



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 387 of 1992

1. Running Down Cause

2. Subject of main suit motor vehicle collision between plaintiffs school bus and the defendants vehicle

Plaintiff sustained personal injury –

Fracture dislocation right elbow

Loss of 2 teeth

Soft tissue

3. Trial 25.5.1999: 30.6.1999

Judgment 30.6.99 (Mitey J)

Award General damages Ksh.250,000/-

Special damages Ksh. 9,125/-

Ksh.259,125/-

Costs

4. Application dated 31 August 2006.

a. Setting aside ex parte judgment

Reasons:

i) the defendant never informed of the hearing of the suit

ii) Service defective

Notice left on door without leave of court

iii) Chair maid had no authority to accept service.

5. Application opposed

i) Judgment delivered regularly

ii) Court satisfied that service was proper

iv) Defendant served personally

6. Held:

7. Case law – nil

8. Advocate

O.N. Njenga for C. Njenga & Co. Advocates for the defendant/applicant- present

P.M. Kuria for Riunga Rainji & Co. Advocates for the plaintiff/respondent-present

SALESIO M'RUTEREPLAINTIFF

VERSUS

FAUSTINO JOSEPH MURIUNGIDEFENDANT

RULING

1: Application to set aside ex parte judgment entered against the defendant 30.6.99

A) Background

1: I am not quite sure why this matter was placed before me for hearing as it is not a Land and Environmental Law application.

2. The Original plaintiff/respodennt sued the defendant/applicant sometime in 1992 as the registered owner of a motor vehicle that collided with a vehicle that the plaintiff was in. The plaintiff/respondent sustained personal injuries being:-

I) A fracture dislocation of the right elbow

ii) A loss of 2 teeth

iii) Soft tissue injuries

3. The suit came for trial before Mitey J between 24 November 1998 to 27 May 1999. It proceeded in the absence of the defendant on grounds that the had been served but failed to appear to court for trial.

4. The defendant had on 5 September 1999 entered a Memorandum of Appearance and was acting in person.

5. The court in its ex parte judgment awarded the plaintiff/respondent.

i) General damages Ksh.250,000/-

- ii) Special damages Ksh. 485/-
- iii) Medical expenses Ksh. 3,550/-
- iv) Records Motor vehicle Ksh. 175/-

Total Ksh.259,125/-

Costs of the suit

6. The defendant became alive to the suit when execution proceeding began against him on 28 July 2003. M/s J.M. Nyaga & Company filed a notice of appointment to come on record for the defendant who all along had been unrepresented. This notice was duly objected to on grounds that leave had not been sort to come on record as required by order III r 9 a, Civil Procedure Rules. Namely, after a suit has been finalized leave to come on record by a new advocate or at all must first seek leave of the court.

7. The application subsequently to come on record was dismissed and struck out on 15 June 2006 as having violated the rules of procedure (Mugo J).

8. The defendant/applicants new advocate filed application of 31 August 2006 – the subject matter of this ruling on 21 February 2007 seeking the setting aside of the judgment ex parte.

II: Application of 31 August 2006

9. The defendant claimed that the exparte orders were irregularly obtained. That in effect he had never been served with the hearing notice of the trial and that he has a good defence.

10. This matter he states was a surprise to him. He filed his defence on 9 September 1994. Service for the hearing of the trial was never effected on him.

11. The plaintiff objects to this. The delay in bringing the application was in ordinate. The defendant had been served to show cause why he should not have his produced goods attached? and sold? He had accepted service. The application should therefore be dismissed.

III: Finding

12. The orders to be set aside are those of Mitey J who has since returned from the bench. It is under order 17 r 10 Civil Procedure Rules that I proceeded with the application before me.

13. The issue herein is whether the defendant as served or not with a hearing notice? It is not disputed that he received the initial summons and entered appearance. at the time summons for direction was compulsory. The forms were marked to him through post. On 28 June 1995 when the hearing of summon was heard he was absent. Ex parte dates for hearing was taken for 29 and 30 July 1990, 21 and 22 April 1997, 13 and 14 may 1998. More of these dates were reached for hearing till 13 May 1998 Aganyanya J. On noting service was though registered post upon the defendant ordered that service he made personally upon the defendant and decided to proceed with the trial. On 24 November 1998 the case came before Mitey J who proceeded with the trial till May 1999 and gave an ex parte judgment ton 30 June 1999.

14. It is the service upon he defendant to attend trial that he defendant/applicant questions. I have before me the affidavit of service that clearly states that service was effected by one Joseph Kithinji who depone on 14 May 1999 that “on 13 May 1999 at 3.30 p.m. be affixed a copy of hearing notice to the outer door of defendants house where he resides “in the presence of a young maid”

15. There was nonetheless prior to the service a return of service dated 12 November 1998 that effected service upon the defendant on 8 November 1998 personally at 100 p.m. at the church. This service was

accepted. The question is whether 8.11.98 was a Sunday? On the of the record here was effected on a Tuesday.

16. Subsequently the service made upon a door post in the presence of a maid was irregular. It was to notify the defendant of the further haring of the trial. Should the orders of the court by way of judgment be set aside.

IV) Finding

17. A process serve must service the process after 6.00 a.m. and before 6.00 p.m. of any given day except part of Saturday, the whole of Sunday and the Public holidays.

18. When effecting service it must be personal. If it is not personal here must be a history of how the said litigant to be served was not traced an or could not be found. An application for substitutive service is thereafter made. If an adult number of the family is present they may be served but after establishing from the history of the process server that the defendants not readily traced.

19. I hereby further find that in the circumstances of this case service upon the defendant was in effect served. As such I decline to set aside the exparte judgment.

Dated t his 4th day of October 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

O.N. Njenga for C. Njenga & Co. Advocates for the defendant/applicant- present

P.M. Kuria for Riunga Rainji & Co. Advocates for the plaintiff/respondent-present