



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL CASE NO. 57 OF 2007

CHARLES MWAVITA MWANGOME.....PLAINTIFF

VERSUS

GRACE ANYANGODEFENDANT

RULING

1. Judgment in this suit was given in the respondent's favor on 15th July, 2009 by Omondi J. An interlocutory judgment having been recorded earlier, the plaintiff adduced evidence during formal proof. Subsequent to the judgment the plaintiff successfully moved the court to review the same by awarding damages amounting to shs. 1,800,000/- for loss of future earnings.
2. On 30th November, 2010 the firm of Muraya Wachira Advocates filed an application under Certificate of urgency on behalf of the defendant. The application expressed to be brought under Order IXA rule 9 and OXXI of the Civil Procedure Rules (old) seeks to set aside the judgment of the court and subsequent orders in respect of damages. It is grounded on the affidavit of Judith Onyango who describes herself as the chief legal officer of M/s Gateway Insurance Co. Ltd., (the insurance company), insurers of the accident vehicle.
3. The above deponent contends that the insurance company was unaware of this suit until a declaratory suit – Mombasa CMCC No. 2378 of 2010 to enforce the decree herein – was filed against it. Further, that even though the firm of M/s L. N. Momanyi & Co. Advocates had filed a memorandum of appearance in the instant suit, they had not been instructed by Gateway Insurance Co. as their insured (the defendant) “never brought to the attention of the insurance company any such summons and plaint.”
4. The application was vigorously opposed by the plaintiff. In the plaintiff's replying affidavit, he asserts service of the statutory notice and demand letters on the insurance company prior to the filing of the suit. As well the defendant was duly served with summons to enter appearance and was served on all occasions with a hearing notice. Finally, the plaintiff's depones that the defendant had appointed competent counsel to represent her and that Judith Onyango the deponent of the supporting affidavit is a stranger to the suit.
5. By consent of the parties the application was disposed of by way of written submissions, which by and large took cue from the respective affidavits. Relying on the case of **Patel v E.A. Cargo Handling Services Ltd. (1974) EA 75** the applicant argues that the defendant has a defence on merits which raises triable issues and should be allowed to defend. The plaintiff/respondent reiterated the fact of service on the defendant and the insurer, but argued that he had no duty to serve summons on the insurance company. In addition he has challenged the capacity of the

deponent of the supporting affidavits as well as the merits of the proposed defence.

6. I have carefully considered the affidavits and submissions made in respect of the present application. I take the following view. There is no dispute that the defendant was duly served with summons and did enter appearance through the firm of Lucy Momanyi Advocates. Whether the said Momanyi Advocate had instructions from the insurance company is not a matter for determination by this court, but it is undeniable in light of annexures CMM 1, 2 and 3 to the replying affidavit that the insurance company had due notice of the plaintiff's claim.
7. There is no requirement under the Civil Procedure Rules or the Insurance (Third Party Risks) Act for the claimant to effect service of summons to enter appearance upon a defendant's insurance company. Upon serving a statutory notice as was done in this case, the plaintiff had no further duty. The record of the proceedings before Omondi J. on 26th November, 2008 and 19th May, 2008 when the matter proceeded for hearing shows that the court satisfied itself as to service on the defendant. Ditto the 24th November, 2009 when an application to review judgment was heard.
8. In my considered view however, the proper party who should dispute service or assert the merits of the draft defence is a party to the suit. In this case the defendant herself has not sworn any affidavit in support of the application to set aside, and no explanation at all has been offered by the insurance company through Judith Onyango. While it is true that in a proper case the insurance company can bring or defend a suit in respect of its insured, under the doctrine of subrogation, the insurance company sues in the name of the party insured and not its own name. That is the law and practice.
9. That a declaratory suit has been filed in enforcement of the judgment in this suit is demonstration of the above position. A declaratory suit would not be necessary if the insurance company is deemed a party to the primary suit. Under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, the insurance company is obligated to satisfy judgments in respect of persons insured by them "notwithstanding that the insurer may be entitled to avoid or cancel ...the policy," but subject to statutory notice, stay pending appeal etc. The insurance company is the true applicant in this instance. Its complaint concerns the alleged failure by its insured (defendant) to inform it about the filed suit, and the unauthorized appointment of a counsel by the defendant. Such alleged breaches cannot be the basis of setting aside a regular judgment in favor of an innocent plaintiff. The insurance company's remedy lies against their insured and not the plaintiff herein.
10. The insurance company cannot be allowed to eschew that remedy and set up a proxy defence on behalf of the 'absentee' defendant. For this and other reasons given, it is my view that the case of **Patel** does not aid the applicant's case. In addition to the draft defence being a mere denial on the face of it, it is not a legitimate defence as it has not been presented by its owner, the defendant, who is the proper party herein. As stated in the **Patel** case, the main concern of the court is to do justice.
11. The principles that govern the setting aside of regular judgments have been pronounced consistently since the case of **Shah vs Mbogo (1967) EA 116** where justice Harris stated as follows at page 123;-

"I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. In my opinion, applying those principles to the facts before me and taking everything into account, the society has not made out a sufficient case on the merits to justify the setting aside of the perfectly regular order of July, 8, 1966, and accordingly the motion must be refused."

12. In my considered view, it would be a travesty of justice to allow the insurance company to step into the shoes of an 'absentee' or reluctant defendant and purport to raise a defence in his behalf, with the self-evident intention of avoiding liability. The accident occurred in 2005 following which, the plaintiff's leg was amputated. The defendant had a chance to raise her defence but did not. The plaintiff should not continue to be denied the fruits of his judgment. This application has no merit and is dismissed with costs.

Delivered and signed at Malindi this **28th** day of **March, 2014** in the absence of parties.

Court clerk - Samwel

C. W. Meoli

JUDGE