



NANDI COUNTY COUNCIL APPELLANT

VERSUS

FRANCIS KIPKETER MUREI RESPONDENT

JUDGEMENT

This is an appeal against the ruling of the Senior Resident Magistrate in Senior Resident Magistrate's Court Civil Case No. 21 of 1994 which was delivered on 5th August, 1997. The facts which gave rise to the appeal as gathered from the pleadings briefly may be stated.

On or about 6th May, 1993 the Defendant's agents and or servants went to the Respondent's shop at Sigowet Trading Centre and while therein unlawfully and illegally removed and took away one weighing machine. The Respondent filed a suit being Senior Resident Magistrate's Court Civil Suit No. 21 of 1994 against the Appellant seeking Judgment for:-

- (a) A declaration that the Appellant's action in removing and retaining the said weighing machine was unlawful and illegal and the same should be returned to the Respondent or in the alternative payment of its value.
- (b) General damages be awarded to the Respondent at the rate of Kenya Shillings Shs. 2,000/= per day.
- (c) Interest at Court rates.
- (d) Costs of the suit.
- (e) Further or other relief as the Honourable Court could deem fit.

The Respondent upon being served with Summons filed a defence denying the Appellant's claim in toto. The suit was fixed for hearing on 18th April, 1996 when the matter came up for hearing on 18th April, 1996, Mr. Birech Counsel for the Plaintiff/Respondent was present. But Mr. Kalya for the Defendant/Appellant was absent and his brief was held by Mr. Kitur who informed the Court that Mr. Kalya was indisposed and sought an adjournment which was not objected to by Mr. Birech.

The Court granted the application for adjournment and the suit was adjourned to 23rd May, 1996 for hearing. On 23rd May, 1996 Mr. Birech Counsel for the Plaintiff/Respondent attended but Mr. Kalya Counsel for the Defendant/Appellant did not attend. The hearing was adjourned to 27th June, 1996. On 27th June, 1996 Mr. Birech for Plaintiff/Respondent was present but Mr. Kalya for the Plaintiff was absent and Mr. Kitur held his brief. The hearing was adjourned to 18th July, 1996. And on 18th July, 1996 Mr. Birech for the Plaintiff/Respondent was present but Mr. Kalya was absent and Mr. Kitur held his brief. Mr. Kitur applied for an adjournment again on the ground that Mr. Kalya was not notified to take a hearing date. The application for adjournment was resisted by Mr. Birech on the ground that the suit had been adjourned severally due to the absence of Mr. Kalya and that day it was taken in Court and he was notified of the hearing date.

The Magistrate considered the application rejected the same due to several adjournments and no valid reason was given for adjournment. The hearing proceeded and the trial Magistrate delivered the Ruling on 25th July, 1996 in the presence of Mr. Birech for the Plaintiff/Respondent and Mr. Kalya for the Defendant/Applicant. Immediately Judgment was delivered Mr. Kalya for the Defendant/Appellant applied for stay of execution for thirty (30) days which application was granted.

On 14th August, 1996 Mr. Kalya filed a Notice of Motion under Certificate of urgency seeking orders that:-

- (a) The Judgment of 25-7-96 plus all consequential orders flowing therefrom be and is hereby set aside.
- (b) The case be heard de novo to the extent of the Defendant being given an opportunity to cross-examine the Plaintiff on evidence so far adduced by the Plaintiff and to present its defence accordingly.
- (c) Pending the hearing and determination of this application inter partes there be stay of execution of the Judgment.
- (d) Costs be provided for.

The application was supported by an affidavit sworn by WILSON KIPLAGAT KALYA Counsel on record for the Defendant in which he averred that:- On 18th July, 1996 when this suit was due for hearing, he sent Mr. Kitur Advocate to hold his brief and to move for adjournment of the suit to another date in view of the following matters:-

- (i) Service was effected on them on 6th July, 1996 and was received under protest.
- (ii) On that day he had other matters in Eldoret Court fixed prior to receipt of the Plaintiff's Counsel's Notice.

That his application for adjournment was disallowed and the suit proceeded for hearing ex parte; that subsequently however it was agreed between the Counsels in the suit that Judgment due for delivery on 25th July, 1996 would be stayed; that the Plaintiff's case be re-opened and the Plaintiff be cross-examined on evidence so far adduced on 25th July, 1996; that it was further agreed that the Defendant would meet the Plaintiff's costs thrown away to be agreed or be assessed; that however when Counsels for the Plaintiff finally signed the consent, the Judgment herein was being written hence the consent was overtaken by events; that it is expedient that the application before this Court be allowed so that the Defendant be availed an opportunity to defend the suit and for the ends of justice to be met.

The trial Magistrate after listening to the arguments by both Counsel dismissed the application. In order to appreciate the issues raised in this appeal, it is pertinent that I reproduce the said half a page Ruling as under:-

"RULING

This is an application made under Section 3A of the CPA and Order L Rule 1 of the Civil Procedure Rules. The Applicant/Defendant seeks that the Judgment delivered by this Court on 25th July, 1996 plus all the consequential orders following therefrom be set aside. The application is opposed by the Respondent. The Applicant told the Court that there was a consent that had been received but which had not been noted by the Court before the Judgment was delivered. The applicant concedes that the said consent had been overtaken by events. The said consent therefore is of no consequence as far as the matter is concerned.

The application is dismissed.

F. M. KINYANJUI

RESIDENT MAGISTRATE”

This is the Ruling the Appellant is contesting in this appeal and he has raised five grounds namely:-

- (a) The learned Resident Magistrate erred in law and in fact in failing to uphold the Appellant’s application in view of the consent order dated 29th July, 1996 which had been filed prior to the date of Judgment allowing the Respondent’s case to be re-opened to the extent of giving the Appellant opportunity to cross-examine the Respondent and to present its defence.
- (b) The learned Resident Magistrate erred in law and in fact in failing to take into account the Appellant’s argument in support of the application in his ruling on the said application to set aside ex parte judgment dated 14th August, 1996.
- (c) The learned Resident Magistrate erred in law and in fact in failing to set aside Judgment in the said case notwithstanding that the Appellant had a good defence and sufficient reasons for non-appearance.
- (d) The learned Resident Magistrate erred in law and in fact in failing to follow judicial precedents in ruling on the Appellant’s application.
- (e) The learned Resident Magistrate erred in law and in fact in failing to set aside the ex-parte Judgment in the said case against the weight of evidence in favour of allowing the application.

Counsel for the Appellant submitted that the learned trial

Magistrate erred in not considering the consent by the parties dated 18th July, 1996 but concedes that the said consent had not been recorded by the Court. The consent was filed the same day the Judgment was delivered. He further submitted that although the consent was overtaken by events the intention as envisaged by the parties had not been overtaken by events.

The other ground of appeal is that the Appellant was not invited to take a convenient date. While Counsel for the Respondent in opposing the appeal submitted that the Court could not consider the alleged consent because the same had been overtaken by events a fact which is conceded by the Appellant.

Further the alleged consent was not signed by Counsel for the Respondent/Plaintiff. On the ground that the Appellant was not invited to take a convenient hearing date he submitted that the date was given by the Court in the presence of Counsel for the Plaintiff/Respondent and Mr. Kitur Counsel who held brief for Mr. Kalya who was on record for the Defendant/Appellant and that this date was taken by consent of both Counsel and indeed Mr. Kitur who held brief for Mr. Kalya when the hearing date was taken did appear during the hearing but chose not to take part when his application for adjournment was disallowed.

In essence the grounds are narrowed into three. First, whether or not the Appellant was invited to take a hearing date. Counsel on record for the Defendant/Appellant having instructed Mr. Kitur to hold his brief and the date having been taken in Court in the presence of both Counsels there was no need to invite Mr. Kalya to take any date. Mr. Kitur did not inform the Court that the date given was not convenient for Mr. Kalya. This ground therefore fails.

The second ground is whether or not the Judgment was ex parte. Counsel for the Appellant/Defendant had instructed Mr. Kitur to hold his brief when the matter came up for hearing on 27th July, 1996 when he applied for adjournment which was granted and the Court gave them 18th July, 1996 for the hearing of the suit. On that day Mr. Kitur appeared and sought an adjournment which was refused and the Court ordered that the hearing should proceed. Counsel then decided not to take part in the proceedings and the hearing proceeded. This did not constitute the proceedings ex parte. See **DIN MOHAMED V. LALJI VISRAM 1937 EACA 1** where it was held that if Counsel duly instructed, on being refused an

adjournment elects to leave the Court and takes no further part in the case, that fact does not constitute the proceedings ex parte. This ground also fails.

The last ground is whether or not the trial Magistrate erred in not considering the consent by the parties dated 18th July, 1996. The Appellant concedes that the alleged consent had been overtaken by events. Since the said consent did not form part of the Court record there was no way the trial Magistrate could have considered the same. This ground also therefore fails.

Accordingly, and for the reasons above stated this appeal is dismissed with costs to the Respondent.

DELIVERED AND DATED AT ELDORET THIS 19TH DAY OF OCTOBER, 2009.

J. L. A. OSIEMO

JUDGE