

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE 45 OF 2005

PETER OTIENO OPOLLO PLAINTIFF

-VERSUS-

**THE BOARD OF GOVERNORS KISUMU POLYTECHNIC COLLEGE
DEFENDANT**

RULING

This is an application brought by the Board of Governors of Kisumu Polytechnic College, the defendant herein, seeking an order to set aside ex debito a default judgment entered herein against it by the Deputy Registrar of this Court on 20th May 2005 in default of filing defence. The application is brought by a notice of motion and is not supported by an affidavit. The provision under which it is brought is not also stated. The plaintiff opposes the application relying on his replying affidavit.

It is contended that the judgment was entered irregularly and without jurisdiction and that there is an error apparent on the record. The defendant relies on the decision of Wambilyangah Judge in Kisumu HCCC No. 311 of 1992 - Joseph Aluoch Agenge -versus- National Bank of Kenya.

In his plaint herein on 13th April 2005, the plaintiff sought judgment against the defendant for an order to set aside his dismissal and for a re-instatement. The defendant was duly served with summons to enter appearance and it did that on 4th May 2005, but thereafter it did not file a defence until the plaintiff requested judgment on 20th May 2005. On that date an interlocutory judgment was entered by the Deputy Registrar and indicated that the case should be fixed for formal proof. However, on 13th June 2005, the defendant brought this application seeking an order to set aside the said default judgment.

Order 1XA rule 5 of the Civil Procedure Rules provides as follows:-

“5. Where the plaintiff draws with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages and any defendant fails to appear, the Court shall on request in Form No. 26 of Appendix C. enter interlocutory judgment and the plaintiff shall set down the suit for assessment by the Court of the damages or the value of goods and damages as the case may be.”

Order IXA rule 9 therein provides:-

“9. The provisions of rules 3 to 8 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.”

In this case the plaintiff as stated above had sought an order for his reinstatement as an employee of the defendant. When the defendant failed to file its defence within 15 days in terms of Order VIII rule 1(2) of Civil Procedure Rules, the plaintiff was entitled to apply for an interlocutory judgment under Order IXA rules 5 and 9 of the Civil Procedure Rules which permit entry of interlocutory judgments where the plaintiffs are drawn without claims for pecuniary damages as in it was done by the plaintiff herein.

I find that the authorities relied on by Mr. Otete are not relevant.

In the result, I find that the interlocutory judgment entered herein on 20th May 2005 is regular and the Deputy Registrar had the necessary jurisdiction to enter it. There is no error apparent on the face of the record as alleged.

The application is therefore dismissed with costs as it is without merit.

Dated and delivered this **11th** day of **October** 2005.

B. K. TANUI

JUDGE

In the presence of; The plaintiff/respondent.

B. K. TANUI

JUDGE

BK/hao