

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 88 OF 2018

MULINYA MASHETI APPELLANT

VERSUS

SOPHIE WICHETA VISAO..... RESPONDENT

(An appeal arising from the ruling and order of the Hon. Malesi, Senior Resident Magistrate (SRM), in Kakamega CMCCC No. 36 of 2016 of 26th September 2018)

JUDGMENT

1. The appeal herein arises from a ruling that the trial court delivered on 26th September 2018. The subject matter of the ruling were three suits, being Kakamega CMCCC Nos. 33, 34 and 36 all of 2016, which had been put together, to proceed simultaneously. The matters were personal injury claims, where the trial court heard the three suits *ex parte* after the appellant and his advocates failed to attend court on the date when the matters were coming up, and thereafter determined the matters. The appellant then moved for the setting aside on the judgments in an application dated 5th April 2018, which was canvassed by way of written submissions and was dismissed on 26th September 2018 in a reasoned ruling.

2. In his memorandum of appeal dated 16th July 2018, the appellant argues that the trial court considered extraneous issues in arriving at its decision, erred in holding that the failure by counsel to diarize the matter properly was not excusable, erred in holding that there were no triable issues and erred in holding that since the accident vehicle was registered in his name that was sufficient to find him liable.

3. The facts of the instant case are on all fours with those in *Pithon Waweru Maina vs. Thuka Mugiria* [1983] eKLR, which turned on the issues as those raised in the instant appeal. In that case the Court of Appeal set out the principles for setting aside *ex parte* judgments, as follows:

(a) that there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties;

(b) that 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 vs. Mbogo* [1967] EA 116 at 123B, *Shabir Din vs. Ram Prakash Anand* [1955] 22 EACA 48);

(c) that the appellate court 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 manner 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 injustice (*Mbogo vs. Shah* [1968] EA 93);

(d) that the court has no discretion where it appears there has been no proper service (*Kanji Naran vs. Velji Ramji* [1954] 21 EACA 20); and

(e) that a discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrary and idiosyncratically (*Smith vs. Middleton* [1972] SC 30).

4. The appellant's case is that although the date when the matter proceeded was given in court in the presence of his advocate, his advocates made a mistake while entering the date in their diary and recorded the wrong date. I have perused through the court record. It is clear that the hearing date had been obtained by consent in open court. It is also clear that the matter had been adjourned many times before then at the behest of the advocates for the appellant. Indeed, at the last hearing date, the one just before the matter proceeded *ex parte*, the advocates for the appellant had sought adjournment on grounds that they wanted to file an application to cease acting for lack of instructions from the appellant. Yet, after the adjournment was allowed, the advocates did not file the application for leave to cease acting for the appellant, and come the hearing date that had been given in their presence they did not attend court. In view of that history of the matter I am not persuaded that the trial court improperly exercised its discretion to disallow the application to set aside its *ex parte* judgment.

5. In the end, I find that the appeal herein is without merit, and it is hereby dismissed. The respondent shall have the costs. It is so ordered.

DATED, SIGNED and DELIVERED at KAKAMEGA THIS 26TH DAY OF SEPTEMBER, 2019

W. MUSYOKA

JUDGE