



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

CIVIL CASE 301 OF 2002

MAKORI ZACHARIA PLAINTIFF

VERSUS

KISII BROADWAYS DEFENDANT

RULING

The Plaintiff/Respondent MAKORI ZACHARIA was injured on

1st April 2000 in an accident while traveling in the defendants/applicant m/v Reg.No.KAH 891C. He sued the defendants for damages by a plaint filed in court on 19th December 2002. The applicant defendants filed a defence on 31st January 2003. The plaintiff/applicant was being represented by

M/S OKAO & CO. ADVOCATES. Defence was filed by GEKONDE OMARIBA ADVOCATE for HUDSON WAFULA & CO. ADVOCATES.

Eventually hearing started on 26th April 2004.

M. Olel held brief for the firm of M/S. Hudson Wafula. After the plaintiff closed his case Mr. Olel asked for time to call his witnesses.

Later on 8th Nov. 2004 the defence closed its case without calling any witnesses. Judgment was delivered on 13th July 2005 in favour of the Plaintiff/Respondent.

On 29th March 2006 the applicant filed this application whose main prayer is to set aside the said judgment and set the suit down for hearing inter parties. There are grounds on the face of the application

and a supporting affidavit sworn by one RACHEL MONYANGI JABESH. It is averred that the hearing of the case proceeded ex parte and as such the defendant/applicant was condemned unheard. Further it was deponed and also submitted by

Mr. Otiso that Mr. Wafula the proprietor of M/S. Hudson Wafula & Co. Advocates was suspended as an advocate. He was the sole proprietor of the said firm and that is why case proceeded ex parte. The deponent averred further that his said Advocate never informed her of the hearing date.

Application was opposed by Mr. Okal who submitted that to the contrary the suit was not heard ex-parte. All along the defendant was properly represented by counsel.

I have considered the application and submissions. Indeed at no time did the suit proceed ex parte. All along there was Mr. Olel who held brief for the firm of M/S. Hudson Wafula & Co. Advocate and he participated fully in the hearing of the suit. He cross examined all the witnesses at length. True at one stage he had said they had no instructions but he continued to appear for the defendant. At no time did he say that the defendant could not be represented fully as Mr. Wafula was suspended.

In fact when the plaintiff closed his case on 13th October 2004 Mr. Olel asked for an adjournment so that he could call defence witnesses.

The court allowed his application and set the hearing for 8th December 2004.

On that day a Mr. Nyaramba held brief for Mr. Olel and stated that the defence was not calling any witnesses. He therefore closed the defence case.

It is in vain, therefore for the applicant to state that the hearing of the suit was ex parte and that he was condemned unheard. There is no denial that Mr. Olel appeared for the defendant. He stated he was holding brief for the firm of Hudson Wafula & Co. Advocates with instructions to proceed.

Thus if Mr. Wafula had been suspended or not is neither here nor there.

Defendant has not stated that they had instructed Mr. Wafula as a person.

In fact even the defence filed was by some other Advocate on behalf of that firm. Mr. Nyaramba when closing the defendants case did not say that the defendant had not been informed or they had any difficulties in getting the witnesses. He never applied for an adjournment and the same refused.

I would therefore say that this application is an afterthought. In fact judgment was entered on 13th July 2005 and this application was filed on 29th March 2006 almost 10 months later. There was no attempt to explain that delay.

The upshot of the above is that I find the application devoid of any merit and dismiss the same with costs.

Dated 12th October 2006.

KABURU BAUNI

JUDGE

Delivered in presence of

cc. Mobisa

Mr. Ombachi H/B for Mr. Okal for Respondent.

N/A for Applicant.