



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 231 OF 2017

BRITISH AMERICAN INSURANCE COMPANY (K).....APPELLANT

VERSUS

TEDDY NGISA MORARRESPONDENT

(Being an appeal from the Ruling delivered on 10th May, 2017 by Hon. M. Murage (Ms.) (Resident Magistrate) at Chief Magistrate's Court at Milimani Commercial Courts Civil Case No.4565 of 2016)

JUDGMENT

1. The Appellant herein was sued by the Respondent before the lower court for the sum of Ksh.390,000/= as reimbursement of medical expenses incurred under a personal accident insurance cover.
2. Judgment was entered against the Appellant on 8th September, 2016 for failure to enter appearance and file a defence.
3. The Appellant subsequently filed the application dated 30th September, 2016 seeking orders that the default judgment be set aside and it be granted leave to defend the suit and file it's Statement of Defence. It was contended that service was effected through the company's mail office, hence the delay in entering appearance. That the Memorandum of Appearance was filed on 13th August, 2016 and the Draft Defence exhibited herein raises triable issues.
4. The application was opposed. It was stated in the replying affidavit that no sufficient grounds were given for the failure to file a Memorandum of Appearance and the Statement of Defence within the prescribed time. That the Appellant was lax as the summons were duly served through it's mail room.
5. The trial magistrate dismissed the application with costs. That is what triggered the filing of the Appeal herein.
6. The grounds of Appeal can be summarized as follows:
 - (a) Whether the *ex parte* judgment was entered regularly.
 - (b) Whether the draft defence raises triable issues.
 - (c) Whether the dismissal of the application caused more prejudice than could have been caused by allowing it.
7. The Appeal was canvassed by way of written submissions. I have considered the submissions alongside the authorities cited.
8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it

appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”.

9. The principles upon which a judgment can be set aside were considered by the Court of Appeal in **Pithon Waweru Maina v Thuka Mugiria** [1983] eKLR where it was held as follows:

“a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76C and E b). Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo* [1967]EA 116at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48.c). Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968]EA 93.

10. In the case at hand, it is not disputed that the summons were received at the Appellant’s mail office. What was contended was that there was no personal service on the Principal Officers of the company. The affidavit of service filed by the process server does not show any attempt to serve the Principal Officers of the Appellant’s company before recourse to service through the mail office as provided for under Order 5 rule 3 of the Civil Procedure Rules. It is however noteworthy that the Appellant has not stated which date the said summons were brought to the attention of the Principal Officers of the company. I say so because if the Appellant became aware of the suit, then the purpose of serving summons which is to notify the parties of the case that they face had been achieved (See for example **Anglican Church of Kenya ACK Guest House v Alfred Imbwaga Musungu** [2014] eKLR).

11. As observed by the Court in the case of **Microsoft Corporation v Mitsumi Garage Ltd & another Nairobi HCCC No. 810 of 2001: [2001] 2EA 460**, it was appreciated that:

“Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it...”

12. This court has considered the copy of the draft defence exhibited. The same raises triable issues which include whether the provisions of the insurance policy were compiled with and whether documentary evidence was provided in support of the claim.

13. This court’s conclusion is that the service of summons was not carried out in accordance with the rules. On the other hand, the Appellant who became aware of the case that it faced has not satisfactorily explained why it failed to file the Memorandum of Appearance and the Statement of Defence in time. This court is however persuaded to allow the Appeal for the case to be heard on merits. Consequently, the Appeal is allowed. The ruling of the trial magistrate is hereby set aside on condition that the sum in contention, Ksh.390,000/= be deposited in a joint interest earning bank account of the counsel for the parties or in court within 30 days from the date hereof. Each party to bear own costs of the Appeal.

Dated, signed and delivered at Nairobi this 30th day of January, 2020

B. THURANIRA JADEN

JUDGE