REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Appeal 229 of 2010

RICHARD BONUKE NTABO ..... APPELLANT

-VERSUS-

KIAMOKAMA TEA FACTORY ..... RESPONDENT

JUDGMENT

(Being an appeal from the ruling of the Chief Magistrate's Court at Kisii, Hon. K. T Kimutai in Civil Case No. 281 of 2008 dated 22nd September, 2008)

This appeal arises from the short ruling of the Senior Resident Magistrate Kisii (**Hon. K. T. Kimutai**) dated and delivered on 22nd September, 2010 by which he set aside the exparte judgment which he had entered against the respondent on 23rd December, 2009 and all consequential orders thereto; stayed execution of the judgment and decree and granted leave to the respondent to file defence.

The facts giving rise to the case, the subject matter of the appeal, are short and straight forward.

The appellant was employed by the respondent, Kiamokama Tea Factory, as a casual labourer. On 30th January, 2004 whilst he was working at the withering machine the conveyor rollers malfunctioned, gripped his hand and entangled it occasioning the appellant grave injuries on the entire arm and the right side of the abdomen.

An examination carried out on him by **Dr. Ajuoga**, consultant surgeon on 13th February 2009 revealed that the appellant had suffered serious fracture of the humerous bone which required internal fixation, which is an expensive surgical management. The injuries had, however, healed well with no permanent disability.

In his plaint filed in Kisii Chief Magistrate's court on 25th June 2007, the appellant averred that the industrial accident was caused by the breach of contract and negligence on the part of the respondent or its agents and during the formal proof the appellant testified that he was not provided with protective gear and that the machine was not properly secured. He prayed for damages for pain, suffering and loss of amenities.

Despite the respondent being served with summons it never entered appearance nor did it file defence and hence the formal proof which was held on 18th February 2009 resulting in the judgment for Kshs. 274,800/= being entered for the appellant. The award is inclusive of both special and general damages.

About 18 months later, the respondent rushed to court pursuant to execution proceedings which were being carried out against it. After some frantic negotiations the following consent order was recorded on 24th August, 2010. The main parts thereof are produced.

"ii. The defendant to deposit the decretal sum of kshs. 336,117/= in a joint interest earning account in the names of advocates on record and the said amount to be deposited before 8th September, 2010.

iii. A copy of the cheque for the decretal sum be supplied to the plaintiff's counsel within 7 days.

iv. That pending the compliance of clauses (ii) and (iii) the motor vehicle to be released on running attachment.

v) The application dated 13th August 2010 to be listed for hearing on 8th September, 2010...".

On 8th September 2010 the application to set aside the exparte judgment was argued. The respondent admitted being served with the summons but stated that the same was misplaced and hence failure to file defence.

The appellant opposed the application on the ground that:

a. The application to set aside the judgment was characterised by inordinate delay;

b. Decretal amount not deposited in court.

On 22nd September 2010 the learned magistrate, without assigning any reasons whatsoever, granted the application and ordered the judgment vacated with a further order that the auctioneers were to be paid by the respondent. Being aggrieved by the said ruling, the appellant lodged this appeal, with three main grounds of appeal which I deal with as hereunder.

The appellant contends that the learned magistrate erred in law and fact in failing to give reasons for arriving at his decision and or ruling. After perusing the ruling, i agree with the appellant. The ruling does not meet the requirements of Order 2 rule 4. Order 2 Rule 4 requires judgments or decisions of the court to contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. The ruling, the subject of this appeal offends this mandatory requirement. This ground of appeal therefore succeeds.

It is not in dispute that the respondent did not comply with various consent orders made on 24th August, 2010. Consequently, the judgment was set aside without the decretal amount being secured. Further, the motor vehicle was released without any guarantee that it would remain within the jurisdiction of the court should it be needed for re-attachment. Again, the cheque exhibited before the learned magistrate was never banked.

In short, it can be said with some justification that the so called consent order was obtained through deception. Moreover, if there was goodwill or genuine oversight on the part of the respondent, why has the omission not been rectified several months afterwards?

The said situation is as follows: The appellant was injured in 2004. The judgment he obtained in December, 2009 has been vacated without any security at all that he will ever be compensated. If the respondent turns out to be bankrupt or impecunious, then the appellant will suffer irreparable loss. There was no fairness at all on the part of the respondent.

I am satisfied, having considered the rival submissions filed by the parties herein that the learned magistrate below exercised his discretion wrongly as the respondent did not offer a reasonable or satisfactory explanation for its failure to enter appearance. It is not sufficient to say that summons was misplaced (for over 18 months). Further, the respondent did not demonstrate whether useful purpose

could be served by setting aside the judgment since there was no possible defence to the action. See **Patel –vs- E.A Cargo Handling Services Ltd (1974) EA 75**.

In my view, justice demands that the interest of the injured party, the appellant herein be taken into account also. The court will not assist a litigant who is dilatory, evasive and who has abused the process of the court. Moreover, the respondent has tried all it can to delay the finalisation of the case.

I allow the appeal. I order the ruling and order dated 22nd September 2010 be and is hereby vacated and set aside. The respondent's application dated 13th August 2010 is ordered dismissed with costs.

The appellant shall be at liberty to execute the lower court's decree forthwith. It is so ordered.

Judgment dated, signed and **delivered** at Kisii this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for appellant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE