



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIV CASE 586 OF 01

REUBEN MUSAU KIVAI PLAINTIFF

VERSUS

SECURICOR SECURITY SERVICES

(K) LIMITED & ANOTHER DEFENDANT

R U L I N G

This is an application for setting aside this courts judgment under Order 9b r8 Civil Procedure Rules and section 3 and 3A of the Civil Procedure Act, brought by the defendant/applicant The main suit involved a running down matter, where the plaintiff sued for damages due to a road traffic accident involving a pedestrian male adult, aged 30 years, who sustained fatal injuries. On the day called one for hearing the defendant was absent. The date for hearing was taken by consent in the registry on the 25.2.2002. The suit proceeded for hearing on the 15.7.02 under order 9b r 3 (a) CPR, namely, that the defendant being aware of the suit and having failed to attend court the trial proceeded exparte. The judgment was delivered on 16.7.02.

The applicant/defendant then filed an application dated 28.3.03 seeking to set aside the exparte judgment that was delivered after hearing. The said application was withdrawn in the light of Preliminary Objection that the respondent/plaintiff wished to raise. Thereafter a subsequent application dated 18.11.03 and filed the 19.11.03 was heard on the 22.1.04 seeking the same prayers – namely, to set aside the said judgment.

The grounds that was given by the advocate for the defendant was that she was not aware of the dates. On 21.2.03 her clerk, one James attended to the registry for fixing of the date. No date was fixed as no one attended. She heard nothing of the case until 16.7.03 when she indeed was notified that a judgment would be delivered. She was not aware of this until 12.45 p.m of the same day. The judgment was delivered at 8.45 a.m.

The file was not available until 21.3.2003 when it was perused. She noted one Robert and another Eva had taken consent dates. She denied that Eva was her employee and as such whoever took the hearing dates with the other party was not authorised by her to do so (implied).

In reply to their allegation the respondent/plaintiff advocate said that on the 21.2.02 her clerk, one Robert attended the registry for taking of the hearing date at 10.00 a.m.. He was informed there was a court adjournment fee to be paid. He went away and returned at 11.30 a.m. to pay the said fee. The file was

missing. He managed to trace the file on 25.2.02 and went back to the defendants advocates office asking them if they could go and take the hearing dates. He was informed only the advocate would be able to take dates. The advocate availed one Evalyne to take hearing dates with Robert her clerk. That it was the advocate for the defendant who actually suggested the 15th and 16th of July 2002. James was in Nyeri and therefore Evalyne was the one who came to take the said dates. It was then, that the allegation that Eva was unknown to the applicant advocate, was explained that Eva was the one and same person as Evalyne.

Further, after judgment, the application was being made five months later.

The question arises as to whether there is good cause to set aside this courts judgment?

From the explanation given by the respondent/[plaintiff, the advocate for defendant indeed was aware of the dates and in fact suggested the same.

I find that the one Eva was in her employment at the time the dates were taken as indicated in both parties annextures. The applicant's annexture being "BIV" I would thereby hold that consent dates for hearing was taken and there was no good cause for non-attendance to the trial for hearing.

I hereby dismiss this application with costs to the respondent/plaintiff.

Dated this 28th of January 2004 at Nairobi..

M.A. ANG'AWA

JUDGE

C.W. Njuguna & Co. Advocates for the plaintiff

Mwangangi & C. Advocates for the defendant