



1. Civil appeal

2. Subject of main appeal:-

- i. CCMC No.12128 of 2003 Nairobi Milimani
- ii. Tort/contract
- iii. Employer/employee
- iv. Employee involved in a motor vehicle accident and sustained injuries
- v. Employer pays for special damages but not general damages.
- vi. Insurance company decline to pay as employer breached the agreement of the policy.
- vii. Employee sues employer
- viii. Employer fails to enter defence.
- ix. Interlocutory judgment entered. 3 February 2004.
- x. Formal proof held 28 June 2007
- xi. Suit declaratory that employee entitled to general damages.
- xii. Application of 21 August 2007 by employer to set aside *ex parte* judgment

3. Reasons

- i. Mistake
- ii. Employer not notified by Insurance company they withdraw from acting.
- ii. Application opposed as advocate not on record.
- iv. No minutes and resolution of the board given to engage advocate.
- v. Ruling by trial magistrate. The application to be brought was from 4 December 2003 to 31 July 2007, a period of 4 years was inordinate.
- vi. No defence filed. Proposed defense was actually the 2nd Defendant's defence.

4. Appeal – By appellant

- i. The appellant made an honest mistake in failing to file a defence.
- ii. Good defence
- iii. Failing to find advocate not on record.

By respondent in reply

- i. The advocate for appellant never on record.
- ii. Took four (4) years to apply to set judgment aside.
- iii. No draft defence was filed.

5. Held:-

- i. The appeal dismissed.
- ii. Decision of trial Magistrate upheld
- iii. *Ex parte* judgment upheld

6. Case Law: Nil

7. Advocates

- i. J. I Mwangi instructed by the firm of Irungu Mwangi, Ng'ang'a T. T & Co.
Advocates for the Appellant - present
- ii. B. Masinde holding brief for C. Serem instructed by M/S Obura Mbeche & Co.
Advocates for the Respondent - present

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

NAIROBI

CIVIL APPEAL NO. 885 OF 2007

**KENYA POWER & LIGHTING COMPANY
LTD.....APPELLANT**

VERSUS

JOHN GITAU KAMONYE.....RESPONDENT

(Being an appeal from the ruling and decree of Hon. Mr. Were, Resident Magistrate delivered on 5th October 2007

at Nairobi Milimani Commercial Courts in Civil Case NO.12128 of 2003)

JUDGMENT

I. BACKGROUND

1. The relationship between the appellant and the respondent is that of master/servant.
2. The respondent/original plaintiff was involved in a road traffic accident and sustained injuries. His employer the appellant/original defendant No. 1 in the subordinate court at Milimani Law courts paid for special damages expenses but failed to pay for the general damages claim.
3. The employer filed a declaratory suit. Interlocutory judgment was entered against the employer. The suit against the insurance company was duly withdrawn.
4. On the issue of representation, the advocate for the Insurance Company entered appearance for both the employer and the Insurance Company. They then wrote to say they do not act for the employer as they had breached the company policy.
5. The employee/respondent proceeded with his case against the employer. He filed a prayer for interlocutory judgment as the employer had failed to file defence and there was entered a judgment against the employer.

6. Formal proof was conducted and an award given.
7. From this, the employer allows the former advocate to apply to court to set aside the judgment so entered. The advocate being still on record failed to file defense.
8. The advocate then applied for the setting aside of the exparte judgment. The trial magistrate declined. The employer appealed to this High Court.

II. FINDINGS ON APPEAL

9. The argument put forward by the appellant is that there was a mistake on the part of the appellant for not filing defense. That the said application was heard by one Hon. Ole Keiwa (when this in effect was not correct) who declined to set aside the exparte application.
10. Being dissatisfied with this decision, the said employer prayed that this court overturn the decision of the trial court.
11. The respondent employer through his advocate commented that the trial magistrate is not Hon. Ole Keiwa but one 'Hon. Were'. That the advocate had written to him to state they no longer act for the employer.
12. Nonetheless, the application was brought after 4 years which was an inordinate delay.
13. The respondent employee asked that the appeal be dismissed.

III. OPINION

14. I require to look at the issue of representation. The employer appellant at all times was of the view that they had been represented. Indeed, a memorandum of appeal for the employer and the Insurance Company had been entered. What the advocate therefore failed to do was to file a formal application to court to cease from acting. That the employer should have been served. Once the orders are obtained from the courts, the employer's advocate is to once again serve the said order upon the employer. This must at all times be done.
15. In this case, it was never shown that an application to formally cease from acting had been made. This means the advocate remains on record unless otherwise served.
16. Interlocutory judgment was entered. The said advocate failed to have filed defense nor were they able to represent the employer. Before any action was done, four years had lapsed.
17. The trial magistrate was correct in declining to set aside the exparte judgment due to the inordinate delay in bringing such application.
18. I would find that the trial magistrate was correct in coming up with its conclusion and declining to set aside the exparte judgment.
19. This appeal is dismissed with costs to the Respondent/Original Plaintiff.

RULING DATED THIS 12TH DAY OF MAY 2011 AT NAIROBI

M. A. ANG'AWA

JUDGE

Advocates

i. *J. I Mwangi directed by the firm of Irungu Mwangi, Ng'ang'a T. T & Co. Advocates for the Appellant - present*

ii. *B. Masinde holding brief for C. Serem instructed by M/S Obura Mbeche & Co. Advocates for the Respondent - present*