Case Number:	Civil Appeal 39 of 2001
Date Delivered:	01 Dec 2010
Case Class:	Civil
Court:	High Court at Bungoma
Case Action:	Judgment
Judge:	Florence Nyaguthii Muchemi
Citation:	ERNEST TEMBI WATAKO v DAVID OGETO MOSETI [2010] eKLR
Advocates:	Mr Onyando for kasaman for Appellants.
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL APPEAL NO. 39 OF 2001

(Appeal arising from BGM CM CC No.6 of 2000)

ERNEST TEMBI WATAKO :::::::::::::::::::::::::: APPELLANT

~VRS~

DAVID OGETO MOSETI :::::::::::::::::::::::::: RESPONDENT

JUDGMENT

The Appellant Ernest Tembi Watako appeals against the ruling of Bungoma Senior Resident Magistrate in PM CC No.6 of 2000. The appeal was supported by eight (8) grounds which were all argued together by Mr. Onyando for the Appellant.

The facts are that the Appellant filed a suit for damages against the Respondent. The Respondent failed to enter appearance and file defence. Interlocutory judgment was entered in favour of the Appellant. The Respondent in his application dated 09/04/2001 sought to set aside the interlocutory judgment. The application was dismissed. The Respondent filed a similar application dated 16/05/2001 seeking for similar orders. The application was allowed by the same court.

The Appellant was aggrieved by the court entertaining the second application and allowing the same. It is the Appellants contention that the application was *res judicata*. The procedure for the respondent would have been to apply for review or appeal against the court's ruling in regard to the first application. It was further argued that the Respondent had not come on record at the time the application was heard.

The record of appeal shows that interlocutory judgment was entered on the 16/05/00 in default of appearance and failure to file defence. Damages were assessed through formal proof on

17-08-2000. Messrs Nyaundi Tuiyot & Co. Advocates came on record officially for the Respondent on 16/05/2001. Earlier on 09/04/2001 the same advocate had filed the first application to set aside interlocutory judgment irregularly because he was not on record for the respondent. The application dated 09/04/2001 was dismissed on 04/05/2001 on grounds that Messrs Nyaundi Tuiyot for the Respondent were not on record. A fresh application was filed dated 16/05/2001 by the same firm. A notice of appearance was filed the same day together with the application. The application had the same prayers as those of the earlier application. It was heard and orders granted.

During the hearing of the application, the issue of *res judicata* was raised by the appellant but rejected by the court in its ruling on grounds that the first application had not been heard on merit and could not render the second application *res judicata* as ***"any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties …….. in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."*** The word ***"suit"*** also refers to applications.

The provision only refers to a suit that has been heard and finally decided by a competent court. The application dated 09/04/2001 had not been heard and finally decided by the court. It was improperly before the court having been filed by a counsel who had not come on record. What the magistrate ought to have done was to strike it out in order to allow the Respondent to file another application following the correct procedure. Dismissing it was the wrong thing to do. However, the use of the wrong term or word did not bar the Respondent's counsel from filing a fresh application when he officially came on record. The question which arises is whether M/s Nyaundi and Tuiyot were properly on record when they filed the 2nd application. This issue was raised during the hearing of the second application. It was argued that the said firm was wrong to file a notice of appearance. The magistrate in his ruling failed to address all these issues in his ruling. He gave a three sentence ruling as follows:

"It will be unfair and against the rules of natural justice to condemn the defendant unheard. The ex-parte judgment is set aside, and all consequential orders. Case be heard interparties."

The issues were quite pertinent and required to have been addressed. The Appellant referred this court to the Court of Appeal case of ***MBURU GICHINI –VRS- GACHINI TUTI*** where Wambuzi and Law JJA held that where the Respondent ought to have appealed against the ruling of the court or seek for review instead of filing a fresh application. I wish to distinguish this case with the one before me. In this case, the first application was not heard on merit. In the ***MBURU –VRS- GICHINI*** case the first application was heard on merit and determined thus rendering the second one *res judicata*.

The ruling of the magistrate for the application dated 16/05/2001 was the correct finding save that the issues raised in the application were not addressed. It was the correct thing to do to set aside the exparte judgment. It is in the interest of justice that both parties be heard. The Respondent's counsel had filed a defence although before filing a notice of appointment. The defence was void *ab initio* because it was improperly on record and it found exparte judgment already entered.

This appeal was heard after the Civil Procedure Act section 1 was amended to include the overriding objective. The Appellate Jurisdiction Act was amended and a similar provision inserted in section 3 which reads:

"(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1)."

This provision empowers the court to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act. This is a needy appeal for this court to invoke the provisions of the law to give effect to the overriding objective of facilitating the just and expeditions disposal of this appeal and the lower court case. For this reason, I overlook all the procedural defects of the various appearances by the Respondent's counsel and the omission by the magistrate to address the issues before him in his ruling. The most important thing in the interests of justice is to have the suit heard between the parties.

I therefore order that the ex-parte judgment stands set aside together with all consequential orders. The appearances of Nyaundi Tuiyot & Co. Advocates for the Respondent is hereby regularized and the defence filed by the firm is hereby deemed properly filed. I find that the appeal has no merit and I dismiss it accordingly. Each party to meet the costs of this appeal. The Deputy Registrar to serve the Respondent's counsel with these orders.

F. N. MUCHEMI

JUDGE

Judgment delivered and dated 1st day of December 2010 in the presence of Mr Onyando for kasaman for Appellants.

F. N. MUCHEMI

JUDGE