



IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 86 OF 2012

ROY MCKENZIE PLAINTIFF

V E R S U S

CARTRACK KENYA LIMITED 1ST DEFENDANT

911 SECURITY LIMITED

{T/A CARTRACK GROUP} 2ND DEFENDANT

RULING

1. Judgment was entered against the Defendants in default of an appearance on 7th June 2012. The matter then proceeded to be formally proved on 18th July 2012. By Court's judgment of 20th September 2012 Plaintiff was awarded general damages of Kshs. 700,000/-, for future medical treatment Kshs. 550,000/- and special damages of Kshs. 3,263,311/-.
 2. The Defendants by their Notice of Motion dated 4th April 2014 seek an order for the ex parte judgment to be set aside.
 3. Plaintiff's claim is that he was a passenger of Defendants' motor vehicle Registration No. KBK 996J on 30th November 2011 when due to Defendants' driver's negligence the said motor vehicle lost control and overturned resulting in him being injured.
 4. The Defendants' affidavit in support of the application was sworn by WENDY KOMEN, the Defendants' Financial Manager. By that affidavit she acknowledges the accident occurred and that the Defendants reported it to their Insurers. This is what she stated in regard to the service of Summons and Plaint on the Defendants-
- **THAT our mail is usually forwarded to us by G4S and we are not sure of when it was actually delivered.**
 - **THAT it is probable that the mail could have been delayed on transit or misplaced in our office and pray to be excused.**
 - **THAT we immediately passed the same to our insurers as required by the policy conditions herein.**

- **THAT later we received communication that judgment had been entered herein for Kshs. 4,676,634/-.**
 - **THAT upon further enquiries I learnt that the summons had been served to our Mombasa Branch office on 17/5/12.**
 - **THAT the same were then forwarded to our offices by Securicor.**
 - **THAT it would appear that the summons got mixed up with mail and were not brought to our attention.**
 - **THAT we have branches in the following towns of which they send us mail on daily basis.**
 - a. **Mombasa**
 - b. **Nakuru**
 - c. **Eldoret**
 - d. **Kisumu**
 - e. **Uganda**
 - **THAT once the mail is received, the same is received at our reception, sorted out and distributed to the various departments.**
 - **THAT it is apparent that the said summons got misplaced together with the other mail.**
5. The deponent further stated that the Defendants have a Defence which raises triable issues. Deponent summarized those triable issues as follows-
- “THAT I further aver that we have a good defence to this matter raising triable issues as follows-**
- (a) **Whether the accident occurred as alleged.**
 - (b) **Whether the driver of motor vehicle KBK 996 was negligent at all.**
 - (c) **Whether the Plaintiff/Respondent contributed to the accident herein.**
 - (d) **Whether the Plaintiff was injured as alleged.**
 - (e) **Whether the Plaintiff is entitled to the special damages sought or whether the same are remote.**
 - (f) **Whether the doctrine of *res ipsa* applies in this matter.**
6. Defendant also relied on a supplementary affidavit sworn by Samson Wambugu Ndegwa the Advocate having the conduct of the Defendants’ case. Defendants’ draft Defence was annexed to that supplementary affidavit.
7. Learned Counsel Mr. Mutiso in submission before Court faulted the service of Summons and Plaint on the ground that the service did not comply with Order 5 Rule 3 which requires service of Summons and Plaint on a Corporation to be effected-

“(a) On the Secretary, Director, or other Principal Officer of the Corporation;”

Learned Counsel submitted that service was not effected in accordance with the above Rule. He did however acknowledge that service on behalf of the Defendants was effected upon the Manager of Car Track (K) Ltd. According to Counsel, that Manager, Mr. Maina, was not authorized to receive the Summons and Complaint. Further that the process server failed to indicate that such service was on behalf of which Defendant, that is, either Car Track (K) Ltd or 911 Security Limited. Defendants relied on following cases which dealt with service on Corporation. **LOCHAB BROTHER LIMITED –Vs- LILIAN MUMBI NG’ANG’A & 2 OTHERS (2014)eKLR**, the Court stated-

“In this case, the process server did not depone about the efforts he made in trying to serve the principal officers of the appellant, before serving the lady named Eunice. Secondly, the process server did not indicate the nature of the relationship between the said Eunice and the Company, Lochab Brothers Limited.”

TOTAL KENYA LIMITED –Vs- SUPA HAULIER LIMITED [2002]eKLR the Court stated-

“How is the court to know that attempts were made in vain by the process server, to effect service of summons upon the principal officers of a corporation? It must be deponed in the affidavit of service to justify the mode of service opted for.”

8. Defendants also relied on the case **SAMMY NJERU –Vs- LINEAR COACH CO. LTD (2005)eKLR** where the Court had this to say on how the Court should deal with draft Defence-

“The principles governing the setting aside of an ex parte judgment were further visited in SEBEI DISTRICT ADMINISTRATION v. GASYALI & OTHERS [1968]E.A. 300, in which at p. 301-2, Sheridan J. cited with approval the words of Ainley J. (as he then was) in JAMNADAS V. SODHA v. GORDHANDAS HEMRAJ [1952]7 ULR. 11, wherein the latter had said-

“... The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court ...”

9. The Plaintiff relied on case **MAINA –Vs- MUGIRIA [1983]KLR** which set out the principles applied in consideration of an application to set aside ex parte judgment. The Court in that case held-

“2. The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in default of either party to attend the hearing are:

- a. **Firstly, there are no limits or restrictions on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.**
- b. **Secondly, 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo [1967]EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955)22 EACA 48.*”**

10. Plaintiff submitted that if the Court finds that Defendants were

properly served with the Summons and Complaint the Court does not have discretion to set aside ex parte judgment, that the Court has discretion where the service was not proper. In this case

Plaintiff submitted that service was proper. Plaintiff invited the Court to look at the affidavit of service which shows service was effected upon Mr. Maina who was the Defendant's Manager as envisaged under Order 5 Rule 3. Plaintiff relied on the definition in Section 2 of the Companies Act Cap 486 to show that Mr. Maina was an Officer of Defendants. That Section defines an Officer of a Corporation to include a Director, Manager or Secretary. Further Plaintiff submitted that the service was effected in the premises of Cart Track (K) Ltd.

11. On the draft Defence Plaintiff submitted that it did not raise triable

issues because Plaintiff was a passenger in the Defendants' vehicle and could not therefore bear contributory negligence.

12. The Notice of Motion calls upon this Court to consider two issues. The

first is whether service of summons and plaint was proper and secondly if so whether the Court should, in exercise of its discretion, set aside the *ex parte* judgment.

13. The affidavit of service by Alfred Kingi dated 7th June 2012 describes

the service of summons as follows-

- **THAT on the 17th day of May, 2012 at about 11.30am. I proceeded to Nyali along the Jomo Kenyatta Road where the offices of Cartrack Kenya Limited are situated whereupon arrival, I met Mr. Fredrick who works with Cartrack Kenya Limited and after explaining to him the purpose of my visit, he referred me to Mr. Maina, the Manager of Cartrack Kenya Limited.**
- **THAT after introducing myself and explaining the purpose of my visit to Mr. Maina, the Manager, I served upon Mr. Maina copies of the Summons to Enter Appearance, Plaint dated 30th April 2012, Verifying Affidavit, Witness Statements of Roy Mckenzie, Marguerite Mckenzie and Nyae Tsuma, List of Witnesses to be called at the trial and List of Documents to be relied on at the trial by tendering the said copies thereof to him and requiring his signature on the originals. He was personally known to me and he accepted service and signed on the original.**

As can be seen from the above Mr. Maina accepted service and acknowledged that service by signing the Summons. I confirm that I have seen that behind the Summons attached to the affidavit of service there is a stamp of CarTrack Kenya Limited Mombasa Branch and below that stamp is handwritten words to the effect: "**Received on 17/06/2012**" which words are followed by a signature.

14. It will be recalled that the deponent of the affidavit in support of the

Notice of Motion did not deny that the Defendants were served indeed what one gets from her depositions is that the Defendants are looking to the Court to exercise mercy when in that affidavit they state at paragraph 21-

"... pray that the Court looks favourably towards our request."

It follows that service was indeed effected on Defendant.

15. Did such service breach Order 5 rule 3. That Rule provides that

service on a Corporation should be effected upon, amongst others, Principal Officers. As correctly submitted by Plaintiff Section 2 of Companies Act defines officers to include Managers. Mr. Maina was described in the affidavit of service as the Defendant's Manager. That deposition

was not contradicted by the Defendants in their affidavit. The service on Mr. Maina was therefore in accordance with Order 5 Rule 3.

16. Had the Court found that Plaintiff had failed to serve the Defendants,

the Defendants would have been entitled to the ex parte judgment being set aside *ex debito justitiae*.

17. Since I have found that the service was regular I will be guided by the

case of PATEL –Vs- E.A. CARGO HANDLING SERVICES [1974]E.A. 76 as follows-

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment, as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.”

18. Bearing that holding above I will begin to consider whether the draft Defence raises triable issues.

19. Defendants in their draft Defence deny that they own the subject motor vehicle then pleaded-

“... as the vehicle KBK 996J cannot be owned by two entities.”

It is important to note that the draft Defence is in respect of both entities that is Cartrack Kenya Ltd and 911 Security Limited T/A Cartrack Group. The Police Abstract attached to Defendant’s supplementary affidavit indicates that the motor vehicle is owned by 991 Security. The Defendants do not attach a Logbook or Search from the Registrar of motor vehicles to prove that indeed the motor vehicle is so owned by 991 Security. It is not, in my view, enough to rely on Police Abstract. This is so because Plaintiff in his statement said that the subject vehicle was Toyota Hilux twin cab Pick-up with 911 signs on its sides and on the bonnet. Could it be that the Police Officer who took details of the accident was influenced by those signs. It is more the reason why the Defendants should have produced a copy of the Log book or a Search of the Registrar of motor vehicles. Such documents would have assisted the Court in determining that there is a triable issue raised by the defence. The burden was upon the Defendant to prove the same.

20. In the draft Defence the Defendants state that Plaintiff’s suit was

“*fatally wrong (sic) as it does not give name of the alleged driver which is fatal to the suit*”
The Plaintiff in his plaint has pleaded that the Defendants liability is vicarious. In my view the fact that the driver was not joined as co-Defendant was not fatal to Plaintiff’s suit. In saying so I rely on the case LAKE FLOWERS V CILA FRANCKLYN ONYANGO NGONGA & ANOTHER [2008]eKLR as follows-

“We agree with the appellant’s complaint both in the Memorandum of Appeal and the submissions before us that vicarious liability was not pleaded in the plaint; and that the driver of the Mitsubishi canter was not joined as a party to the proceedings in the superior court. However, it is our view that the failure to sue the appellant’s driver and the omission by the 1st Respondent to directly refer to the appellant’s liability as being vicarious was not necessarily fatal to his claim. It is sufficient that the relevant primary facts were pleaded and evidence led to show the owner of the Mitsubishi canter and from which vicarious liability can be inferred as a matter of law. And as put in *Dritoo v. West Nile District Administration [1968]E.A. 428:-*

‘Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose

negligence the owner is responsible.’

In *Ndungu v. Coast Bus Company Limited* [2000]2 E.A. 462 it was held that:-

‘From the authorities (*Selle & Another V Associated Motor Boat Company Limited & Others* [1968]EA 123 (ibid) and *Mwonia V Kakuzi* [1982] 46 (CAK) it would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged to the employee’s liability but to his negligence.’”

20. Defendant further in their defence deny that their driver was negligent

as pleaded in the plaint. The Plaintiff in his statement had this to say on how the accident occurred-

“According to me the following is what happened on the recce for satellite tracking Nov 30 morning for KCB Mtaani Rally. I am Roy B Mckenzie and was the Clerk of the Course for this event. My duty on that day was to show the Cartrack team the route for the upcoming Mtaani Rally. We had gone from Matope to Kinango and were returning on the Kinango to Mariakani road in the area of the town Mtaa. The time was about 11.30am. The day was clear and dry the road was open and had no livestock or other obstacle ie matatu motorbike bicycle persons etc. The road was clear and visible around a gentle right hand bend for 300 metres. I was not wearing a seatbelt because the seat belt clip was located under the canvas set cover and could not be accessed. I was in the back seat of a Toyota Hilux twin cab 4X4 pick up. I was alone on the back seat. The vehicle swerved a couple of times on exiting the corner before rolling over at least twice may be thrice landing driver side down facing backward and about 20 feet off the road on the open grass. When the car came to rest I found that I could not exit because my left arm was immobile. Several witnesses helped to lift me from the car including Mr.

Tsuma of the Mombasa Fire Department who was at his home at the crash site on vacation.”

21. Mr. Tsuma mentioned in his statement said-

“I do not know how the driver of the vehicle lost control as there was no other vehicle on the road nor was there any pedestrian or animal crossing the road to make the driver lose control. I believe that the driver must have lost control of the vehicle due to high speed.”

22. Bearing those statements in mind I will just repeat what was stated by

the justices in the case LAKE FLOWERS (supra)-

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible.”

In the absence of a statement of the driver, which should have been attached to the draft Defence the Court is unable to determine otherwise other than the claim of denial of negligence is nothing more than mere denial.

23. Although the Defendant’s have alleged in the draft defence that the

accident was due to the negligence of the Plaintiff they fail to set out the particulars of such alleged negligence. In the absence of such particulars and in view of the fact that the Plaintiff was a passenger even the allegation that the Plaintiff's damages were too remote does not raise a triable issue.

24. Defendants in the draft Defence stated the Plaintiff had failed to give

them a Notice of intention to sue. Defendants did not allude any Rule or provision of law that nullifies a suit or makes it incompetent where Notice before suit is not given. At the most the consequence of a party fails to give Notice before suit is that such a party would not be entitled to Advocates costs at Taxation. That is what The Advocates (Remuneration) Order of Cap 16 provides under paragraph 53. That paragraph states-

“If the Plaintiff in any action has not given the Defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing, no advocate's costs shall be allowed except on a special order of the judge or magistrate.”

In any case amongst the Plaintiff documents attached to the plaint is a letter addressed to the Defendants dated 24th January 2012 demanding settlement of Plaintiff's claim before suit. That letter was sent to the Defendants by Registered Post.

25. The issues I have considered above are the issues raised in the draft

Defence. In my view those issues do not show that the Defendant's defence raises any triable issues and because in considering an application such as the one before Court I am required to do justice to the parties, in my view the justice of this case would best be met by the dismissal of the Defendants application.

26. Accordingly the Notice of Motion dated 4th April 2014 is dismissed

with costs to Plaintiff.

DATED and DELIVERED at MOMBASA this 31ST day of JULY, 2014.

MARY KASANGO

JUDGE