

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
HIGH COURT CIVIL APPEAL NO. 48 OF 2001

NORMAN KAIRU MURIITHI APPELLANT

VERSUS

PAUL WANJOHI WAHOME RESPONDENT

(Appeal from original Ruling in Chief Magistrate's Court Civil Case No. 19 of 2000

dated 12 th April 2001 by Mr. W. K. Korir – R.M. – Nyeri)

J U D G M E N T

Norman Kairu Muriithi is aggrieved by the ruling made by the Resident Magistrate Nyeri on 12th April 2001 in which the magistrate rejected his application to set aside the judgment entered against him on 16th March 2001.

It is apparent from the court record that on 16th March 2001, when the suit came up for hearing, the Plaintiff and his advocate were ready to proceed but the defence advocate through an advocate holding brief for him asked the court for an adjournment. The court did not consider the application for adjournment but instead decided to enter judgment in favour of the Plaintiff since the Defendant was not in court.

Order IXB rule 3 which allows a Plaintiff to proceed *ex parte* in the absence of a Defendant states as follows:-

“If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the Plaintiff attends, if the court is satisfied .

(a) that Notice of hearing was duly served it may proceed *ex -parte*”.

Two things arise herein first, the court could not talk of proceeding *ex-parte* as there was an advocate holding brief for the defence counsel. It was not a situation where only the Plaintiff attended court. Secondly even if, the matter was to proceed *ex-parte* the proper procedure is for the Plaintiff to call evidence in proof of his case.

In this case the Plaintiff did not call any witness but the court merely proceeded to enter judgment which judgment had no basis. I find that the trial magistrate erred in entering judgment for the Plaintiff in the manner that he did.

As concerns the application to set aside the judgment which was the subject of the ruling dated 12th April 2001 it is apparent that the trial magistrate erred in failing to set the judgment aside when there was an error apparent on the face of the record as the judgment was irregularly entered.

Further the trial magistrate erred in failing to exercise his discretion to set aside the *ex parte* judgment so as to avoid the injustice or hardship that was resulting from the mistake of counsel in failing to contact the Defendant. In all the circumstances of this case I find that there is sufficient cause to set aside the order made by the Resident Magistrate on 12th April 2001.

Accordingly I allow this appeal set aside the order of 12th April 2001 and substitute it thereof with an order allowing the Appellants application dated 23rd March 2001 and setting aside the judgment entered

on 16th March 2001. The Appellant shall further have costs of this appeal. Those shall be the orders of this court.

Dated signed and delivered at Nyeri this 25 th day of October 2004.

H. M. OKWENGU

JUDGE