



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 198 OF 2013**

**FRANCIS MIUTHEE T/A BELL MART..... APPELLANT**

**VERSUS**

**KENYA ORIENT INSURANCE LIMITED.....RESPONDENT**

*(An Appeal from the ruling and orders of the Chief Magistrate's Court at Milimani by Hon. T. W. C. Wamae dated 05/04/12 in CMCC No. 1922 of 2012.)*

**JUDGEMENT**

1. On 5.4.2013, Hon. T. W. Wamae (Mrs), the learned chief magistrate delivered a ruling in which she set aside the exparte judgment obtained by Francis Muchee, the Appellant herein vide Milimani C.M.C.C no. 1992 of 2012. The learned chief magistrate too granted Kenya Orient Insurance Co. Ltd, the Respondent herein leave to defend the aforesaid suit. The Appellant was aggrieved hence he filed this appeal.

2. On appeal, the Appellant put forward the following grounds.

1. *That the learned magistrate erred in law and in fact in setting aside the judgment in view of her findings that service of summons had indeed been effected.*
2. *That the learned magistrate erred in law and in fact in setting aside the judgment in the absence of any explanation or excuse for the failure to file an appearance or file defence despite having been served with summons to enter appearance.*
3. *That the learned magistrate erred in law and in fact in setting aside the judgment in view of the express admission of indebtedness to the plaintiff.*
4. *That the learned magistrate erred in law and in fact in finding that there were only serious triable issues whereas there were either none at all or in the alternative and without prejudice, the same were negated by the express admission of the claim by the defendant/Respondent.*
5. *That the learned magistrate erred in law and in fact failing to award costs to the plaintiff.*

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 considered the rival submissions after re-evaluating the arguments presented before the trial chief magistrate. It is clear from the recorded evidence that judgment in favour of the Respondent herein was entered on 20.06.2012 in default of appearance of the defendant. Upon obtaining judgement, the plaintiff proceeded to execute the decree. The Appellant avers that the Respondent had admitted his indebtedness in writing, and made part payment of the decretal sum. Later the Respondent made an application to set aside the judgement.

4. It is said that the application was heard by way of cross-examination of the deponents of the affidavits sworn in support and in opposition. In the end the learned chief magistrate came to the conclusion that the summons to enter appearance was indeed served upon the defendant. She also concluded that the

defendant was in fact served with a notice of entry of judgement. She also concluded that the defendant's head of claims department, Mercy Kiana did not admit the defendant's indebtedness nor did the defendant make part payment of the decretal sum under duress. It is the submission of the Appellant that the findings by the learned chief magistrate left no grounds whatsoever for her to exercise her discretion to set aside a regular judgement in place more so in the face of the express, voluntary admission of liability and part payment on the part of the defendant. The Appellant (plaintiff) urged this court to find that the learned chief magistrate erred in setting aside the default judgment in view of the express admission of indebtedness to the plaintiff/Respondent.

5. The Respondent on the other hand has urged this court to dismiss the appeal on the basis that the learned chief magistrate was entitled to set aside the judgement. It is argued that the defence raised triable issues which entitled the Respondent herein to defend the suit. The Respondent also argued that the learned chief magistrate found that if the *exparte* judgment was not set aside the Respondent would suffer serious prejudice in that the judgment sum of ksh.2,847,049 was clearly well beyond the cover that had been offered by the Respondent which was a maximum of kshs.1,400,000/=. The Respondent further argued that a party should not make a profit from an insurance policy that go against the principle of indemnity. This court was urged not to reinstate the judgment as this would mean that the Respondent will be forced to pay more than its contractual liability.

6. Having considered the rival submissions and after re-evaluating the case that was before the trial court, in my humble view, though the Appellant put forward a total of five grounds can be actually be determined all together. The main issue is whether the learned chief magistrate properly exercised her discretion in setting aside an *exparte* judgment which is said to have been regularly obtained.

7. In **Mohamed and another =vs= Shoka (1990) K.L.R** at p. 468, the court of appeal expressed itself in part as follows:

**“... the tests for the correct approach in an application to set aside a default judgment are; firstly whether there was a defence on merits, secondly whether there would be any prejudice, and thirdly what is the explanation for any delay.”**

8. In my considered view the learned chief magistrate erred when she set aside the *exparte* judgment which was regularly entered. There was an assailable evidence that the Respondent (defendant) was served with the summons to enter appearance. The learned chief magistrate further found as a matter of fact that the Respondent was actually served with a notice of entry of judgment. It should be appreciated that when a party who seeks to set aside an *exparte* judgement which has been regularly obtained shows that it has a good defence, the court is enjoined to set aside the judgement. This is what the learned chief magistrate did in this case. In fact that is the main ground the Respondent is heavily relying on to show that the chief magistrate properly exercised her discretion. With great respect, I do not think the learned chief magistrate should have done so because there is clear evidence which manifests itself from the record that the Respondent freely admitted the claim and even proceeded to settle part of it. Parties cannot be allowed to blow hot and cold a the same time. One cannot admit a claim at one time and shortly it turns round and states it has a valid defence with triable issues.

9. Before exercising her discretion to set aside the *exparte* judgment, the learned chef magistrate should have considered the prejudice that would be caused to the parties as a result. The dispute that arose out of an Insurance Policy issued to the Appellant by the Respondent was to cover burglary and loss at the Appellant's store along Factory Street Nairobi. The risk insured attached on the nights of 14/1/2012 and 15/1/2012 and in the process the Appellant lost 371 bags of brown sugar worth ksh.2,782,500/=. That is the amount the Appellant filed an action to recover from the Insurer (Respondent).

10. The Appellant was able to show the trial court that the sugar which was stolen from his store belonged to a company by the **Baston Ltd** and further stated that upon receipt of the money paid to it, the same was remitted to the aforesaid company. Kshs.480,000/= was paid as Auctioneers fees. In short, the amount paid to the Appellant by the Respondent is no longer held by the Appellant. I agree with the Appellant that had the learned chief magistrate considered the issue regarding prejudice, she would have come to the

conclusion that the Appellant would have suffered considerable hardship if exparte judgement is set aside since the decree had been partly satisfied and the claim having been fully admitted by the Respondent.

11. In the end, I find the appeal to be meritorious. The same is allowed. Consequently the order setting aside the exparte judgment issued on 5.4.2013 is set aside and is substituted with an order dismissing the motion dated 25<sup>th</sup> September 2012. Costs of the appeal and the motion are awarded to the Appellant.

Dated, Signed and Delivered in open court this 20<sup>th</sup> day of May, 2016

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent