



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 141 OF 2013

MURIITHIA LIMITED.....APPELLANT

- V E R S U S -

LONRHO MOTORS (E.A) LIMITED

(UNDER RECEIVERSHIP).....1ST RESPONDENT

PETER MARTIN..... 2ND RESPONDENT

ZAVERCHAND JIVRAJ SHAH.....3RD RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate's

Court at Milimani by Hon. Nditika (Mr) at Nairobi dated

20th February 2013 in Civil Suit No. 1971 of 2005)

JUDGEMENT

1. Lonrho Motors (E.A) Ltd (under receivership), the 1st respondent herein, filed a suit against Muriithia Ltd, the appellant herein and two others before the Chief Magistrate's Court, Milimani Law Courts, claiming for *inter alia* to be paid ksh.348,365/55 being payment for the loss and damage the 1st respondent suffered as a result of a road traffic accident involving motor vehicle registration no. KVF 787 and the 1st respondent's motor vehicle registration no. KAL 008V. It is said that on or about 26.2.2002 while motor vehicle registration no. KAL 008V was lawfully being driven by the 1st respondent's authorised driver along Mander road, Peter Martin, the 2nd respondent so negligently and recklessly drove motor vehicle registration no. KVF 787 that it violently collided with the 1st respondent's motor vehicle. The appellant was sued as a beneficial owner of KVF 787 having allegedly bought the same from Zaverchand Jivraj Shah, the 3rd respondent herein. The 1st respondent obtained judgment in default of appearance and defence against the appellant. The 1st respondent sent a notice of entry of judgment to the appellant. Upon receipt of the notice of entry of judgment, the appellant filed an application seeking for *inter alia* the setting aside of the default judgment. The application was contested. The application was heard and dismissed by Hon. Nditika, learned ag. Senior principal Magistrate on 20.2.2013. Being dissatisfied, the appellant filed this appeal.

2. On appeal the appellant put forward the following grounds:

1. The learned magistrate failed to appreciate or apply the correct test on an application to set aside judgement.

2. The learned magistrate not only applied the wrong test but allowed himself to be influenced by irrelevant considerations including:

a. Whether the order for substituted service was proper?

b. That the appellant ought to have been vigilant to note there was no defence on record, yet they had no knowledge of the suit.

c. That the plaintiff is entitled to the fruits of its judgment.

3. The learned magistrate erred in failing to consider the fact that the appellant became aware of the suit on 27th November 2012.

4. The learned magistrate erred in dismissing the application considering the facts of the case and the applicable law. The entire decision is wrong and the learned magistrate failed to follow decisions of higher courts which were binding to him.

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court and the rival submissions. In his ruling, Hon. Nditika concluded that service was proper and that the appellant could not dispute service. He further concluded that the appellant ought to have been vigilant. He also noted since there was no draft defence, it was difficult for the court to determine whether or not triable issues had been raised. Based on the aforesaid grounds the learned magistrate dismissed the application.

4. On appeal, the appellant argued that the trial magistrate erred when he dismissed the appellant's application without considering the applicable tests and principles. It is also argued that the trial magistrate took into account irrelevant considerations. The 1st respondent on the other hand is of the view that the trial court's decision should not be interfered with because he considered the relevant principles in dismissing the appellant's motion. It is pointed out that the trial magistrate considered the facts of the case and the applicable law.

5. Having re-evaluated the arguments presented before the trial court and having considered the rival submissions, it is now clear to me that the learned ag. Senior Principal Magistrate fell into error when he dismissed the appellant's application. It is on record that the appellant informed the trial magistrate that it did not see the newspaper advertisement. It was therefore wrong for the trial court to allude that the appellant was not vigilant. The moment the appellant stated that, it did not see the newspaper advert, the burden of proving otherwise shifted to the 1st respondent to show that indeed the appellant saw the newspaper advertisement. On this ground alone, the dismissal order must be set aside.

6. The other ground which the learned ag. Senior Principal Magistrate relied on in dismissing the appellant's application was that there was no draft defence showing triable issues. With respect, the trial magistrate fell into error. A reading of the affidavit filed in support will show that the appellant denied being the owner of motor vehicle registration no. KVF 787. That in itself is a triable issue which goes to the root of the motion.

7. On the basis of the above grounds this appeal is found to be with merit. Consequently, it is allowed. The order dismissing the motion dated 14.12.2012 is set aside and is substituted with an order allowing the motion in terms of prayers 3 and 4.

8. Costs of the appeal and motion to abide the outcome of the suit.

Dated, Signed and Delivered in open court this 23rd day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent