



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 183 OF 2012**

**DANIEL MUSAU KIMEU..... APPELLANT**

**- V E R S U S -**

**JOHN MALOLI KITUKU .....RESPONDENT**

***(Being an appeal against the judgment of the Honourable Ole Keiwua Principal Magistrate in Milimani Case CMCC no.3807 of 2005)***

**JUDGEMENT**

1. John Maloki Kituku, the respondent herein filed a compensatory suit vide the further amended plaint dated 13.03.2009 against Daniel Musau Kimeu, the appellant herein and four others. In the aforesaid plaint the respondent sought for both special and general damages for injuries he sustained in a road traffic accident along Nairobi-Machakos road on 30.6.2000 involving motor vehicle registration number KAE 244Q wherein the respondent was a fare paying passenger and motor vehicle registration number KAJ 198F. Summons to enter appearance and the plaint were allegedly served upon the appellant and his co-defendant. It would appear the appellant did not deem it fit to enter appearance nor file a defence, hence the respondent successfully obtained judgment in default of appearance and later proceeded with the matter as a formal proof. The appellant avers that he got surprised when he was informed by his wife that her household goods were being attached with the intention of satisfying the decree. The appellant was prompted to file the motion dated 26.9.2011 where of he sought for inter alia an order for stay of execution of the decree and for the judgment entered against him set aside and for the appellant to be given leave to unconditionally defend the suit. The respondent opposed the aforesaid motion by filing a replying affidavit. The motion was heard and dismissed by Hon. Ole Keiwa, learned Senior Resident Magistrate on 16.5.2011. Being aggrieved the appellant preferred this appeal.

2. On appeal, the appellant put forward the following grounds in his memorandum of appeal:

***1. The Trial Principal Magistrate erred in law and in fact by failing to exercise his discretion in accordance with principles of law developed over the year as regards the setting aside of expert judgment.***

***2. The trial Principal Magistrate erred in law and in fact by failing to note that the defence that was proposed raised triable issues and that court only be dealt with in a full trial.***

***3. The trial Principal Magistrate erred in law and in fact by condemning the appellant unheard and failed to note that the same suit was filed and heard in Machakos Court SPMCC NO. 208 of 2003, and the respondent had lost the suit and the suit before him was res judicata.***

3. When the appeal came up for hearing learned counsels appearing in this appeal 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. I have also considered the rival submissions.

4. On the first ground of appeal, the appellant has argued that the learned Senior Resident Magistrate erred when he failed to exercise his discretion to set aside the *ex parte* judgment in accordance with the well established principles. It is argued that the learned magistrate misunderstood the import of Order 5 rule 8 of the Civil Procedure Rules which require that summons should be served personally or upon an agent empowered to accept service. The appellant pointed out that the trial magistrate did not first ascertain whether he had been properly served before holding that the defendant (appellant) was aware of the suit. It is also argued that the summons and the amended plaint were served by registered mail without prior leave hence the service was improper. The appellant further averred that when he received the summons and the amended plaint he forwarded the same to his insurers and thought the insurer would take action.

5. In response to the appellant's submissions over the first ground of appeal, the respondent is of the view that the appellant did not give a plausible explanation for his failure to enter appearance and file a defence. The respondent further pointed out that the appellant was properly served but instead of entering appearance he forwarded the documents to his insurers who let him down. The respondent urged this court to reject the appellant's arguments.

6. The appellant does not *per se* deny that he was served but instead he is attacking the mode of service claiming the same was improper since leave to serve by substituted service was not obtained. The appellant further avers that he handed over the summons and the amended plaint to his insurers to take over his defence but the insurer failed him hence he should have been given a chance to defend the suit before the trial court. In the motion before the trial court, the appellant averred that a suit similar to the one before the trial court had been filed against the appellant and was eventually dismissed because the appellant was not the registered owner of the motor vehicle which caused the accident. I have carefully examined the ruling delivered by Hon. Ole Keiwa, the subject matter of this appeal. It is apparent that the learned Senior Resident Magistrate held *inter alia* that the appellant was aware of the suit. With respect, I agree with the submissions of the appellant that the learned Senior Resident Magistrate did not determine the question as to whether or not the appellant was properly served with the summons to enter appearance. It is also apparent that the Senior Resident Magistrate failed to consider the appellant's plea that his insurers failed to enter appearance and or file a defence. Had he taken the later submission into consideration, he would have come to the conclusion that the appellant did not deliberately fail to file an appearance and a defence. With respect, I agree with the appellant's argument that the learned Senior Resident magistrate fell into error.

7. The second ground of appeal is to the effect that the appellant's argument that he had a defence with triable issues was never considered. The respondent is of the view that the defence does not raise triable issues hence the trial magistrate was right to dismiss the motion. I have re-examined the draft defence annexed to the affidavit of Daniel Musau Kimeru sworn on 26.9.2011 and filed in support of the motion of the same date. Though the appellant stated before the trial court that he has a good defence, with triable issues, the learned Senior Resident Magistrate did not make a finding on the submission. A critical examination of the aforesaid draft defence will reveal that the same raises serious triable issues to wit *inter alia* that the suit is *resjudicata* and secondly that the appellant was not the owner of the motor vehicle which allegedly caused the accident. Where a party shows he has a good defence with triable issues, the court has a wide discretion to set aside *ex parte* judgment to enable it open the doors to the temple of justice. With respect, the learned Senior Resident Magistrate failed in resolving this critical issue. The decision on this ground substantially determines the third ground of appeal which is to the effect that the appellant as a result of the trial court's decision, was condemned unheard.

8. In the end and on the basis of the above reasons, the appeal is allowed. Consequently the order dismissing the motion dated 26.9.2011 is set aside and is substituted with an order allowing the motion. The appellant is given unconditional leave to defend the suit.

9. The appellant is given costs of this appeal and the motion before the trial court

Dated, Signed and Delivered in open court this 29<sup>th</sup> day of September, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent