REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 115 of 2003

KENYATTA MWANZO & ANOTHER …… APPELLANT

V E R S U S

FESTO LUBALE ……..……. RESPONDENT

J U D G E M E N T

This is an appeal from the decision of the Webuye Senior Resident Magistrate made on 1.9.2003. The appellant filed five grounds of appeal which are that:-

1. That the Learned trial magistrate erred in law and in fact in failing to find that the failure by the appellants not to file their statement of defence on time or at all was not their own making.

2. That the learned trial magistrate erred in law and in fact in holding that the defendants had no good defence contrary to the evidence on record.

3. That the learned trial magistrate erred in law and in fact in not finding that failure by the plaintiff to serve the appellants for formal proof was fatal to the proceedings before her.

4. That the learned trial magistrate erred in law and in fact in failing to exercise the wide discretion under order IXB rule 8 in favour of the appellants.

5. That the learned trial magistrate erred in law and in fact in dismissing the appellant's application contrary to the evidence on record.

Mr. Anziya, Counsel for the appellants, submitted that the defendants entered appearance but failed to file their defence on time. On 3/11/2002 ex-parte judgement was entered and the matter proceeded for formal proof on 20/12/2002 without the Court inquiring whether the defendants had been served. There was no evidence of service on the defendant who had entered appearance and the trial court violated the provisions of Order IX rule (1) (2) and (3). The trial court declined to set aside the ex-parte judgement even after the issue was raised.

Mr. Omukunda for the respondent opposed the appeal and submitted that setting aside ex-parte judgement is a discretion of the court and that the trial court exercised its discretion properly. The trial magistrate looked at the draft defence which amounted to mere denial.

Order IXB rule (2) states as follows:-

"*(2) At any time after the entry of interlocutory judgment, the plaintiff may upon giving not less than 14 days notice to every defendant who has appeared, set down the suit for assessment of damages or of the*

value of goods and damages as the case may be."

It follows from the provisions of the above order that the defendants ought to have been given at least 14 days notice. The lower court record shows that a notice of entry of judgement was filed on 8th April 2003. There is no affidavit of service to show that the defendants were aware about the entry of the Interlocutory Judgement.

The case proceeded for formal proof on 20/12/2002 and judgement was delivered on 8th April, 2003. The appellants did nothing until 5th August, 2003 when they applied to set aside the ex-parte judgement. This was after the 2nd appellant had been committed to civil jail.

The counsel for the respondent submitted that the draft defences were mere denials. I have noted from the pleadings that the Plaintiff's daughter got married to the 1st defendant and she died while pregnant. The Plaintiff contends that there was an agreement which the respondents breached.

Since the decretal sum was deposited in court, no prejudice will befall the respondent. The appellants were not notified about the hearing yet they had entered appearance. For the best interest of justice, it is only fair that the appellants be allowed to present their case. I have looked at the draft defences and the same cannot be held to be mere denials.

I therefore find that this Appeal has merit and the same is allowed. The Webuye SRMC No.165 of 2002 shall be heard fully. The defendant shall file their defences within fourteen (14) days from the delivery of this judgement. Costs shall be determined by the outcome of the lower court case.

Delivered, dated and signed at Kakamega this 23rd day of July, 2009.

SAID J. CHITEMBWE

J U D G E