



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 637 OF 2006

PETER WEYAMA.....APPELLANT

VERSUS

EMMANUEL ODUNGA ORODI.....RESPONDENT

(Being an appeal from the ruling of the Hon. Magistrate, at Magistrates

Court Milimani, Nairobi (Hon. Githua SRM) dated 24th August 2006)

JUDGEMENT

1. Emmanuel Odunga Orodi, the respondent herein, was on 16th August 2002 allegedly knocked down by motor vehicle registration no. KAM 843 T while he was lawfully walking off the road. The aforesaid motor was registered as owned by Peter Weyama, the appellant herein who was driver at the material time by Samson Wandera, the 2nd defendant in the suit. The respondent filed a compensatory suit before the chief magistrate's court, Milimani vide the amended plaint dated 8th November 2004. Summons to enter appearance were served upon the appellant who in turn failed to enter appearance nor file a defence within the required time limits. The respondent successfully obtained an interlocutory judgement in default of appearance on 23rd February 2005. Thereafter the matter proceeded to hearing as a formal proof and on 28th November 2005, the trial court pronounced judgement in favour of the respondent in the sum of ksh.350,000/= . Upon learning of the entry of judgement, the appellant applied to have the exparte judgment set aside. The aforesaid application was dismissed on 24th August 2004. The appellant was dissatisfied hence this appeal.

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

1. THAT the learned trial magistrate erred both in law and in fact in the exercise of her discretion by dismissing the appellant's application to set aside the default judgment herein.

2. THAT the learned magistrate erred in law by failing to apply the "Golden Rule" in her ruling i.e. by totally ignoring and failing to consider the issue of whether or not the appellant has shown a good defence deserving to be heard on merits.

3. THAT the learned magistrate erred in law by failing to apply the requisite principles in reaching her ruling and specifically failed to consider whether or not the appellant as a person had deliberately sought to delay or otherwise avert the course of justice and thus undeserving of the exercise of the court's discretion in his favour.

4. *The learned magistrate ruling shall actually occasion and injustice and great hardship to the appellant for no mistake of his.*

5. *The learned magistrate failed to give fair consideration to the reasons advanced by the appellant for the failure to file his defence within the prescribe time.*

6. *THAT the learned magistrate erred in awarding costs of the suit to the respondent.*

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. The appellant argued that the trial magistrate fell into error when she failed to give serious consideration to the grounds advanced by the appellant to explain the reasons for the delay to file an appearance and defence within the statutory time. The appellant also argued that the trial magistrate failed to find that he had a good defence with triable issues. The respondent is of the view that the trial magistrate considered all the reasons advanced and properly dismissed the appellant's application.

4. I have re-examined the grounds argued before the trial court. I have also analysed how the trial magistrate appreciated those arguments. The record shows that the learned principal magistrate appreciated the fact that the court has a wide discretion to set aside *ex parte* judgment on terms that are just. She however stated that she did not find sufficient cause to set aside the *ex parte* judgement. She further stated that the appellant's conduct did not deserve him to benefit from the court's discretion. The learned principal magistrate went in detail to explain the unbecoming conduct of the appellant. She stated that the appellant was served with the summons to enter appearance but instead of entering appearance he chose to serve the insurance company with the summons and the plaint and went to sleep. She concluded that the appellant was indolent while the respondent was vigilant. It is clear from the ruling of the trial magistrate that the learned principal magistrate did not appreciate the relationship between the insured and the insurer. She did not deeply consider the reasons given for the delay to file an appearance and defence. She did not also consider the defence put forward by the appellant. There are ample authorities which have expounded the principles to be considered before deciding an application to set aside an *ex parte* judgment. It suffices to cite Patel =vs= **E.A Cargo Handling Ltd (1974) E.A 75** in which the East African Court of Appeal restated the following principles inter alia:

i. That there must be a good defence or a defence that raises a triable issue.

ii. That the court must also be satisfied as to the cause of delay in entering appearance.

5. I have already stated that the record shows that the appellant submitted before the trial court the reasons for the delay and the fact that he also had a good defence with triable issues.

6. On the first principle, the appellant stated that he handed over the documents he was served with to the insurance company and he expected the insurer to act on those suit documents by applying the doctrine of subrogation. The learned Principal Magistrate was of the view that the appellant should have made a follow up.

7. With great respect, the learned Principal Magistrate fell into error. In this case, the insurer terribly failed to protect the interest of the appellant who took over the appellant's case using the principle of subrogation. The learned Principal Magistrate correctedly stated that the insurer was not a party to the suit. She however, failed to appreciate the fact that the relationship between the insurer is governed by an insurance policy in which the insurance company takes up the appellant's defence. The learned Principal Magistrate should therefore have understood the predicament the appellant was put in. After a careful reconsideration of the reasons advanced by the Appellant, I am convinced that the appellant was candid and truthful. The appellant admitted having been served and that since he was insured, it behoved upon him to surrender the suit papers to the insurance company.

8. The other issue which was not given due consideration is the question as to whether or not the appellant had a good defence. This issue was given a black out by the learned Principal Magistrate. I

have on my part critically examined the draft defence attached to the affidavit filed in support of the application for setting aside judgement and it is clear to me that the appellant put forward a defence with serious triable issues. The appellant has specifically stated that the respondent is to wholly to blame for accident. The appellant further stated that he was going to show that the respondent had been convicted for careless riding and fined ksh.1000/=.

9. In my view the defence raised serious triable issues which in the end affect the apportionment of liability and quantum.

10. In the end, I am satisfied that the appellant's appeal must succeed. The appeal is allowed. The order dismissing the application dated 14.12.2005 is set aside and is substituted with an order allowing the application.

11. For the avoidance of doubt the following orders are issued on

appeal.

- i. The ruling on the Senior Resident Magistrate dated 24.08.2006 is set aside.**
- ii. The exparte judgement obtained on 23.02.2005 is set aside hence Nairobi P.M.C.C. no. 8835 of 2005 is ordered reinstated.**
- iii. The appellant is given 10 days leave to file his defence out of time in Nairobi P.M.C.C no. 8835 of 2004.**
- iv. Costs of this appeal to abide the outcome of the suit.**
- v. The suit to be heard afresh before any other magistrate other than Hon. C. W. Githua.**

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