REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 6 of 1995

JANEPHER ASAMI & 3 OTHERS.........................PLAINTIFFS

-versus-

AKAMBA BUS SERVICES..................................DEFENDANT

RULING

The plaintiff/respondent sued the defendant/applicant seeking damages for injuries sustained in accident while traveling in the defendants motor vehicle. The case was heard exparte and judgment entered in favour of the plaintiffs/respondent when the execution process was set in motion the defendants bus was attached. Thus prompting them to come to court under the rules quoted seeking orders that the orders made on 17.12.96 the decree and any other consequential orders made there under be and are hereby set aside and that costs be provided for.

The grounds in support are set out in the supporting affidavit and oral submissions in court and the main ones are that:

1. The Deputy Registrar should not have entered interlocutory judgment as the claim was not liquidated.

2. The defendant having entered appearance was not served with the notice of formal proof.

3. That after entry of judgment against them they were not served with the notice of entry of judgment as it is required by law.

4. That some of the plaintiffs are minors and yet the suit was brought in their names instead of it being brought in the names of their next friends and so these suits are incompetent and not maintenable.

5. That no injustice will be suffered by the plaintiffs if the judgment is set aside.

6. That they are within the ambit of the principle governing the setting aside of exparte orders because they depone that the plaint was filed on 13.1.95 and served on them on 7.2.95 and they did enter appearance on 21.2.95 thorough their agent the firm of M/s Nyairo & Co Advocates of Eldoret. That thereafter counsel for the plaintiffs wrote to them intimating that they wished to amend the plaint to reflect the correct capacity of the plaintiffs and the defendants anticipated to be served with an application for amendment but they never did so and upon search of the court file it is noted that the plaintiffs counsel

made a request for interlocutory judgment in default of appearance and defence on 3.8.95 filed on 7.8.95 which was in error as appearance had already been filed. That since they were not notified of any action in the matter they sent their defence to an agent in Eldoret who filed it on 22.1.98 but failed to serve it on counsel for the plaintiffs but unfortunately judgment had already been entered in the matter. That they had no notice of the proceedings in the file as they were not notified of it despite the fact that counsel for the plaintiffs knew that they were on record as acting for the defendants and yet never notified them of the proceedings on the file.

The plaintiff/respondent on the other hand have opposed the application on the grounds of opposition filed affidavit and oral submissions in court and the main points relied on by them are as follows:

1. That since the application is not brought under section 3A, of the CPA order 9A rule 10 and order 9B rule 8 the discretionary powers of this court have not been invoked.

2. The grounds in support of the application have not been set out in the main body of the application and so the application is defective.

3. That the plaintiff was not obliged to issue notice of formal proof and notice of judgment as the memo of appearance relied on as basis for such reliefs is not a valid memo of appearance in law as it has never been served on to the plaintiffs todate and so the provision of order 21 rule 6 cannot be invoked.

4. That if the court were to hold that the memo of appearance was duly filed then the applicant/defendant was not entitled to any notice as there was no valid defence on the file as the purported defence filed on 1998 was filed 3 years later after the plaint had been filed and served and long after the case had been heard and judgment delivered and so there is no valid defence on the file.

5. The applicants have not contended that they have a valid defence onto the claim neither is there any which has been annexed to that effect for the courts perusal.

6. That the accident took place more than 5 years ago and if the judgment were to be set aside the plaintiff will be prejudiced as they will have to wait for another long period for a hearing before the matter can be heard again.

7. That the defendants were given ample time to defend the suit but failed to do so and given the conduct of the defendant they are not entitled to the equitable remedy they seek.

8. That the attachment follows a valid judgment and the same proper.

9. That the affidavit and correspondents annexed show that the defendants were aware of the suit and cannot say that they failed to file a defence because they anticipated an amendment as the pleadings had not been closed and so the plaintiff could amend without reverting to an application for leave to amend.

Further that the annextures shown by the applicant tends to show that there was an element of negligence on the part of the defendant and their counsel in the handling of this matter and these mistakes should not be visited on the plaintiffs. The defendant was indeed indifferent to the proceedings and despite being given a chance to defend failed to do so and this court should not grant them the indulgence they seek and the application should be dismissed with costs.

In reply counsel for the applicant maintained that execution was illegal and secondly that if there are any defects in the application they are covered under order 50 rule 12 of the CPR.

3. That they have made out sufficient cause to warrant the court intervening on their behalf.

4. That no prejudice will be suffered by the plaintiff if the matter is reopened for them as the same can be heard on priority basis before the end of the year.

The court was referred to a number of authorities which I have perused namely the case of Njagi Kanyunguti alias Karingi Kanyunguti 2. Aserica Wanjiru Karingi 3. Severio Mwaniki Karingi 4. Saverio Mwaniki Karingi 5. John Munyi Karingi v David Njeru Njogu C.A. No 181/94 Nairobi – where it was held inter alia that the power to set aside a judgment entered pursuant to an exparte hearing is donated by order 9B rule 8 of the CPR and the application having been brought under incorrect provision of law in our view is incurably defective.

2. That the court will only exercise its judicial discretion in the form of setting aside judgment in order to avoid injustice and hardship resulting from accident, in advertence or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

The case of Kavindu and another v Mbaya and another (1976) KLR 164 where it was held inter alia that where application is made to set aside a judgment on the grounds of irregularity the irregularity should be specified in the summons and the affidavit in support should state the circumstances in which the defence arose and should also disclose the nature of the defence.

2. That a defendant who has not filed a defence is not entitled to be served with notice of an application under the CPR order 9A rule 5 and 9 to enter interlocutory judgment nor with notice of the hearing of the assessment of damages. The reference in order 9B rule 1(2) to a defendant who has appeared relates only to an application to set down a suit for the assessment of damages etc. where the application to enter judgment was made under order IXA rule 6 and does not avail a defendant against whom interlocutory judgment was entered under order IXA rules 5.

The case of Haji Ahmed Sheikh t/a Hasa Hauliers v Highway Carriers 1982-88 IKAR 1184 where it was held inter alia that the exercise of the judges discretion was initiated by the consideration of extraneous matters and in particular by derogatory and unwarranted remarks displaying hatreds towards the applicants advocates.

2. That the judge ought to have considered the defence which was on the court file and had he done so he would have realized that it raised triable issues.

Also the case of Pithon Waweru Maina v Thika Muguria (1982-88) I KAR 171 where it was held inter alia that the magistrate had failed to consider whether it would be just and reasonable to set aside the judgment under order 9B rule 8.

And lastly the celebrated case of Shah v Mbogo (1967) EA 116 where it was held inter alia that the courts discretion to avoid injustice or hardship resulting from accident, in advertence or excusable mistake or error but not to assist a party who has deliberately sought whether by evasion or otherwise to obstruct the cause of justice.

Applying the above principles to the facts of this application I find that the complaints raised by the applicant are as follows:

1. Interlocutory judgment should not have been entered as the claim was not liquidated order 9A rule 5 indicates that interlocutory judgment is to be entered where the claim is liquidated or where it is a claim for goods. The claim herein was not for a liquidated claim or for recovery entered. The same is superfluous but the defendant has not asked this court to set it aside. He is only concerned with the judgment entered and formal proof. The formal proof held cured that anormally and that entry is of no consequence and the same can be ignored.

2. That in view of the correspondence exchanged between the parties the plaintiff should not have taken any procedural steps in the matter. I have perused the correspondences exhibited and find that nowhere in them did the defendant ask the counsel for the plaintiffs to hold on as they negotiate and not to proceed in the matter. Likewise nowhere did the plaintiffs counsel state that they were undertaking not to proceed until the negotiations were over and so they were entitled to proceed as they did.

3. The 3rd complaint is that since they had entered appearance they should have been served with the notice of formal proof. Indeed there is a memo of appearance on the file counsel for the plaintiffs has said that they were not served which fact is not contested by the defendants as they have not said that the same was served. Order 9B rule 1(2) requires notice of formal proof being served on all those who have appeared. It does not say those who have appeared and served appearance. Apparently the presence of appearance on the file was sufficient to warrant the defendants being served with the notice of formal proof which was not served.

4. That 4th complaint is that the claim for the minors is incompetent. The rules require that a minor presents his claim through a next friend with the consent of the next friend. The plaint presented does not indicate that the minors are suing through their next friend neither are consents of next friends filed on record. This aspect escaped the scrutiny of the court during formal proof and it is a genuine complaint. This in itself does not render the whole claim invalid. What it does is that the plaintiffs counsel cannot enforce the claims of the minors as presented.

5. The 5th complaint is that the defendant was not served with the notice of entry of judgment order 21 rule 6 makes it mandatory for the notice to be served. The plaintiff has not said he served the same.

Despite the foregoing the defendant has not shown to this court what complaints or issues he intends to raise if the matter is opened for him. There is no draft defence annexed and the defence filed relates to some other parties. Failure to show what defence the defendant intends to raise is enough to deny him the relief sought. In fact this court would not have hesitate doing so had it not transpired that the plaint as framed presents problems and that proceedings or trial in relation to the minors claim was irregular. It would not have reopened the matter for the defendant. It is imperative to reopen the matter so that the plaintiff can regularize the minors claim.

This court is alive to the fact that the current state of affairs was largely contributed to by the conduct of the defendant and the interests of the plaintiffs have to be taken into account and when so considered ends of justice demands that:

1. The exparte judgment and proceedings conducted herein and all consequential orders emanating therefrom be and are hereby set aside on condition that the defendant do deposit the entire decretal sum into a joint interest earning account in the joint names of counsels of both parties within 30 days from the date of the reading of the ruling.

2. Upon such deposit being made the defendant do have 14 days from the date of deposit to file and serve as defence on the plaintiff.

3. The defendant will pay all the thrown away costs so far incurred to be agreed or taxed.

4. The plaintiff will have costs of the application.

5. The plaintiff will have liberty to amend the plaint in respect to the minors at an appropriate time if he so wishes and thereafter parties to proceed according to law.

Dated at Eldoret this 14th day of October, 1996.

R NAMBUYE

JUDGE

14.10.98

Read and delivered at Eldoret this 4th day of November 1998.

R. NAMBUYE

JUDGE