



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO.18 OF 2017

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....APPELLANT

- V E R S U S -

ALOICE OCHIENG OLAL.....RESPONDENT

(Being an appeal arising from the Ruling of the Chief Magistrate (Hon. Mokuu) In Civil Suit No.69 of 2016 delivered on 4/7/2017)

J U D G M E N T

1. The Appellant (**NATIONAL TRANSPORT AND SAFETY AUTHORITY (NTSA)**) hereafter referred to as the Appellant filed this appeal against the ruling delivered on 4/7/2017 in CMCC No.69 of 2016.
2. The Respondent in this case **ALOICE OCHIENG OLAL** filed a Plaintiff which he amended on 18/3/2016 seeking the following remedies against the Appellant.
 - (i) An Order directing the Applicant to release the Respondent's driving licence or in the alternative, to issue the Respondent with another driving licence.
 - (ii) The Appellant to pay the Respondent Kshs.480,000/= being Special Damages suffered as a result of detention of the licence by the Appellant.
 - (iii) General Damages and any other relief this Court may deem just to grant.
 - (iv) Costs of the suit.
3. The Appellant filed a statement of defence dated 18/4/2016 denying the Respondent's claim.
4. The hearing of the case proceeded ex parte the Appellant having been served with the hearing notice and having failed to appear in Court for the hearing of the case on 18/10/2016.
5. In the Judgment delivered on 22/11/2016, the Court found that the Respondent's claim was not challenged and entered Judgment in favour of the Respondent against the Appellant as prayed in Plaintiff together with General Damages of Kshs.100,000/= and costs of the suit.
6. The Respondent's evidence was that on 6/11/2014 a 3 p.m., the Respondent was driving Motor Vehicle No.KBQ 461 B Toyota Probox along Kericho-Kisumu Road when an Officer by name **DENIS NTHIGA** who works for the Appellant stopped him and took his driving licence and the Number Plates of the Motor Vehicle.
7. The Respondent was subsequently charged in Court and convicted and fined but the Appellant failed to release the driving licence to him and the Respondent suffered loss and damages.
8. The trial court received the evidence of the Respondent and adopted statements dated 15/3/2016 by the Respondent and one **PETER OKOTH KAIRO** together with a list of documents and a consent dated 5/4/2015. The trial court entered the impugned Ex parte Judgment for Kshs.587,770/= together with costs of the suit.
9. The Appellant filed an Application dated 2/12/2016 seeking to set aside the Ex parte Judgment but the said Application was dismissed on 20/12/2016 on the grounds that the firm of Albert Muma and Company Advocates was not properly on record.

10. The Appellant file a Subsequent Application dated 11/1/2017 for review of the ruling delivered on 20/12/2016 and the said subsequent Application dated 11/1/2017 was also dismissed on 4/7/2017. The Appellant has now appealed against the ruling delivered on 4/7/2017 on the following grounds:-

(i) THAT the Learned Magistrate erred in law and fact by failing to allow the Application dated 11/1/2017 and hence the ruling dated 4/7/2017 should be set aside and/or vacated.

(ii) THAT the ruling dated 20/12/2016 should be reviewed/and or set aside.

(iii) THAT the Exparte Judgment entered on 22/11/2016 should be set aside and the Appellant be granted an opportunity to be heard on his defence and counter-claim.

(iv) THAT Civil Suit No.69 of 2016 should be set down for interpartes hearing on merit.

11. The parties filed written submissions in the Appeal dated 4/10/2019 and 21/11/2019 respectively which I have duly considered. This court delivered a ruling dated 3/10/2019 staying Execution of the Exparte Judgment and all consequential orders pending the hearing and determination of this Appeal.

12. The Appellant submitted that the Respondent filed a fictitious claim and obtain the Exparte Judgment on 22/11/2016 unconventionally.

13. The Appellant also submitted that an application dated 2/12/2016 seeking to set aside the exparte judgment was dismissed on 20/12/2016 on the grounds that the Firm of Prof. Albert Mumma & Company Advocates was not properly on record and he further submitted that the said order was premised on the incorrect finding that the said firm was not present yet there was a counsel from the said firm in court and a notice of appointment filed on 15/12/2016.

14. It was further submitted by the Appellant that a subsequent Application dated 11/1/2017 seeking to review the order made on 20/12/2016 was also dismissed on 4/7/2017 on the ground that the firm of Prof. Albert Mumma and Company Advocates had not complied with order 9 rule 9 of the Civil Procedure Rules.

15. The Respondent also stated in his submissions that the Appeal herein is incompetent as it does not comply with order 42 Rule 13(4) of the Civil Procedure Rules and further that the Counsel who attended Court on 20/12/2016 disowned the Application dated 2/12/2016.

16. The Respondent submitted further that the Application dated 11/1/2017 which was dismissed on 4/7/2017 did not meet the threshold for review as required by Order 45 Rule 1 & 2 of the Civil Procedure Rules.

17. The issues for determination in this appeal are as follows:-

(i) Whether the firm of Prof. Albert Mumma and Company Advocates was properly on record on 20/12/2016.

(ii) Whether this Appeal is competent.

(iii) Whether the Order made on 20/12/2016 should be reviewed and/or set aside.

(iv) Whether the Order made on 4/7/2017 should be replaced with an Order setting down civil Suit No.69 of 2016 for hearing interpartes.

18. I find that the Court in its ruling dated 3/10/2018 made a finding that the firm of Prof. Albert Mumma and Company Advocates was not required to seek leave to come on record since the Appellant was acting in person through its in-house counsel Ms Sirai and Order 9 Rule 9 of the Civil Procedure Rules only comes into operation where a party who had an Advocate either changes the Advocate after judgment or wishes to act in person after Judgment has been entered.

19. I accordingly find that the firm of Prof. Albert Mumma and Company Advocates was properly on record on 20/12/2016 and therefore the Trial Court erroneously dismissed the Application dated 2/12/2016 for non-attendance by Judith Opili Sirai.

20. The Respondent did not controvert the averments in the Supporting Affidavit to the Application seeking stay of Execution pending this Appeal in which it was stated that there was a Notice of Appointment dated 15/12/2016 which was filed by the firm of Prof. Albert Mumma and Company Advocates and further that there was a Counsel in Court on behalf of the said firm.

21. The Respondent submitted that this Appeal is incompetent for reasons that the order appealed against has not been filed. I find that this submission has no basis as the current file contains all the Orders and Rulings appealed against.

22. I find that the order which was issued on 20/12/2016 was premised on the erroneous position that Miss Sirai Advocate was not in attendance. The firm of Prof. Albert Mumma had come on record by filing a notice of appointment on 15/12/2016 and was represented in court on 20/12/2016.

23. Consequently, the orders made on 4/7/2017 dismissing the Application dated 11/1/2017 were erroneously arrived at since the firm of Pro. Albert Mumma and Company Advocates were not required to seek leave to come on record.

24. I find that it is not clear who was served with the hearing notice when this matter proceeded for hearing exparte.

25. I accordingly allow this Appeal in the following terms:-

*(i) **THAT** the Order dated 20/12/2016 dismissing the Application dated 2/12/2016 for non-attendance by Counsel for the Appellant be and is hereby set aside and said Application dated 2/12/2016 be and is hereby reinstated.*

*(ii) **THAT** the Order issued on 4/7/2017 dismissing the Application dated 11/1/2017 for reasons that Order 9 Rule 9 Civil Procedure Code was not complied with be and is hereby set aside and the said Application dated 11/1/2017 be and is hereby reinstated.*

(iii) The Exparte Judgment entered on 22/11/2016 be and is hereby set aside with all consequential orders since it is not clear whether the hearing notice was served upon the Appellant before the hearing proceeded exparte.

(iv) I direct that this case be heard inter partes by any other trial magistrate other than the one who issued the impugned order dated 4/7/2017.

(v) I also direct that the decretal sum be held in an interesting earning account pending the outcome of this suit.

(vi) Finally, the costs of this Appeal to abide the cause.

Dated, Delivered and Signed at Kericho this 18th Day of September, 2020

A.N. ONGERI

JUDGE