on the basis that the Appellant had failed to tender evidence of ownership of the suit motor vehicle. Being aggrieved by the aforesaid decision, the Appellant preferred this Appeal. The appeal was finally heard and determined by the Hon. Mr. Justice Makhandia J. In his judgment delivered on 25th January 2010, the learned judge set aside the order dismissing the suit and substituted it with one entering judgment in favour of the Appellant in the sum of Ksh.201,990/= plus interest and costs. The aforesaid judgment is the one the Respondent now seeks to set aside under *Order XLI rule 18* of the Civil Procedure Rules. Under the aforesaid provisions, the Court is given discretion to set aside an *ex parte* judgment pronounced and to rehear the appeal if the Respondent satisfies the Court that he was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing. It is the Respondent's submission here that no proper service was effected on the Respondent's current advocate. I have perused the record and it is clear that when this appeal came up for hearing on 12th October 2009, the Honourable Mr. Justice Makhandia proceeded for hearing in the absence of the Respondent upon being satisfied that the Respondent's counsel had been served with a hearing notice for that date. The Honourable judge heavily relied on the evidence of the affidavit of service of Jeremiah Ndungu Mbuthia sworn on 15th July 2009. The Respondent has not denied that service of the hearing notice and other processes were effected upon the firm of Kinyanjui Njuguna & Co. Advocates. The only response is that the aforesaid firm had no instructions to get on the appeal hence the Appellant should have served the Respondent personally. There is no doubt that the firm of Kinyanjui Njuguna & Co. Advocates had been instructed to appear for the Respondent before the subordinate Court. Processes of appeal were effected upon the aforesaid firm to receive on behalf of the Respondent. That firm did not decline to receive documents on behalf of the Respondent. In the circumstances of this appeal it cannot be said that the firm of Kinyanjui Njuguna & Co. Advocates had no instructions. Of course I am aware that the Respondent's argument is that at the time of filing this appeal, the Respondent's insurer, Invesco Assurance Company Ltd., had been placed under statutory management and that a moratorium was issued and advertised in the daily newspapers of 1st March 2008. It is argued that upon Invesco being placed under statutory management, the firm of Kinyanjui Njuguna & Co. Advocates lost instructions to represent the Respondent and that all transactions involving Invesco Assurance Co. Ltd. and its insureds were suspended. There is evidence that this Court vide **Milimani Commercial Court's H.C.C. NO. 318 OF 2008 (O.S.)** issued orders on 1st July 2008 which *inter alia* suspended all civil suits filed against Invesco Assurance Co. Ltd. and or its policy holders during the pendency of the moratorium declared by the Statutory Manager on 1st March 2008. There is no doubt that Shadrack Kuira the Respondent herein, was a policy holder of Invesco Assurance Co. Ltd. I am persuaded by the submissions of the Respondent that at the time of filing the appeal, the Appellant and his counsel were aware that the Respondent's Insurer i.e. Invesco Insurance Co. Ltd. had been placed under statutory management. I am also convinced that they were aware that a moratorium had been declared by the Statutory manager, which in effect suspended and or stayed all civil proceedings against the Insurer and its insured. The Appellant and his counsel did not reveal this crucial information to the Hon. Mr. Justice Makhandia. I also agree with the submissions of the Respondent that the effect of placing Invesco Assurance Co. Ltd. under Statutory management, meant that the firm of

Kinyanjui Njuguna & Co. had to seek fresh instructions from the statutory manager to continue appearing for the insured i.e. the Respondent herein. A careful perusal of the replying affidavit of Joel Kimithu Mwangi will reveal that the Appellant and his advocate do not deny the fact that they were aware that a statutory manager had been appointed to manage the affairs of Invesco Assurance Co. Ltd. They do not also deny the fact that they knew that the statutory manager had declared a moratorium and that he had obtained a court order from this Court to suspend all proceedings which were pending against Invesco Assurance Co. Ltd. and its insured. The appointment of a statutory manager meant that all previous transactions and instructions given by Invesco Co. Assurance Co. Ltd. were suspended. The instructions given to the firm of Kinyanjui Njuguna & Co. Advocates were automatically suspended. It is presumed that the Appellant and his advocate knew or ought to know the effect of the appointment of a statutory manager to run the affairs of Invesco Assurance Co. Ltd. Even if such an inference was not made, still the Appellant and his advocate are not out of the woods because there was a specific order which was issued by this Court through **Milimani Commercial Court's H.C.C.C. NO. 318 of 2008 (O.S.)**. I am convinced that the Appellant and his counsel acted recklessly when they purported to serve pleadings and processes upon the firm of Kinyanjui Njuguna & Co. Advocates when they knew the aforesaid law firm lost instructions to act in the matter on behalf of Invesco Assurance Co. Ltd. and its insured upon the appointment of a statutory manager. Service upon a law firm without instructions to appear for a particular litigant is improper service and is equivalent to no service at all. In the circumstances of this case, I am convinced there was no proper service upon the Respondent and his counsel hence the appeal will be treated as having proceeded for hearing *ex parte*. Consequently, the Appellant's assertion that the provisions of *Order XLI rule 18* of the Civil Procedure Rules do not apply cannot hold water. The Appellant and his legal advisers did not disclose to the Honourable Mr. Justice Makhandia that the legal status of the insurer who had taken over the Respondent's case by dint of the principle of subrogation had changed upon the insurer being placed under statutory management. The Appellant and his counsel did not also disclose to the Honourable judge that an order staying all proceedings and actions against the insurer and its insured had been issued by this Court. This Court has been urged to *inter alia* strike out the Memorandum of Appeal. I do not think such an order can be issued under *Order XLI rule 18*. If well advised the Respondent's remedy lies elsewhere. Under *Order XLI rule 18*, this Court is given the discretion to set aside *ex parte* proceedings and judgment done in an appeal and to admit the appeal for hearing *de novo*. I am satisfied the Motion meets the requirements of *Order XLI rule 18*. I hereby set aside the *ex parte* judgment of the Hon. Mr. Justice Makhandia delivered on 25th January 2010. The Appeal will be heard *de novo*. Costs of the Motion is to abide the outcome of the Appeal.

Dated and delivered at Nyeri this 19th day of November 2010.

J. K. SERGON

JUDGE

In open court in the presence of Kingori holding brief Mbuthia for Appellant. No appearance Respondent.