



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 349 OF 2000

PATRICK WILLIAM IRUNGU MACHARIA APPLICANT

VERSUS

ELISHIBA WAITHIRA & ANOTHER RESPONDENTS

J U D G E M E N T

On 9th April, 1997 the plaintiff-respondent filed a suit in the court of the Senior Principal Magistrate at Thika for recovery of Kshs.92,000/= and a weekly payment of Kshs.1,000/= until full payment of the above amount from the appellant-defendant, on account of an agreement entered into by and between the parties on 4th December, 1996.

It was alleged the appellant and the respondent's husband and a third party had entered into a partnership agreement on 25.8.90 to buy a public service vehicle registration number KYL 525. That the third party withdrew from the deal and the respondent's husband died, whereof the respondent took out letters of administration in respect of her husband's estate thus becoming party to the partnership agreement by virtue of those letters.

A defence filed on 21st May, 1997 denied the plaintiff's claim and after usual preliminaries, the case was placed before the court of the Resident Magistrate on 12th August, 1999 for hearing.

Though the plaintiff and her advocate attended court, neither the defendant nor his advocate attended and the case was heard *ex parte*.

The plaintiff-respondent testified in the case and judgement for the plaintiff was delivered on 31st August, 1999 with costs. It was for Kshs.62,000/= and weekly payment of Kshs.1,000/= with effect from 4.12.96 to the time he clears the principal sum. There was also an order for costs of the suit and interest.

An application was then lodged to the same court on 21st February 2000 to set aside the *ex parte* judgement after the appellant was allegedly served with notice to show cause. It was heard on 15.6.2000. Counsel for the parties addressed the same Magistrate thereon.

The main reasons why the application was made was because the appellant was not served with a hearing notice and/or that the judgement entered was not as per the agreement of the parties.

That there had been no communication from his advocate about the hearing of the case. Counsel for the respondent submitted that the appellant's counsel on record was served with a hearing notice.

The learned Resident Magistrate wrote a ruling and dismissed the application on 29.6.2000 and this is the cause for the present appeal.

The memorandum of appeal list 7 ground of appeal but the main one to me seems to be in paragraph 3 thereof – that the learned Magistrate erred in not considering that the shillings 1,000/= per week was to cease immediately on payment of the first instalment.

Counsel for both parties appeared before this court on 30th May, 2002 and either urged or opposed this appeal with counsel for the appellant reiterating that he was to pay the respondent Kshs.1,000/= per week until he paid a total sum of Kshs.30,000/= to Kshs.40,000/=.

He said very little about not being served with a hearing notice for 12th August, 1999.

On the other hand counsel for the respondent stated that the counsel for the appellant had been served with a hearing notice and that failure to turn up on 12.8.1999 was inexcusable.

I have heard and recorded submissions of counsel for both parties on this appeal.

Perusing through the lower court's record, there is return of service dated 12th August, 1999 attached to the hearing notice dated 4th March, 1999.

This return says the firm of Kiagayu & Co. Advocates then counsel for the appellant was served with that hearing notice on 9th March, 1999 and this is affirmed by the signature and stamp of that firm affixed at the back of the said hearing notice.

Thus, there can be no dispute that counsel for the appellant then was actually served with the hearing notice for the case subject to this appeal 12.8.99 but for some unexplained reason neither the appellant nor his advocate appeared in court.

For this, the appellant should blame no one but his advocate.

The appeal was against the ruling refusing to set aside judgement of 31.8.2000 and not the judgement itself as counsel for the appellant tender to argue.

Counsel had to explain his and the client's failure to appear in court on 12th August, 1999. He did none of these in his submissions.

However, this notwithstanding, and as I had hinted earlier in this judgement, paragraph 4 of the plaint gave the claim of the respondent but when I read this against what was said to be the agreement upon which the same was based I was not able to reconcile the two.

What was referred to as an agreement was actually an attempt at arbitration by the elders to try and reconcile the parties.

To my understanding, the so called agreement gave the impression that the parties had agreed that by January, 1997 the appellant would have paid the respondent between Kshs.30,000/= and Kshs.40,000/= and that the balance was to be paid by weekly instalments of Kshs.1,000/=.

This is why the respondent testified that she had been paid Kshs.30,000/= and demanded the balance of Kshs.62,000/= in her testimony on 12th August, 1999.

But when she went on to claim a further sum of Kshs.1,000/= weekly payment it raised some confusion as to what these further payments were for.

This is why I feel there was a mix up when the Magistrate's judgement was written as it was not clear where Kshs.14,000/= was from and/or how the payment of the weekly sum of Kshs.1,000/= on weekly basis came about.

I am sure if some of those who attempted to arbitrate between the parties were called to testify, they

may have shade some light as to what all these figures were about.

I would allow this appeal and remit this matter to Thika Chief Magistrate's Court for retrial.

Half ($\frac{1}{2}$) costs of this appeal should be paid to the appellant while each party should bear his/her own costs of the case in the lower court.

Delivered this 19th day of June, 2002.

D.K.S AGANYANYA

JUDGE