



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO 4004 OF 1989

KAKUZI LTD..... PLAINTIFF

VERSUS

GERALD MWANGI MUNGIRI & ANOTHER.....RESPONDENT

RULING

Prior to the filing of this suit, the respondent had demanded Shs 70,930.00 as damages in a running down matter. On failing to receive a response from the applicants herein, the respondent filed suit for the following.

(a) Pre-accident value of motor

vehicle Shs 25,000/=

Less salvage value Shs 64,000/=

Amount due Shs 61,000/=

(b) Assessors fee Shs 1,230/=

(c) Police Abstract Shs 100/=

(d) Loss of User Shs 5,600/=

Total due Shs 67,930/=

However in the prayer, the respondent prayed for Shs 195,930/=

On being served, the appellant once more failed to file a defence and the registrar entered a judgment *ex parte* for the respondent for Shs 195,930/= instead of the particularized amount of Shs 67,930/= and without calling for proof of the damages. Since the entry of the aforesaid judgment and on the decree being executed, the applicant has now moved this Court to set aside the *ex parte* judgment on the grounds that he was never served with summons.

The matter raises two issues. Firstly, whether the summons were ever duly served on the applicant and/or if in the interest of justice the judgment should still be set aside in the particular circumstances of this case. Starting with service, it is observed that under our Rules of Procedure a party should always

endeavour to serve the other personally. A service other than personal service can only be accepted where the persons “cannot be found”, and the person served resides with the person sought to be served.

Proceeding on the above basis, it is observed that the return of service on which the judgment was obtained, the affidavit merely says that the process server had on various occasions been told at the home of the applicant that he was out and consequently the summons were served upon a Mrs Mary Wairimu Mwangi, said to be the legal wife of the applicant. There is no evidence that the process server ever inquired from the said legal wife the whereabouts of the applicant or the place where he ordinarily resides. In the view of this Court, the process server does not satisfy the Court that he had made enquiries from the right quarters and / or the residence of the person served with the applicant. This Court therefore finds that the summons were not duly served.

Two other matters have caused some concern to this court. Firstly, the Registrar is only entitled to enter judgment for liquidated amounts. The amount herein is not liquidated and should have gone to formal proof. As a result of the irregular entry of judgment, the applicant had been condemned to pay damages for loss of user as matter which is not as yet settled and is arguable if it is payable in a running down matter.

The other matter regards the amount of the judgment. The pleadings clearly show that the total claim is for Shs 67,930/= and yet the Registrar entered judgment for Shs 195,930/= a figure far in excess of the amount claimed or the loss suffered by the respondent. This was an error apparent on record.

On account of the above, even if I had found that the summons had been duly served, I would have nonetheless set aside the *ex parte* judgment as it was irregularly entered. I therefore hereby set aside the *ex parte* judgment and all subsequent orders against both defendants as it was irregularly entered. I hereby order all the attached goods released and grant leave to the applicant to file a defence within 14 days hereof. The respondent to pay the costs hereof and of the Court broker. Orders accordingly.

Dated and Delivered at Nairobi this 10th day of June, 1993

G.P. MBITO

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JUDGE