



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1737 of 2001

WILLIAM MOSSI MOIPLAINTIFF

V E R S U S

THE CHAIRMAN BOARD OF GOVERNORS

HIGHWAY SECONDARY SCHOOLDEFENDANT

R U L I N G

The Defendant seeks by notice of motion dated 16th November, 2006 two main orders:-

1. An order that the judgment and decree herein passed on 21st February, 2003 and all subsequent orders made be reviewed and/or set aside (prayer No. 3).
2. An order to expunge from the record the proceedings herein from 11th July 2002 that culminated in the said judgment (prayer No. 4).

The application is essentially brought under Order 44, rules 1 and 3 of the Civil Procedure Rules (the Rules). It is premised upon the main grounds:-

1. That there is no evidence of service of summons to enter appearance upon the principal of Highway Secondary School or upon the chairman of its board of governors as ordered by the court on 10th April, 2002.
2. That the suit proceeded to formal proof on 23rd January, 2003 upon the erroneous presumption that the interlocutory judgment entered on 15th February, 2002 was still in place whereas it had in fact been set aside on 10th April, 2002.
3. That the said formal proof proceedings were thus irregular, and amount to an apparent error on the face of the record.
4. That by the same token the judgment and decree passed on 21st February, 2003 are null and void.
5. That the application raises matters of public interest in that the Defendant is a public secondary school and the decretal sum is huge; the students of the school and their parents will thus be subjected to great financial hardship.

The Plaintiff has opposed the application as set out in the grounds of objection dated 20th November, 2006. Those grounds are, *inter alia*:-

1. That the application is frivolous, scandalous and an abuse of the process of the court, a similar application having been dismissed.
2. That it is *res judicata*.
3. That there are no grounds placed before the court to warrant review.
4. That the judgment now challenged is valid and has never been challenged on appeal.
5. That summons to enter appearance were duly served as ordered on 10th April, 2002.

I have considered the submissions of the learned counsels appearing, including the cases cited. I have also read the two supporting affidavits and the replying affidavit. Finally, I have perused the court record. The background of this matter is as follows. The Plaintiff sued the Defendant by plaint dated 5th October, 2001 for general and special damages for wrongful termination of employment and defamation. On 15th February, 2002 interlocutory judgment was entered against the

Defendant in default of appearance. When the case came up for assessment of damages on 10th April, 2002 before Rimita, J the learned judge set aside the interlocutory judgment upon the main ground that there was no proper service of summons to enter appearance. He further ordered that summons to enter appearance be served upon the principal of the Defendant or the chairman of its board of governors. Rimita, J also observed that the Plaintiff is not entitled to interlocutory judgment “**in this type of case**”.

The case was eventually fixed for “**formal proof**” hearing, and it came up for such hearing before Hayanga, J on 23rd January, 2003. Prior to that the Plaintiff had requested for interlocutory judgment in default of appearance by a request dated 13th and filed on 16th May, 2002. By a note endorsed on the request, the Deputy Registrar declined to enter such judgment in view of the observations of Rimita, J of 10th April, 2002.

The Plaintiff’s case was then heard *ex parte* by Hayanga, J. The Plaintiff testified and called one witness. In a judgment delivered on 21st February, 2003 he was awarded the total sum of KShs. 781,102/00 plus costs and interest.

By chamber summons dated 14th and filed on 15th April, 2003 the Defendant applied under Order 9A, rule 10 of the Rules for an order to set aside the aforesaid judgment entered on 21st February, 2003. That application was heard *inter partes* by Hayanga, J. In a considered ruling apparently delivered on 25th August, 2003, the learned judge dismissed the application with costs.

On 21st January, 2004 the Plaintiff’s bill of costs was taxed at KShs. 123,317/00, all inclusive. It would appear that execution thereafter issued. By notice of motion dated 24th February and filed on 4th March, 2004, the Defendant applied under Order 44 of the Rules for an order to review or vary the judgment entered on 21st February, 2003. That application was never prosecuted. It was dismissed on 7th December, 2004 by Mugo, J after the learned judge refused adjournment and the counsel holding brief for the Defendant’s advocate declined to prosecute the same for lack of instructions. As already seen, the Defendant then filed the present application on 16th November, 2006, which application is also for an order of review and setting aside under Order 44 of the Rules. The Defendant’s previous application for review (by notice of motion dated 24th February, 2004) was dismissed for failure to attend court to prosecute the same. For the Defendant to then file another application for review is to abuse the process for the court. It should have applied for reinstatement of the earlier application so that it may be disposed of by way of hearing. It matters not that the latter application advanced grounds different from those in

the earlier application. It was not open to the Defendant to file another similar application, the first one having been dismissed for want of prosecution. Had the Defendant successfully sought its reinstatement, the application could have been amended to incorporate the new grounds. I would dismiss the application for being an abuse of the process of the court.

It was urged for the Defendant that there is no evidence on the court record that summons to enter appearance were served as ordered by Rimita, J on 10th April, 2002. There is indeed such evidence. It is an affidavit of service sworn by one JOSEPHINE M. MAGOTI on 15th May, 2002 and filed the following day. It states categorically that summons to enter appearance and copy of the plaint were served upon the principal of the Defendant, one DANIEL KARABA, on 22nd April, 2002 at the school. He was personally known to the process-server, and he accepted service by stamping and signing the original copy which is annexed to the affidavit of service. Hayanga, J in his ruling of 25th August, 2003 found that summons to enter appearance had indeed been served upon the principal of the school as ordered by Rimita, J. There is no substance at all in this complaint.

The point was also taken that the proceedings before Hayanga, J of 23rd January, 2003 and the resulting judgment delivered on 21st February, 2003 were irregular and amounted to an error apparent on the face of the record, and thus null and void. As already pointed out elsewhere above, after summons to enter appearance were served as ordered by Rimita, J on 10th April, 2002 and the Defendant did not enter appearance or file defence, the Plaintiff sought interlocutory judgment. But the Deputy Registrar declined to enter the same on account of the observation of Rimita, J on 10th April, 2002 that interlocutory judgment was not available to the Plaintiff. The case was then fixed for what the registry called “formal proof” hearing. This was *ex parte* hearing, and that is what Hayanga, J conducted on 23rd January, 2003. As the Defendant had not entered appearance nor filed defence the Plaintiff was entitled to prosecute his case *ex parte*, and that is what he did before Hayanga, J. The learned judge did not proceed upon the basis that there was an interlocutory judgment. There was none as the one entered on 14th February, 2002 was set aside by Rimita, J on 10th April 2002, and no other interlocutory judgment was subsequently entered.

It is true that in his ruling of 25th August 2003 Hayanga, J appears to be of the impression that the judgment entered for the Plaintiff on 21st February, 2003 was “**a result of interlocutory judgment awarded on 15th February 2002**”. He wrote that ruling about seven months after the judgment. It appears to have escaped the learned Judge’s attention that the interlocutory judgment entered on 15th February, 2002 was set aside by Rimita, J on 10th April, 2002. This was a slip that did not cause, and could not have caused, any party prejudice. The record of 23rd January, 2003 does not at all support the contention that Hayanga, J heard the Plaintiff’s case *ex parte* upon the basis that there was interlocutory judgment in place.

Finally, it has been urged for the Defendant that since it is a public school, and that ultimately the students and their parents may have to bear the burden of the decretal sum, the application raises matters of public interest. I fail to see any issue of public interest in this matter. All are equal before the law. The court will not look at the matter any differently merely because one of the parties is a public school. The applicable law must apply to all and sundry in equal measure. No special consideration will be given to the Defendant merely on account of it being a public school.

Having considered all matters placed before the court, I do not find any merit in this application. It is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF FEBRUARY, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 15TH DAY OF FEBRUARY, 2008