



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 106 OF 2008

BENEDICT MIGWI NYAGA
& ANOTHER.....APPELLANT
VERSUS
BENSON MITHAMO KAMUKU.....RESPONDENT

RULING

This is an Appeal against the Ruling of **MR. S. MBUNGI – RESIDENT MAGISTRATE KERUGOYA** delivered on 16.10.2008 in **PMCC NO. 171 OF 1995**.

The ruling was in respect of an application dated 26.08.08 which was grounded on Order 1XB Rule 3 and 8 of the Civil Procedure Rules. The Applicant in that Application who is the Respondent in this appeal was asking the court to set aside its judgment that was delivered on 8.08.08. The said Application was allowed and not only was the said judgment set aside, but the learned magistrate ordered that the case starts denovo.

That was notwithstanding the fact that the plaintiff's had already closed their case and the defendant had also testified and had remained to call only one witness. The Appellants felt aggrieved and therefore filed this Appeal. They have proffered 5 grounds of Appeal as per the memorandum of Appeal dated 11th November 2008 as hereunder:-

1. ***The learned trial magistrate erred in law in allowing an incompetent application as it offended the Provisions of Order XVI Rule 4 of the Civil Procedure Rules.***
2. ***The learned trial magistrate erred in law in allowing the application yet it offended provisions of Cap 15 Laws of Kenya.***
3. ***The learned trial magistrate erred in law in failing to hold that the application was incompetent as no decree had been extracted and annexed to the application.***
4. ***The learned trial magistrate erred in law in failing to hold that it was fanctus official as this was a final judgment.***
5. ***The learned trial magistrate erred in law in ordering the case to be heard a fresh and yet non of the parties had applied for the same.***

He asks the court to set aside that ruling and allow the judgment dated 8.08.08 to remain as the judgment of the court. Both counsel herein filed written submissions in support of their case. I have carefully considered the said submissions along with the applicable law. In order however to understand the issues raised in the able submissions of both counsel, it is important to revisit the history of this matter which led to the judgment in question.

As stated earlier on in this Ruling the plaintiffs had already testified and closed their case. The defendant also testified and called 3 other witnesses in support of his case. He was left with only 1 witness who was the Land Registrar. On the date appointed for hearing, the defendant did not attend court and his witness was not there either. Counsel for the Appellant herein applied that the court proceeds to prepare its judgment and that is how the judgment in question came to be.

The fact that the matter had already proceeded and evidence taken from both sides removed the matter from the ambit of Order IXB Rule 3. Order IXB Rule 3 deals with exparte judgments. In this case, there was evidence from both sides which included cross examination of both parties and their witnesses by counsel and the judgment that could arise from that evidence cannot be said to amount to an exparte judgment. It cannot therefore be subjected to the provisions of Order IXB Rule 8. I agree with counsel

for the Appellant herein that the applicable provision of the law was Order XVI Rule 4 of the Civil Procedure Rules which provides:-

“Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of the witnesses or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may notwithstanding such default, proceed to decide the suit forthwith.”

Since the trial court proceeded as provided above, then the provisions of Order IXB Rule 8 could not apply at all to set aside the said judgment. The authorities accompanying the Respondent’s submissions are not therefore relevant in this Appeal. They apply in cases of setting aside judgments and orders given under Order IXB of the Civil Procedure Rules.

I have studied the judgment in question and confirmed that indeed the learned trial magistrate did consider the defence on record and even the evidence adduced by the defendant and his witnesses. This was certainly not an exparte judgment that the magistrate could set aside.

I agree with the Appellant’s counsel that once the learned magistrate rendered the said judgment he became funtus officio. He could not set aside his own judgment ostensibly under Order IXB Rule 8. He therefore made a gross error of law in setting the said judgment aside. The same could only be subjected to review by the same court on the grounds provided for in law, or alternatively be appealed against before this court.

I need state also that ordering that the trial starts denovo was a preposterous and unjust order given that none of the parties had prayed for the same. It subjected the plaintiffs to serious prejudice and placed the defendant at an undue advantage. The fairest thing that he could have done if he was within the law was to direct that the matter proceeds from where it had reached when it was last in court.

The upshot of all this is that the Appellant’s appeal has merit. The Appeal is hereby allowed. The Ruling dated 16.10.08 is hereby set aside. The judgment rendered on 8.08.08 will remain as the judgment of the court. The Respondent will bear the costs of this Appeal. Orders accordingly.

**W. KARANJA
JUDGE**

Delivered, dated and signed at Embu this 9th day of November 2010

In presence of:- Mr. Njage for Gacheru for Appellant and Ms. Kimani for Gachugi for Respondent.