



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 33 of 2004

HARRISON GAKUMO THUKU.....APPELLANT

AND

PAULINE WAITHIRA GITHINJI.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Ang'awa, J.) dated 28th March, 2003

in

H.C.C. Suit No. 266 of 1998)

JUDGMENT OF THE COURT

HARRISON GAKUMO THUKU, the appellant herein was sued by the respondent (**Pauline Waithera Githinji**) before the High Court sitting in Nairobi in a running down matter by way of a plaint which was amended on 4th May, 1999. He was sued in his capacity as the registered owner of motor vehicle registration number **KTB 680** Isuzu lorry which was involved in the accident in which the plaintiff's son died.

The record shows that upon service, the appellant entered appearance through the firm of M/s Mburu Mbugua & Company Advocates on 29th June, 1999. No defence was filed within the stipulated period and so the respondent applied for interlocutory judgment which was entered in her favour on 17th September, 1999.

On 12th October, 1999, a clerk from the respondent's advocates firm went to the court registry and took a hearing date ex-parte. The record shows that the hearing notice was supposed to be served on the defendant. There was no service of the hearing notice and the matter proceeded by way of formal proof on 1st March, 2000 in the absence of the appellant. Judgment in favour of the respondent was rendered on 2nd March, 2000 and the process of execution of the decree was started. It was during the said process that the appellant realized that judgment had been entered against him ex-parte and consequently, he moved the court vide the application dated 18th June, 2001 seeking orders to set aside the judgment. Another application seeking stay of execution of that judgment was heard and stay orders granted by Githinji, J (as he then was).

The application seeking to set aside the ex-parte judgment was dismissed on 28th March, 2003. It is that

dismissal that gave rise to this appeal in which the appellant has proffered seven grounds of appeal as hereunder:-

1. *That the Learned Judge erred in law and in fact in failing to consider whether it would be just and reasonable to set aside the judgement.*
2. *The Learned Judge exercised her discretion wrongfully in dismissing the Appellant's application upon finding that the Defendant had a defence on merit.*
3. *The Learned judge exercised her discretion wrongfully in not allowing the judgement to be set aside whereas the Appellant was not served with a hearing notice for the formal proof, despite having filed a memorandum of Appearance.*
4. *The learned Judge erred in law and in fact in finding that the Appellant made the application for setting aside on 19th June 2001 when the Applicant had applied in person on 23rd February 2001.*
5. *The Learned Judge erred in law and in fact in failing to consider the reason for failure to file the defence given in the affidavit evidence which was not controverted.*
6. *The Learned Judge erred in law and fact in failing to allow the Defendant to defend the suit when the failure to file the defence in time was occasioned by accident, inadvertence mistake or misunderstanding of his Counsel on record.*
7. *The learned Judge erred in law and in fact in dismissing the application dated 18th June 2001 with costs.*

He entreats the Court to set aside the said ruling, and substitute the same with an order allowing the application dated 18th June, 2001.

Learned counsel for the appellant **Mr. Gitonga Kimani** urged that the appellant's failure to file a defence was not his fault but that of his counsel on record and counsel's lack of diligence should not be visited on the party. He urged that the appellant had a good defence in that the motor vehicle in question was not his and he should therefore have been allowed to ventilate the said defence. He also urged that the application to set aside the ex-parte judgment had been filed timeously and further, that he had not been served with the hearing notice of the formal proof notwithstanding the fact that he had filed a memorandum of appearance.

In response, learned Counsel for the Respondent **Mr. Gichachi** submitted that the learned Judge of the Superior Court had exercised her discretion judicially in declining to set aside the ex-parte judgment. He maintained that there was inordinate delay in filing the application for setting aside the ex-parte judgment, and also disputed that there was a memorandum of appearance in the Court file as at the time the hearing date was given. He therefore conceded that they had not served the hearing notice for the formal proof. He submitted further that the appellant did not have a good defence and that the application was properly dismissed.

He urged us to dismiss this appeal.

We observe that there was a memorandum of appearance in the Court file and the learned trial judge acknowledged that. That being the case, whether there was a defence on record or not, the plaintiff was duty bound to serve the hearing notice on the defendant at least 14 days before the hearing date pursuant to the then **O1XB Rule 1(2)** which was applicable. We have considered the grounds of appeal herein along with the rest of the record and submissions of both learned Counsel. **Rule 1(2)** of **Order 1XB** Civil Procedure Rules provided:

“At any time after the entry of the interlocutory judgment, the plaintiff may upon giving not less than 14 days notice to every defendant who has appeared, set down the suit for assessment of damages as

the case may be.”

Failure to do so rendered the judgment in question voidable *ex-debito justitiae*. This being the case, it goes without saying that ground 3 of the memorandum of appeal must carry the day and it will not even be necessary for us to consider the other grounds.

We could mention however that even the learned trial Judge had observed in her ruling that the issue of ownership of the motor vehicle “*would have been a justifiable defence*”. This goes to show that the appellant had a triable issue and his defence was not merely a frivolity.

In the circumstances, we are persuaded that the appellant ought to have been given a chance to defend the case. For these reasons we allow this appeal, set aside the High Court's ruling dated 28th March 2003 and substitute the same with an order allowing the application dated 18th June 2001. The costs of this appeal shall abide the outcome of the suit before the High Court.

Dated and delivered at Nairobi this 15th day of March, 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR