

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Civil Appeal 102 of 2007

STEPHEN WAWERU CIGITI.....APPELLANT

VERSUS

JOSEPH MWANIKI.....RESPONDENT

JUDGMENT

The appellant who appears in person filed this appeal against the Judgment of the ***Resident Magistrate Kerugoya in R.M.CC.No. 354/2006***. Basically, his major complaint against the Judgment is that he was condemned unheard which was against the rules of natural justice. He is asking the court that the Judgment be set aside and the matter be reheard.

According to counsel for the Respondent however, the Appellant's appeal has no merit and it should be dismissed. He contended that the Appellant was indeed served with the hearing notice and that he was even in court earlier on the hearing date during the callover but when the matter was called later, he was found to have disappeared and so the court proceeded to hear the matter ex-parte. Counsel also submitted that if the appellant was unhappy with the Judgment, he should have applied for it to have been set aside. I agree with him on the latter issue. If a ruling or Judgment is given ex-parte, the first option a party has is to move the court that passed that Judgment to have it set aside. The court nonetheless takes cognizance of the fact that the defendant/appellant was still acting in person and he may not have been aware of that option. The court cannot nonetheless shut him out. A decree followed the said Judgment and it was appealable against. His appeal cannot; be dismissed on that basis. I will now proceed to consider the same on merit. I have gone through the record of the trial court. I have noted that the date of 2/7/2007 when the matter was heard had been taken ex-parte by a representative of the respondent counsel on 14/6/2007. The notes recorded on that date show that "matter fixed ex-parte for hearing of application dated 29/3/2007 on 2/7/2007."

The hearing notice which was served on the Appellant dated 19/6/2007 and filed in court on 2/7/2007 states explicitly that what was coming up for hearing on 2/7/2007 was an application. It must therefore be understood to mean that what was supposed to come up for hearing on 2/7/2007 was not the main suit but the hearing of the application dated 29/3/2007. That application was for leave for the plaintiff to file an amended plaint. So even if the defendant/appellant failed to appear in court on that date, the most the Magistrate could have done was allow the application-which means the amended plaint would still have been served on the defendant/appellant and if already served, the defendant was still entitled to file an amended defence within the prescribed time. The suit was definitely not listed for hearing. It was not even ripe for hearing. The learned trial Magistrate therefore erred in proceeding to hear the plaintiff's evidence while in fact the matter was not listed for hearing of the main suit on that date.

This was improper on the part of the trial Magistrate. He ought to have checked the record properly before proceedings to hear the plaintiff ex-parte. On the other hand counsel for the plaintiff being an officer of the court also had a duty to update the court on what was supposed to have done. Having failed to do so, neither him nor the respondent would be entitled to costs of the proceedings before the subordinate court.

In my finding is that this appeal has merit. The same is allowed. The Judgment dated 6/8/2007 is hereby set aside with orders that each party bears its own costs in the lower court. The appellant is awarded the costs of this appeal. It is further ordered that this file be remitted back to Kerugoya Court for

hearing and final disposal by a Magistrate of competent jurisdiction other than **Mr. A. K. Thuku.**

Orders accordingly.

W. KARANJA

JUDGE

Delivered, dated and signed this 20th .day of ...July...2008

In presence of:-