



REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 41 of 2006

OSCAR MUEMA MUTIE RESPONDENT/PLAINTIFF

VERSUS

JOSEPH M KISILIA APPELLANT/DEFENDANT

J U D G M E N T

In a ruling dated 24th March 2006 and delivered on 3rd April 2006 on application dated 17/3/2005, the subordinate court in **Machakos CMCC No. 1078 of 2004** concluded as follows:-

“By reason of the matters aforesaid, having found that the defendant herein was properly served and did not take the necessary step to enter appearance or file defence in time, and that he has no explanation for the default, and further that he has no defence on merits of the suit, then in the interest of justice, I cannot set aside a regular judgment obtained by the plaintiff. To allow the defendant application would be to assist a person who is obviously bent to, subvert the court of justice. That, I refuse to do. Accordingly, the defendant’s application dated 16/3/2005 is hereby dismissed with costs to the plaintiff/respondent. Dated and signed by me this 24th day of March, 2006.

S.M. Mwendwa – Resident Magistrate”

The above ruling has given rise to this appeal, which was filed by Joseph Kisila the appellant/defendant.

The memorandum of appeal herein lists several grounds. They are seven (7) in number. The parties filed written submissions through their counsel **B.M. Mung’ata** for the appellant, and **Sila & Company** for the respondent/plaintiff. I have perused the submissions.

This is an appeal in which judgment was to be delivered by **Waweru J.** However, the file was later brought to me and I decided, with agreement of counsel for the parties, to deliver the judgment.

The subordinate court refused to set aside the *ex-parte* judgment. Under **Order 9A rule 10** of the **Civil Procedure Rules**, a court has a wide discretion to set aside a judgment entered in default of entering appearance or filing defence. As was stated in the case of **African Safari Club Ltd –vs- Walter Oluoch Seko – Mombasa Civil Appeal No. 134 of 1989** - the discretion to set aside such judgment is very wide. The discretion only needs to be exercised by the court on terms which are just to the parties.

Service of process is very primary in a case where one is expected to enter appearance or file defence. The learned magistrate appreciated that there was lack of necessary detail in the affidavit of

service, which neither gave the time of the service nor did it give the details or particulars of the way the defendant was identified for service. The learned magistrate also stated that the defence was a mere denial.

Having seen a copy of the alleged agreement for the loan which the plaintiff/respondent was relying upon in the case in the subordinate court, I am of the view that the learned magistrate should have given the appellant a chance to defend himself. That agreement appears to have been signed by only the financier. It does not appear to have been signed by the other side. In my view, it is an agreement that, from the face of it, required to be proved.

In my view, justice requires that I allow the appellant to defend himself, as I am of the opinion that the learned magistrate erred in rejecting the request to set aside judgment. The request for setting aside judgment was justified because the facts to support sufficiency of service of the plaint and summons were not candid. Secondly, there is a triable issue regarding the validity of agreement relied upon by the respondent/plaintiff.

Consequently, I allow the appeal and set aside the ruling of the subordinate court. I order that the judgment entered by the subordinate court and all consequential orders be and are hereby set aside. The appellant/defendant is granted 14 days to file and serve a defence in the case in the subordinate court. Costs of this appeal however, will be in the cause. The same will follow the decision in the proceedings in the subordinate court.

Dated and delivered at Machakos this 27th day of **November** 2012.

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George Dulu
Judge

In the presence of:
Mr Kasyoka for appellant
Court clerk - Nyalo