

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Civil Appeal 74 of 2005

JOSEPH MUNGAI NJOROGE.....APPELLANT

VERSUS

BOARD OF GOVERNORS GITARAKA

GIRLS SECONDARY SCHOOL.....RESPONDENT

RULING

The appellant Joseph Mungai Njoroge has filed this appeal against the Ruling by the learned trial magistrate Lucy Gitari in **Suit No. 198 of 2000 dated 1/11/2005.**

The said ruling set aside the ex-parte Judgment entered in favour of the plaintiff dated 31/8/2004. In setting aside the said Judgment, the learned trial magistrate said that she found that the respondent's defence raised "***a serious triable issue***" and further that the Plaintiff/Respondent would not suffer any prejudice if the ex-parte Judgment was set aside.

The Appellant was aggrieved by the said ruling and hence this appeal.

I have gone through and keenly considered the entire proceedings and pleadings in this file. I have also considered the 10 grounds of appeal relied on by the appellant. My finding is that there were several misconceptions in the ruling of the trial magistrate. The question however is whether these misconceptions or errors go into the root of the matter.

One of these misconceptions or errors is that "***There is nothing on record to show that leave to amend the plaint was obtained.***"

The record however shows that the court (at page 54 of the appeal record) following a consent by both counsel allowed the plaintiff to amend his plaint within 14 days from 14/6/2001. The amended plaint was filed on 27/6/2001 and it was therefore filed within the 14 days. What is not clear from the record though is whether the same was served on the defendants. I also note that the state counsel filed a defence on behalf of the 2nd defendant when there was already a defence on record. The earlier defence filed by Joan Ndorongo & Co. Advocates had not been withdrawn and so the subsequent defence dated 12/9/2000 by the state counsel was invalid and should not have been accepted as you cannot have 2 sets of pleadings simultaneously for the same party. It was also not clear from the record whether the defendant was represented by Joan Ndorongo & Co. Advocates or by the Attorney General. That issue was raised by counsel for the plaintiff/appellant and the learned trial magistrate found that the Attorney General was properly on record. Having made that finding, she ought then to have gone a step further and determined which party was represented by Joan Ndorongo & Co. Advocates. The insurers were not parties in this suit and they could not therefore be represented nor could they have filed a defence. The issue of the 2 defences and the representation of the defendant was not properly resolved. Be that as it may however, as I mentioned earlier what concerns this court at this point in time is whether the learned trial magistrate erred in setting aside the said Judgment. Setting aside of an exparte Judgment is purely at the discretion of the court. The discretion must nonetheless be exercised judicially, fairly and in the interest of justice. Where a defence raised triable issues, the court should not dethrone the defendant from the seat of justice. A defendant who has exhibited a good defence and who shows interest in defending the matter

should be allowed to defend his case. This should be more so if in the opinion of the court the plaintiff does not stand to suffer any prejudice or in cases where the plaintiff can be compensated by way of an award for damages. In this case, I am satisfied like the learned trial magistrate was that the defendant had raised a serious triable issue and he was rightly allowed to proceed to ventilate his defence.

On the other hand however, it is noted that the plaintiff/appellant had incurred substantial loss because the application to set aside the Judgment was made after the execution process had already started. The plaintiff had even instructed the auctioneers etc. The learned trial magistrate ought to have given the plaintiff thrown away costs to cushion him from loss upon the setting aside of the ex parte Judgment. While upholding the learned trial magistrate's decision to set aside the ex-parte Judgment, my finding is that the plaintiff was indeed entitled to thrown away costs. I therefore substitute the learned magistrate's order making no orders as to costs with one awarding the plaintiff/appellant thrown away costs of 70,000/= The thrown away costs be paid within 45 days of this order failing which the ex-parte Judgment will be reinstated and the appellant be at liberty to execute the decree arising therefrom. Each party will bear its own costs of this appeal.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 30th day of June 2009.

In presence of:-Mr. Nyaga for appellant

N/A for Attorney General