



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 489 OF 2015

CHARLES WAINAINA APPELLANT

- V E R S U S -

OXFORD UNIVERSITY PRESS..... RESPONDENT

(Being an appeal from the ruling of Hon. Mrs. Chesang', Resident Magistrate at Milimani Commercial Court in CMCC No. 5310 of 2014 delivered on 15th October, 2015)

JUDGEMENT

1) Oxford University Press, the respondent herein filed a compensatory suit against Charles Wainaina the respondent herein, for special damages amounting to ksh.136,250/=. It was alleged by the respondent in its plaint dated 5th September 2014, that on 7th September 2011, the respondent was driving motor vehicle registration no. KBB 565G along Argwings Kodhek road in Nairobi, when his car was rammed into by the appellant's motor vehicle registration number KBM 256F causing the respondent's car extensive damage. The respondent stated that the cost of repair was kshs.136,250/= comprising of:

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| i. Cost of repairs | ksh.108,776/= |
| ii. Assessment & re-inspection charges | ksh.8,200/= |
| iii. Tracing charges | ksh.19,274/= |

2) The appellant filed his defence dated 8th May 2015 denying the Respondent's claim.

3) The suit was heard and determined *ex parte*. The appellant then filed a notice of motion dated 8th May 2015 in which he sought for *inter alia* the *ex parte* judgment be set aside and the appellant be allowed to defend the suit on grounds that, he never signed on summons to enter appearance, neither was he served with summons to enter appearance.

4) Hon. M. Chesang, the learned Resident magistrate held that the appellant was properly served with the plaint and summons to enter appearance and thus dismissed the appellant's motion.

5) Aggrieved, the appellant preferred this appeal and put forward the following grounds in his memorandum of appeal:

- 1. The learned magistrate erred by concluding that the *ex parte* judgement against the defendant was properly obtained.***
- 2. The learned magistrate erred by holding that the defendant was duly served with the summons to enter appearance.***
- 3. The learned trial magistrate erred by dismissing the defendant's application seeking to set aside the *ex parte* judgement.***
- 4. The learned trial magistrate erred by failing to consider the appellants statement of defence which raises triable issues.***

6) After a careful consideration of the aforesaid grounds the same may be summarised into two main grounds namely;

- i. Whether or not the summons to enter appearance were duly served.***
- ii. Whether or not the learned trial magistrate erred in law and fact by failing to set aside the default judgement.***

- 7) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.
- 8) I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions.
- 9) The first ground to be considered is whether or not the summons to enter appearance were duly served. The appellant submits that he operated a taxi business along Standard Street in Nairobi, and he was never served with summons to enter appearance. The appellant states that the process server lied to the court by alleging that he served the appellant at Ambassador stage and that the signature appeared on the returned summons was not that of the appellant. The respondent submits that proper service had been effected and therefore the trial court was right in entering judgment in default of appearance by the appellant.
- 10) It is clear from the averments made before the trial court that, there was a dispute over the signature appended on the summons as well as the place of service. The process server stated that he effected service at Ambassador stage instead of Standard street. The learned Resident Magistrate considered the averments made by the process server vis-a-vis those deposed by the respondent. She further considered the evidence of the process server in cross-examination and came to the conclusion that the appellant was properly served and acknowledged receipt of the summons by appending his signature on the summons. I have on y part re-evaluated the arguments made before the trial court and I have come to the conclusion that the learned Resident Magistrate properly analysed the evidence and submissions and arrived at the correct decision.
- 11) The second ground of appeal is whether or not the learned trial Magistrate erred in law and fact by failing to set aside the default judgement. The appellant submits that he has a draft defence on record to be evaluated by the court on whether it raises any triable issues. It is argued that the trial court ought to have set aside the ex-parte judgement because the appellant's defence raised triable issues. The respondent have argued that the trial court has the discretion in deciding whether the default judgement entered ought to have been set aside upon such terms as are just.
- 12) I have carefully perused the ruling of the learned Resident Magistrate and it is apparent that she did not give much attention in determining the question as to whether or not the draft defence raises any triable issue. This being the first appellate court, I am enjoined to reconsider the issue. I have looked at the draft defence attached to the affidavit which was filed in support of the motion seeking to set aside the default judgment. In the draft defence, the appellant denied being negligent. He instead blamed the respondent for being negligent. In my view, the defence raised triable issues. However, this court has considered the conduct of the appellant as shown in the proceedings and it has come to the conclusion it should not exercise its discretion in favour of a party who has sought by evasion to delay and defeat the expeditious disposal of the matter. The appellant was properly served after which he appended his signature to acknowledge receipt of summons.
- 13) The learned Resident Magistrate considered affidavit evidence of the process server and she even had to conduct a hearing session to cross-examine he process server to establish whether the appellant was properly served. In the circumstances the appellant does not deserve to benefit from the discretion of this court.

14) In the end, I find no merit in this appeal. It is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 9th day of March, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent