



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 246 OF 2009

GENERAL MOTORS (EA) LIMITED.....APPELLANT

-VERSUS-

CATHERINE MOKAYA.....1ST RESPONDENT

LAWRENCE NYAN'GAU.....2ND RESPONDENT

LINEAR COACH COMPANY LTD.....3RD DEFENDANT

(An appeal from the Order/Ruling of Hon. M. Atiang Resident Magistrate

delivered on 11th November 2009 in Nakuru CMCC 1781 OF 2005)

JUDGMENT

1. The primary suit, Nakuru CMCC No. 1781 of 2005 was filed on the 13th October 2005. Summons to enter appearance were purportedly served upon the defendants, now the Appellant. On the 8th November 2005 the Appellant by M/S Ratemo Oira and Co. Advocates filed a Memorandum of appearance and on the 10th November 2005, a Statement of Defence was also filed on behalf of the appellant and two others by the said firm of Advocates.

2. The Respondents took an *ex parte* hearing date and served the hearing notice to the said firm of Advocates who purportedly accepted service but failed to attend court for the hearing of the suit. The Respondent (plaintiff) proceeded to formal proof her claim and judgment delivered in her favour on the 23rd May 2008, followed by execution proceedings against the appellant.

3. Faced with imminent attachment of its properties, the Appellant moved the court by a **chamber summons application dated 9th March 2009**, brought under Order XX1 Rule 22 and 1XB seeking among others, that the *Ex parte* judgment entered against the appellant on the 23rd May 2008 be set aside and all consequential proceedings too be set aside.

4. The main grounds for the application was that the Appellant was never served with the summons to enter appearance nor had it instructed the firm of Ratemo Oira & Co. Advocates or any other advocates to act for it, and therefore the said judgment was irregular.

5. Upon hearing the said application interparties, the trial magistrate found no merit and dismissed it on the 11th November 2009.

This ruling is the subject of this appeal.

6. I have considered the Appellant's written submissions and oral submissions by the respondent.

The issues that arise for determination are threshold in my view, thus:

(1) Whether the Appellant was served with summons to enter appearance in the primary suit.

(2) Whether the Appellants instructed the firm of Ratemo Oira & Co. Advocates to enter appearance and file a defence on its behalf, and whether the Memorandum of Appearance and defence as filed and competently on record.

(3) Whether the Exparte judgment entered against the appellant in the primary suit ought to be set aside.

I shall interrogate all of them together as they are interrelated and intertwined.

7. Service of Summons upon a defendant by a plaintiff is so important that any order issued in favour of the defaulting plaintiff by a court is irregular and must be declared null and void, and any judgment resulting therefrom must also be set aside *ex debito justitiae* upon the defendant moving the court Under **Order 10 Rule 11 Of The Civil Procedure Rules**. However, the applicant is under an obligation to satisfy the court that indeed no service of summons was effected.

8. The court may also set aside such *ex parte* judgment on its own motion and as of right because the party against whom such *ex parte* judgment is entered has been condemned unheard, and without notice of the allegations against it, and without being accorded an opportunity to defend itself – **Mbogo & Another -vs- Shah (1968) EA 93**. The above holdings were echoed by the **Court of Appeal in Civil Appeal No. 6 of 2015 – James Kanyita & Another Nderitu -s- Marios Philotas Ghikas & Another (2016) e KLR**.

9. The respondents allege to have served summons upon the Appellant, a limited liability company upon which some law firm entered appearance and filed a defence, facts that the Appellant deny.

10. The process server's affidavit of service dated the 16th November 2005 and annexed to the Replying Affidavit of the Advocate for the Appellants in the application to set aside the *ex parte* judgment states **that the summons were served on 27th October 2005 at general Motors EA LTD at Industrial Area where it has its office, to its unnamed secretary – who instructed him to serve the said summons to the 2nd Defendant (Not a party to the Appeal) and whose legal officer – (not Appellant's legal officer, but alleged and Defendant's legal officer – accepted the summons for the appellant.**(emphasis mine)

11. For clarity purposes the 2nd defendant is **Linear Bus Service Co. Ltd**. It has not been explained why General Motors Ltd would send a process server to serve its summons upon another company on its behalf.

12. I have also not seen copies of the summons to enter appearance and plaint allegedly served upon the Appellant duly accepted, signed and returned and filed as evidence of such service.

13. The respondents in opposing the appeal stands by the court record that there is a Memorandum of Appeal and defence filed by Ratemo Oira & Advocates. They have not addressed the court on whether or not the said law firm was duly instructed to act by the appellant as had been denied by the appellant.

14. Likewise the trial magistrate in her ruling failed to analyse the issues stated and to interrogate them as to come up with a well reasoned ruling. Stating that she has gone through the court record and has seen the Memorandum and defence that comply with Order IX rule 2 Civil Procedure Rules was not enough. She failed to address her mind on the authorised mode of service of summons upon a corporations as provided under the Civil Procedure Rules.

15. The trial magistrate further failed to interrogate whether or not M/S Ratemo Oira & Co Advocates had been instructed by the appellant to act for it, a fact that vigorously denied. Had the trial magistrate took time to carefully apply her mind to the issue, a different finding would have been reached.

16. **Order 6 Rule (3) (a)** Civil Procedure Rules provides that:

(a) where the suit is against a corporation the summons may be served on the secretary, director or other principal office of the Corporation or if the process server is unable to find any of the officers of the Corporation mentioned herein

(i) leave it at the registered officer of the corporation.

17. The process server alluded to have served the summons at General Motors EA Ltd at Industrial Area where they have their offices “to the secretary of the said company.”

Without going further, the unnamed secretary has not been certified to have been an official, director or principal officer. A Secretary in the context of **Order 6 Rule 2(a) of Civil Procedure Rules can only mean “company secretary”** not a receptionist.

Further, and as urged by the appellant it was not stated clearly in the affidavit of service which part of Industrial area the process server found the offices of the appellant.

18. It is common knowledge that Nairobi's Industrial area is expansive, and has names to each street. It is not disputed that General Motors EA Ltd has its main offices along Mombasa Road, Nairobi, and not at Industrial Area, Nairobi.

19. Clearly, it cannot be said that proper service of summons were duly served upon the Appellant. The affidavit of such service upon a secretary without indicating her position and name, and the exact place of service is but ambiguous.

20. Further the serviced documents were not returned to court as duly accepted, signed and stamped. If served, there would be no reason to fail to return the same.

21. In its letter dated 10th February 2009 attached to the supporting affidavit of its Legal Officer, the appellant registered its dismay after learning that the alleged law firm of Ratemo Oira & Co. Advocates entered appearance and defence on its behalf without its instructions. The said letter was responded to. This was after the appellant became aware of the execution proceedings against it.

22. Legal action was threatened against the said law firm. If indeed instructions were given, this law firm would have defended itself by producing the letter of instruction or any other form of instruction, knowing well the consequences that would befall itself if the threat was actuated – **Misc Appl. No. 36 and 35 of 2011 Hezekiel Oira t/a Oira and Co. Advocates -vs- KBC (2015) e KLR and Misc. Civil Application No. 336 of 2012 Mereke and Co. Advocates -vs- Zakhem Construction (Kenya) Ltd 2014 e KLR.**

23. An Advocate-client relationship can be express or implied, and sometimes by conduct of the client. Looking at the correspondence exchanged between the appellant and the advocates, it cannot be said that instructions to act can be implied from their conduct in the absence of express instructions. Nothing was placed before the trial court to demonstrate any client – relationship between the appellant and the Advocates.

24. The discretion to set aside an ex parte judgment lies with the court.

It is intended to be exercised to avoid injustice or hardship resulting from a mistake or error or inadvertence and is not designed to give undue advantages to one party or obstruct or delay the cause of justice. Before doing so, a court ought to be satisfied that the applicant has a valid defence that raises triable issues – **Shah -vs- Mbogo (1967) EA 116.**

25. There is no doubt that the proposed statement of defence filed with the application to set aside the ex parte judgment raises serious triable issues of concern in the matter of a financier of a motor vehicle who is registered as a co-owner of an accident vehicle.

26. The question for trial would evidently be whether the financier can be held liable or to blame when such vehicle being under the control of the purchaser causes an accident, and therefore liable for consequential damages.

27. That issue was raised during hearing of the application before the trial court. There is no indication in the proceedings that the trial court addressed itself to the said submissions, as well as on the issue of vicarious liability-

28. In the instant appeal, the Appellant was, going by the documents provided, the financier of the accident vehicle whose owner was shown as the 3rd Respondent.

In very similar situation in **Civil Appeal No. 243 of 1998 Mohammed Hassan Musa and Another -vs- Diamond Trust (K) Ltd**, the Judges of Appeal held that the financier (Diamond Trust Bank) had nothing to do with the accident but had merely financed the purchase of the vehicle which caused the accident and was therefore wrongly sued and attached.

See also **Civil Appeal No. 232 of 2010 Equity Bank Ltd -vs- Naftali Anyumba Onyango & Others (2014) e KLR and Civil Appeal No. 44 of 2016 Diamond Trust Bank Kenya Ltd -vs- Richard Mwangi Kamotho & 2 Others.**

29. In both cases and many others, the thread running across all is that a financier of a motor vehicle, and registered as a co-owner, cannot be held liable for acts of the purchaser's agents as it is merely a financier and cannot be held vicariously liable.

For the foregoing, I come to the finding that the trial court misdirected itself and misapprehended the law as concerns service of summons upon a corporation and the matter of vicarious liability of a financier of an accident motor vehicle.

30. Finally and upon the above findings, it would be improper and illegal for a decree holder, and more so upon an ex parte judgment, to execute against a financier of an accident vehicle on the ground only that the said financier is co-registered as the owner of the vehicle.

31. I am persuaded to interfere with the trial court's findings in the offensive ruling delivered on the 11th November 2009 in the trial case being minded that an appellate court ought to do so only when it is satisfied that the trial court's findings are based on no evidence or misapprehended the law.

32. For the foregoing, the appeal dated 17th November 2009 is allowed. The trial court's ruling delivered on 11th November 2009 is set aside, and substituted with an order allowing the Appellant's application dated 9th March 2009. In addition, the ex parte judgment of the 23rd May 2008 is hereby set aside and all consequential orders flowing therefrom.

The Appellant is granted leave to defend the Respondent's claim and the proposed draft defence shall be filed within 7 days of this ruling in the trial court, after which the primary suit Nakuru CMCC No.1781 of 2005 shall proceed to hearing in the ordinary and normal manner before the Chief Magistrate's court but with expediency in view of the age of the case.

34. Costs are awardable at the court's discretion depending on the circumstances of each case – **Section 27 Civil Procedure Act.**

I have carefully considered all the circumstances. The order that comments itself to me is that each party shall bear its own costs on the appeal.

It is so ordered.

Dated, signed and delivered this 28th Day of November 2018.

J.N. MULWA

JUDGE