



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 638 OF 2013
G4S SECURITY SERVICES (K) LIMITED.....APPELLANT
VERSUS
JOSEPHAT MASILA MUTUKU.....RESPONDENT
(Being an appeal from the Ruling and order delivered on 8th
December, 2013 by Hon. Ms. S. Atambo (Principal Magistrate)
Milimani Commercial Courts in CMCC No. 1586 of 2010)

JUDGMENT

1. The Respondent Josephat Masila Mutuku, filed suit in the Lower Court against the Appellant, G4S Security Services (K) Limited. The claim was for damages arising out of injuries sustained in a Road Traffic Accident while the Respondent was riding a motorbike in the course of his duties with the Appellant. The Respondent blamed the accident on the alleged negligence or breach of the terms of employment by the Appellant. The case proceed *ex parte* and judgment was entered for the Respondent for the sum of Ksh.453,000/= plus costs and interests.
2. The Appellant subsequently filed the application dated 4th June, 2013 seeking orders, *inter alia*, that the interlocutory judgment entered on 4th February, 2011 and the final judgment delivered on 8th March, 2013 and all the consequential orders be set aside and that the Defendant (Appellant) be at liberty to defend the suit. The failure to enter appearance and file a defence was attributed to the Appellant's not being aware of the suit as service was effected on an employee. A draft defence was annexed to the further affidavit.
3. The application was opposed. It is stated in the replying affidavit that service of summons was effected on the Appellant's Assistant Manager at their Head Office.
4. The Lower Court in a ruling dated 6th December, 2013 found no merit in the application and dismissed the same. That is what triggered this appeal.
5. Although the Appellant raised eleven grounds of appeal, the same were summarized in it's written submissions into two grounds as follows:

a. Whether service of the summons was proper and whether the Honourable Magistrate erred in law and in fact by holding that the interlocutory and final judgment entered against the Appellant was regular.

b. Whether the Appellant's draft defence raised a valid or reasonable defence.

6. The appeal was canvassed by way of written submissions which I have considered.

7. 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)”.

8. The principles applicable in determining whether to set aside an *ex parte* judgment were laid out by the Court of Appeal in the case of **Pithon Waweru Maina v Thuka Mugiria [1983]eKLR** 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*.

9. The affidavit of service of summons reflects that service was effected on the Appellant's Assistant Manager at their Head Office. The original copy was returned duly stamped at the back. The said service is not disputed. Although it is stated in the affidavit in support of the application that service was effected on an employee, the designation of the said employee was not stated for this court to decide whether the employee was a Principal Officer of the company or not. The averment by the Respondent that the person served was the Appellant's Assistant Manager was not controverted by any other evidence. The Trial Magistrate correctly held that the service was regular.

10. I have considered the draft defence. The same alleges negligence on the Respondent's side and denies any breach of the duty of care. The other triable issue raised was whether the trial magistrate erred in awarding the cost of future medical treatment when the same was not pleaded.

11. This court's view is that although the Appellant may have made some mistakes, the Appellant should not suffer the consequence of not being heard on merits. The Respondent can be compensated by way of costs. Consequently, I allow the application on condition that the orders for the deposit of the decretal sum do remain in force pending hearing *inter partes* and determination of the suit. Throw away costs and

the costs of this appeal to the Respondent in any event.

Dated, signed and delivered at Nairobi this 27th day of Feb., 2018

B. THURANIRA JADEN

JUDGE