



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 70 OF 2008

D. T. DOBIE (K) LIMITED.....APPELLANT/APPLICANT

VERSUS

MARY GORETTY MBATHA.....1ST RESPONDENT

SAMULE K. MAMO..... 2ND RESPONDENT

KENSTA FORWARDERS..... 3RD RESPONDENT

(BEING A APPEAL FROM THE RULING AND ORDER OF HON. E. N. MAINA (MS) SENIOR PRINCIPAL MAGISTRATE DELIVERED ON 5TH FEBRUARY, 2008)

JUDGEMENT

1. Mary Goretti Mbatha, the 1st Respondent herein was on the

12th May 1996 involved in a road traffic accident while boarding motor vehicle registration no. KAB 689V as a fare paying passenger along Langata road. It is said that the aforesaid motor vehicle belonged to Samuel K. Mamo, the 2nd Respondent herein and D. T. Dobie (K) Ltd, the Appellant herein. The 1st Respondent alleged that the aforesaid motor vehicle was carelessly managed and driven by the employee and or agent of the owners that it collided with motor vehicle registration no. KAD 640L owned by Kensta forwarders, the 3rd Respondent herein. As a result of the accident, the 1st Respondent suffered serious injuries. The 1st Respondent consequently filed a compensatory suit before the Senior principal Magistrate's court, Nairobi vide the plaint dated 18th June 1998 whereof she sought for damages and costs of the suit.

2. Summons to enter appearance plus the plaint were alleged to

have been served upon the Appellant, the 2nd and 3rd Respondents. The firm of Kangethe and Co. Advocates filed an appearance and a joint statement of defence to resist the 1st Respondent's claim. In their defences, ownership of both motor vehicles was denied. The 1st Respondent tendered evidence in support of her case while the Appellant, the 2nd and 3rd Respondents closed their cases without presenting evidence in support of their defence. Eventually on 18.12.2003 Hon. G. W. Ngari, learned Senior Resident Magistrate entered judgement in favour of the 1st Respondent and against the Appellant, the 2nd and 3rd Respondents in the sum of ksh.201,100/=.

3. The Appellant took out the summons dated 23rd May 2006 in

which it applied to have the aforesaid judgement entered against it west aside and that it be allowed to defend the suit. The gist of the Appellant's application is that it was never served with the summons to enter appearance and that it was an arguable defence. .

4. On appeal, the Appellant put forward the following grounds of

appeal.

1. ***THAT the trial magistrate erred in law by exercising her discretion wrongly.***
2. ***THAT the trial magistrate exercised her discretion wrongly in refusing to set aside the judgment against the appellant, when n evidence whatsoever was laid to show that summons had been served on the appellant.***
3. ***THAT the trial magistrate exercised her discretion wrongly in refusing to set aside the judgment against the appellant, ex debito justitiae.***
4. ***THAT the trial magistrate exercised her discretion wrongly in failing to appreciate that the appellant had not instructed the firm of Kangethe & Co. Advocates.***
5. ***THAT the trial magistrate exercised her discretion wrongly in failing to take into consideration that the purported joint defence filed by Kangethe and CO. Advocates, and the Draft defence annexed to the appellants application dated 23.5.06 are different and couldn't have been from same instructions.***
6. ***THAT the ruling of the trial magistrate is such as it will cause injustice and hardship to the appellant.***
7. ***THAT the judgement against the appellant was not caused by deliberate conduct, action, or omission of the appellant as the process was completely and wholly outside the knowledge of the appellant.***
8. ***THAT the trial magistrate completely and wholly misapprehended and misapplied the law relating to setting aside default judgment or otherwise.***
9. ***THAT the ruling is against the law as established.***

5. 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. I have further considered the rival written submissions. It is the submission of the Appellant that the trial magistrate failed to give due consideration to its assertion that it did not instruct the firm of Kangethe & Co. Advocates to enter appearance and file a defence of its behalf. It argued that it was not served with the summons to enter appearance nor with the plaint and that it only became aware of the suit when it was served with a notice to show cause why execution should not be issued. The 1st Respondent on the other hand is of the view that the Appellant was served with the summons to enter appearance plus the plaint by a process server by the name Joel Momanyi who passed on before filing his affidavit of service. The 1st Respondent also pointed out that the firm of Kangethe and Company Advocates soon thereafter filed an appearance on behalf of the Appellant and other defendants thus confirming that indeed the Appellant was served. It should be noted that similar arguments were made before the trial court. The learned Ag Senior Principal Magistrate took note of the fact that despite the Appellant complaining that it did not instruct the firm of Kangethe & Co. Advocates to act for it, it did not show any evidence of any correspondence complaining of acting for it without instructions.

6. I have carefully re-evaluated the arguments presented before

the trial court. In paragraph 5 of the affidavit of Nyagah Makembo sworn in support of the summons dated 23rd May 2006, it is expressly deposed as follows:

“That the firm of Kangethe & Co. Have not been our lawyers and we do not know or understand how they came on record and filed a defence on our behalf.”

7. The summons plus the supporting affidavit was served the firm of Kangethe & Co. Advocates.
8. The averments of Nyaga Mamembo contained very serious allegations made against the firm of Kangethe & Co. I have perused the record and it is clear that the aforesaid firm of advocates did not deem it fit to respond to the serious allegations which in my view dents its image. There are also no correspondences or evidence that the Appellant complained against the firm of Kangethe & Co. Advocates as being imposters in this matter.
9. I am convinced that the learned Ag. Senior Principal Magistrate

exercised her discretion correctly. The Appellant had failed to tender credible evidence to show that it was not served.
10. The Appellant's conduct clearly shows that the firm of Kangethe & Co Advocates had full instructions to act for the Appellant in this matter. This is one of those peculiar cases where the client will be left to suffer for the mistakes of their advocates. If indeed, the Appellant felt the firm of Kangethe & Co. Advocates had acted without its instructions, if well advised there are many avenues for it to seek for redress against the aforesaid firm. On this ground I find no fault in the decision of the trial court.
11. The other ground which was ably argued before this court and the court below is that the Appellant had put forward a Co. Advocates. The Appellant and the other defendants through the firm defence with triable issues which the trial magistrate should have considered to set aside the judgment. This argument in my view must fall on the wayside. To begin with, the trial magistrate correctly point out that the grounds put forward in the draft defence by the Appellant are nearly similar to those put forward by the firm of Kangethe & Co. However, Kangethe & Co. Advocates failed to tender evidence to establish the veracity of their defences. I see no merit in the argument.
12. In the circumstances of this case, even if the Appellant had put forward a good defence with triable issues, I do not think this court would set aside the judgement because the same was not made exparte. The Appellant and its colleagues voluntarily closed their defence without summoning witnesses to buttress their defence.
13. In the end I see no merit in this appeal. The same is dismissed with costs to the 1st Respondent.

Dated, Signed and Delivered in open court this 11th day of December, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent