REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 158 of 1999

ANNA WAMAITHA IRUNGU

WILLY WAIRE IRUNGU ::::::::::::::::::::::::::::::::PLAINTIFFS/RESPONDENTS

VERSUS

ESTHER MWIKALI::1ST DEFENDANT

ABDUL HAKIM KASIM ::2ND DEFENDANT

RULING

1. The Application before me is dated 17.2.2006 and is brought under Order IXA Rule 10 and 11 of the Civil Procedure Rules and section 3A of the Civil Procedure Act as well as all other enabling provisions of the law. Save for the prayer as to costs, the substantive prayer is that the interlocutory judgment entered against the 2nd Defendant, Abdul Hakim Salim and all consequential orders be set aside.

2. In the Supporting Affidavit of the Applicant sworn on 20.2.2006, it is deponed that the Applicant was unaware of the proceedings leading to a warrant for arrest being issued against him. That all along he was under the false impression that his insurers, M/S Stallion Insurance Company Ltd were defending the claim against him and he was surprised when M/S Al-Amin Insurance Brokers, Mombasa called him on 13.2.2006 and showed him a copy of the warrant of his arrest. That he had indeed been served with the summons to enter appearance which he forwarded to his insurers aforesaid and that he trusted them to do what was necessary to secure his interests. They failed to do so and yet he had a good defence to the suit since the accident subject of the suit occurred because of the negligence of the driver of motor vehicle KAD 039V Toyota Corona and not the driver of KAD 211Y Nissan Lorry belonging to him. A draft defence is annexed to the Supporting Affidavit and in it, at paragraph 4 thereof, particulars of negligence in the part of the 1st Defendant's authorized driver, agent or servant are set out.

3. The Applicant in another Affidavit sworn on 9.11.2006 reiterated all the above matters and depones that he is desirous of being heard in the matter although in fact the 1st Defendant has already settled what part of the decree was demanded from her and the issue of her liability settled.

4. The Plaintiffs on their part filed a Replying Affidavit sworn on 20.3.2006 by Anna Wamaitha Irungu. In that Affidavit she depones that interlocutory judgment was entered when the 2nd Defendant/Applicant failed to enter appearance. That the hearing also proceeded without his presence since the 1st Defendant had entered appearance and filed a Statement of Defence. On 6.6.2002, judgment was entered against the Defendant's jointly and severally but the judgment was reviewed on 17.1.2003 and liability was apportioned at 50% - 50% as between the two Defendants. That subsequently a Notice to show cause was served upon the present Applicant who failed to show cause why warrants of attachment should not be issued against him. Later he only came to court when the warrants were issued and yet he has no one to blame but himself for his lack of diligence.

5. Advocates for the parties relied entirely on the Affidavits on record and the law as I understand it is as follows:-

6. In Mbogo vs Shar [1968] E.A. 93 at 95, Sir Charles Newbold stated thus;

That in exercise of judicial discretion to set aside a judgment, a court must determine, "*whether … in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary upon terms to be improved"*. Applying those principles to the Application before me, it has been admitted that summons to enter appearance were indeed served upon the Applicant who then says that he took the same to his insurers and I see from the record that on 19.6.2001 M/S Mohamed Muigai Mboya Advocates entered appearance for the "*Defendants"*. Default judgment had however been entered against the defendants on 5.5.2000 but I see that the said Advocates participated in proceedings and appeared to defend only the 1st Defendant inspite of their Memorandum of Appearance that they appeared for all Defendants. In any event there appears nothing on record to show that the 2nd Defendant/Applicant ever had any role in the proceedings until the present Application. But that is not an end in itself because I have also seen the evidence tendered before Nambuye , J. in which the learned judge found that when motor vehicle registration numbers KAD 039Y and KAD 211Y collided, the principle of res ipsa loquitor was properly invoked and the Defendants were thus equally liable for the injuries to the deceased husband of the Respondent. Later, the judgment was reviewed and each of the Defendants found to be 50% liable for the accident. The Applicant says that in fact the 1st Defendant was 100% liable but try as I might, there is no such evidence and the averments in the draft Defence are neither here nor there.

7. In the end my mind is tilted to refuse to grant the Application because to do so would serve no useful purpose since the Applicant has also failed to show why after he took the summons to his insurers, he never took any action to ensure that his interests were secured and I have said that the facts on record do not justify a relitigation of the dispute.

8. The Application dated 17.2.2006 is misguided and is best dismissed with costs.

9. Orders accordingly.

Dated and delivered at Machakos this 15th day of October 2008.

Isaac Lenaola

Judge

In the presence of: Mr. Makau for Respondent

Mrs Mutua for Applicant

Isaac Lenaola

Judge