REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civil Appeal 248 of 1996

JOHN WAIGI MARARO…….....
……..APPELLANT

AND

JULIUS WAMBUGU…….....
……..RESPONDENT

(Appeal from the from the ruling and order of the High Court of Kenya Nyeri (Mr. Justice Osiemo) dated the 24th day of July, 1996

IN

H.C.C.C. NO. 299 OF 1992)

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JUDGMENT OF THE COURT

On 6th October, 1993 the superior court entered judgment for the present respondent (the plaintiff) against the present appellant (the second defendant) in the sum of shs.962,500/= with costs and interests. The hearing of the suit had proceeded ex-parte as the second defendant (the owner of the motor vehicle registration number KXV 810 in which vehicle the plaintiff was a passenger) did not enter an appearance or file defence. The first defendant entered appearance and filed defence.

The second defendant was served with the summons to enter appearance and a copy of the plaint which he forwarded to his insurer's advocates, M/s Musyoka & Wambua, who for some reason not before us entered appearance and filed defence on behalf of the first defendant only, who was the driver of motor vehicle registration number KXV 810. Until about April, 1996 the second defendant did not know what had happened to the suit. Since he was insured in respect of his liability to the plaintiff he probably thought the matter was under control.

As it turned out that was not the case. Although the record before us does not show the date of entry of judgment, sometime between 13th January, 1993 and 25th May, 1993 the Deputy Registrar entered judgment against the second defendant in the following terms:

"Defendant John Waigi Miano having been served and having failed to enter an appearance and on the

application filed defence (sic) of the plaintiff's advocate, I enter judgment as prayed."

We note that the request for judgment filed by the plaintiff's advocates on 12th March, 1993 does not seek interlocutory judgment as it should have been by virtue of order IXA Rule 6 of the Civil Procedure Rules. The request for judgment was in terms of the plaint with interest and costs. Such entry of judgment was in our view irregular. The proper way to enter such a judgment would have been to enter an interlocutory judgment on liability and specials (the only sum pleaded for specials was shs.100/=, the rest of the specials bore the legend "to be stated") and that the assessment of damages to have awaited the outcome of the trial of the suit between the first defendant and the plaintiff.

However, the suit came up for formal proof before Ang'awa J. on 17th September, 1993 when there was no judgment against the first defendant and in fact when the defence of the first defendant was very much on record.

Order IXA rule 6 of the Civil Procedure Rules reads as follows:

"6. Where the plaint is drawn as mentioned in rule 5 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, or request in Form No.26 of Appendix C, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders."

The Court had not ordered otherwise, so there could not have been a formal proof against the second defendant. In terms of Order IXA rule 6 set out above there were two requirements not complied with. There could only have been entered an interlocutory judgment against the second defendant and the assessment of damages could have taken place only when the suit came up for hearing against the first defendant. The suit as against the first defendant was not set down for hearing. Therefore the assessment of damages against the second defendant as was done in the superior court was premature. As yet, we were informed by the respondent's (plaintiff's) counsel, there is no judgment against the first defendant as the suit, in so far as the first defendant is concerned, has not been set down for hearing.

So effectively we are left with what appears to be a final (as opposed to interlocutory) judgment against the second defendant and a concluded formal proof (for assessment of damages) as against him. In both these respects the court below erred. Order IXA rule 6 of the Civil Procedure Rules makes sense. If the suit against the driver is, on merits, dismissed, the owner who is only vicariously liable has still got a judgment entered against him hereby there being two separate and conflicting judgments in respect of one accident. It is for this reason that the said rule envisages assessment of damages at the time of trial against the defendant or defendants who have entered appearance and filed defence.

The irregularly entered interlocutory judgment (irregular as it purports to be final) is hereby set aside. The assessment of damages is also set aside for reasons we have given. These are our orders.

Effectively therefore there is no judgment of any sort left against the second defendant. That being so the second defendant can still enter appearance and file defence in terms of order IX rule 1 of the Civil Procedure Rules.

The improper mode of entry of judgment against the second defendant followed by assessment of damages against him prematurely have caused, as we see it, untold problems to the second defendant. Yet, we must hasten to point out, the second defendant ought not to have fully relied on his insurers' advocates to look after his interests particularly when the insurers were themselves in doldrums. He ought to have kept a tag on what was happening to the case against him. The insurers advocates M/s Musyoka & Wambua cannot escape blame. They did not file defence for the second defendant; nor did they inform him that they were opting out of the suit. Any advocate who agrees to take up a defence on behalf of any defendant (either directly or through the insurers) is duty bound to protect the interests of such defendant. For these reasons, we make no order as regards all costs thrown away by the abortive proceedings in the superior court, despite the second defendant having succeeded in having the judgment

set aside.

This court granted stay of execution of the decree in the superior court on condition (one of them) that the second defendant do deposit in an interest bearing account in the joint names of the parties or their respective advocates a sum of shs.400,000/=, within 30 days of 5th September, 1996. We are told this sum has been so deposited. As the judgment has been set aside in its entirety this sum together with the accrued interest should now be released to the appellant forthwith and we so order.

We come now to the question of costs of this appeal. This appeal to a certain extend primarily succeeds on the issue taken up by this court. The entry of judgment and actual assessment of damages was not challenged in form. In the circumstances we think the appellant should get one half the costs of this appeal.

It follows therefore that this appeal is allowed. The judgment against the second defendant is set aside in its entirety. The monies deposited in the joint account together with the accrued interest are to be released to the appellant forthwith as hereinabove ordered. There is no order for costs thrown away and occasioned by the applications following entry of wrong judgment. The appellant will have one-half the costs of this appeal.

Dated and delivered at Nyeri this 30th day of October, 1997.

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR