



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 94 OF 2011

PAUL ASIN T/A ASIN SUPERMARKETAPPELLANT

VERSUS

PETER MUKEMBIRESPONDENT

JUDGMENT

The Respondents claim in the lower court was for general and special damages arising from the tort of negligence based on the facts that the Respondent was an employee of the Appellant who in the course of employment suffered pain, loss and damage when he was attacked by a gang of thieves.

Further that the appellant had a duty to provide adequate and suitable appliances to enable the Respondent to carry out his work safely and that the appellant failed to provide safe systems of work and was therefore responsible for the pain, loss and damages occasioned to the Respondent.

A defence was filed by the firm of S.M. Otunga & Company Advocates.

The matter was subsequently fixed for hearing but on the hearing date both the Advocate and the Appellant were absent in Court. In their absence the matter proceeded to formal proof. Judgment was on 28th December, 2012 entered in favour of the Respondent and against the Appellant in the sum of Ksh. 600,000/= being general damages and Ksh. 2,000/= being special damages.

The Appellant was notified of the Judgment when the Respondent commenced execution proceedings.

The appellant instructed the firm of Maina Njanga & Co. Advocates as that of S.M. Otunga & Co. Advocate could not be traced.

It is the contention by the Appellant that on the 15th day of February, 2011 the firm of Maina Njanga & Co. Advocates filed a Notice of change of Advocates.

Further that on the 17th day of February, 2011 the firm of Maina Njanga & Co. Advocate filed an application under certificate of urgency seeking leave to come on record and a prayer to set aside the default Judgment.

Thereafter leave to come on record was granted and interim stay orders too.

On 1st March, 2011 the Respondent filed a replying affidavit raising the issue that the Appellants

Advocate was not properly on record as the first notice of change of Advocates was filed without leave of the court.

Subsequently, the application dated 17th February, 2011 was dismissed by an order issued on 13th June 2011. It is that order of 13th June, 2011 which forms the basis of this appeal.

The application dated 17th February, 2011 sought orders for

- (a) Leave for the firm of Maina Njanga to act for **the Appellant.**
- (b) Stay of execution of any decree, order, or **Warrants of attachment.**
- (c) Stay of execution of the Decree and Judgment.
- (d) The setting aside of the default Judgment.
- (e) Enlargement of time for the appellant to prepare for its case.

It is the contention by the appellant that the application was dismissed on technicalities rather than substance. That though the application sought several prayers, the trial magistrate limited himself to only two of them.

Counsel for the appellant has cited the case **Mombasa HCCA 202 of 2007 Leena Apparels Ltd. Vs Mwatha Mulwa** where Azangalala, Judge was dealing with the issue of whether a mistake by an Advocate should be visited on his client in a similar case to the present one and where he cited with approval the case of **Philip Chemwolo & Anor. Vs Augustine Kubende (1982 – 88) KAR 103** where Apolo, Judge rendered himself thus,

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.

In his ruling the trial magistrate did observe that,

“there was no evidence that the application dated 17th February, 2011 in which the defence counsel herein purportedly sought and obtained leave to act for the Defendant was served upon the firm of S.M. Otunga & Co. Advocates”.

Yet there is an affidavit sworn by a processor server on 22nd February, 2011 and filed in court on 23rd February, 2011 which is to the effect that service of the Notice of motion dated 17th February, 2011 was served on S.M. Otunga & Co. Advocates.

I do find that it was not correct to state that the firm of S.M Otunga & Co. Advocates had not been served. Having been severed with the application, the notice of change of Advocates and having failed to appear for the hearing of the application interpartes it cannot be heard to be said that counsel for appellant was not properly on record.

In the case of **Shah –Vs- Mbogo & Another (1967) EA 116.** It was held,

“the discretion to set aside an exparte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

In the present case the defence had been filed. There is no indication whether the trial magistrate did consider it before making his ruling.

In the case of **Patel -Vs- E.A. Cargo Handling Services Ltd.** It was held,

“in considering an application to set aside an exparte Judgment, the nature of the action should be considered, the defence if any 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 it should be remembered that to deny a litigant a hearing should be the last resort of a court”.

I am of the considered view that the trial magistrate did not fully appreciate the application before him and he selectively dealt with the issues before him. The mistake of counsel should not be visited on his client.

I find that this appeal has merit and its accordingly allowed.

The ruling dated 28th April, 2011 is set aside with costs to the appellant.

Judgment delivered dated and signed this **28th** day of **October, 2013.**

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M. MUYA

JUDGE

28TH OCTOBER, 2013

In the presence of:-

Learned counsel for the appellant Mr. Ojode holding brief Njanga

Learned counsel for the Respondent absent

Court clerk Musundi.