

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL SUIT NO. 28 OF 1998

EDWARD NJOROGE MAINAPLAINTIFF

VERSUS

JOHN KOIMA1ST DEFENDANT

ALFRED LAGAT

T/A UGWE BUS SERVICE2ND DEFENDANT

RULING

This is an application under Order IXB Rule 8 of the Civil Procedure Rules. In it, the 2nd Defendant seeks, in pertinent part, to have the Judgment and/or decree herein and all consequential orders set aside. The 2nd Defendant's case is that the suit was heard without his participation. The Court Record shows that on May 18, 1999 when the suit came up for hearing an Advocate who stated to be holding brief for the Defendants' Advocates successfully sought the leave of the Court to have the case adjourned as the said Advocates wanted to withdraw from acting for the Defendants. The same reason was advanced on February 9, 2000 but was rejected by my Learned Brother the Honourable Mr. Justice Rimita who ordered that the case do proceed for hearing on that date as scheduled.

The case was duly heard and Judgment was delivered against the Defendants on March 17, 2000. The matter came for taxation on May 9, 2000 at which the Defendants were represented by an Advocate holding brief for Mr. Kembi Gitura who is from the same firm of Advocates which had sought to withdraw from acting for the Defendants. The said firm of Advocates appear to have been instructed to act in the matter by the 2nd Defendant's insurers. The 2nd Defendant stated that those Advocates did not inform him of the hearing date in the case. He blamed them for having "casually and negligently handled (his) ... case".

Order IXB of the Civil Procedure Rules, as its heading rightly suggests, deals with hearings and consequence of non-attendance. All authorities on the point accept this. From what was stated by the 2nd Defendant in his affidavits dated May 23, 2003 and May 22, 2003, this was not a case of non-attendance but one in which the Defendants' Advocates attended before the Court and sought the adjournment of the hearing which was refused. That alone brings the case out of the scope of Order IXB of the Civil Procedure Rules.

Although this Court sympathises with the 2nd Defendant for being let down by the Advocates appointed by his insurers to act for him, no sufficient reason has been demonstrated to prevent the Plaintiff from enjoying the fruits of his Judgment. That conclusion is sufficient to determine the application before me. However, in fairness to Counsel and for conclusiveness of record, I would like to state that I have carefully looked at the authorities relied on by the 2nd Defendant's Counsel and the same are not relevant in view of the decision I have come to. There was also argument that the 2nd Defendant was not properly named in the pleadings but I think that that is an issue beyond the scope of the application under consideration. In any event, the Defence filed on behalf of that Defendant expressly admitted his

description in the Plaint and he cannot now state otherwise.

I, therefore, dismiss the 2nd Defendant's application dated May 23, 2003 with costs to the Plaintiff.

Dated and Delivered at Nakuru this 8th day of July, 2003.

ALNASHIR VISRAM

JUDGE