

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI MILIMANI

crim case 3543 of 81

DR JOSEPH CHEGE.....PLANTIFF

AND

PETER KIARII NJUGUNA & ANOTHER.....DEFENDANT

RULING

This application is made under Section 3A of Civil Procedure Act and Order IXA rule 10 of the Civil Procedure Rules (Cap 21). It seeks setting aside an ex parte judgment entered herein on February 13, 1982 and to allow defence filed on April 7, 1982 out of time. The application also seeks court's order for the plaintiff to deposit in court the amount of Kshs 60,693.65 being the proceeds of the execution in this case. The application is supported by an affidavit sworn herein and filed in court by Peter Eluid Ndungu Thiongo, acting clerk to Kiambu County Council.

Section 3A of the Civil Procedure Act allows the court to invoke its inherent powers "to make such order as may be necessary for the ends of justice or to prevent abuse of the process of the court", and order IXA rule 10 of the Civil Procedure Rules states as follows:

"Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

According to the affidavit filed herein, the clerk to the second defendant depones in paragraph 3 of the affidavit that he had himself gone through the file and believes that summons in this case had been misplaced in the offices of the second defendant through a genuine mistake and as a result the second defendant was unable to instruct its advocate within the prescribed time. Unfortunately, the deponent does not explain how the file was misplaced to enable court to decide how genuine mistake and was as a result the second defendant was unable to instruct its advocate within the prescribed time. Unfortunately, the deponent does not explain how the file was misplaced to enable court to decide how genuine the mistake was. As had been said earlier, judgment was entered on February 13, 1982. The second defendant filed his defence on April 7, 1982 that is about two months after. This looks a substantial delay and court can only give indulgence in applications of this nature where sufficient cause has been shown.

It is clear from the affidavit that appearance was entered for both defendants on March 8, 1982. It was still outside the prescribed period. The advocate who was dealing with this matter in the offices of defence counsel disputed the date of entry of judgment, although this was clearly indicated on the court file and this then cause delay in filing of the defence by the defence counsel. But the plaintiff is not to blame for that because what the defence counsel was supposed to do was simply to check on the court file for the date when judgment was entered and not engage in arguments in respect thereof.

Another point which the applicant has not brought out in either the application or submissions in court is whether there is a triable issue or good defence to the civil case.

There is no paragraph in the affidavit indicating any triable issue or good defence to this suit apart from relying on the discharge voucher which the plaintiff signed (see pent 2) discharging Kenya National Assurance Co Ltd from liability after paying the plaintiff Kshs 15,000. But this was in respect of property loss relating to vehicle No KQD 223. It did not relate to personal injuries which the plaintiff suffered as a result of this accident.

But it appears that although the plaintiff was paid Kshs 15000 by the Insurance Company in respect of loss of his car he seems to have made claim for a similar loss in the plaint filed by this in this case. At the same time his plaint does not show in the main paragraph (paragraph 4) how the second defendant is connected to this claim. In view of this, it is only fair and just that the court invokes its inherent powers as per Section 3A of the Civil Procedure Act (Cap 22) to grant this application and to allow the defendant to file his defence out of time as court is satisfied that there are triable issues in the case. This should be done within seven days from the date hereof. If there is need for the plaintiff to file reply to the defence then he will need to do so within ten days from the date of service of defence upon him. I do not however, propose to grant prayer 3 of this application.

Cost of the application will go to the plaintiff in any even.

Delivered at Nairobi this 5th day of October, 1983.

D K S AGANYANYA

JUDGE