



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO.12 OF 2010

IMA HAULIERS LIMITED.....APPELLANT

VERSUS

PHILIP ONG'ATO ATAKO.....RESPONDENT

J U D G M E N T

1. This appeal arises out of a decision of Hon. E. K. Makai, PM in which he declined to set aside an ex-parte judgment entered against the Respondent on 22nd September 2009.
2. I note that the plaint in SRMCC No.366 of 2008 (Mumias) was filed on 10th September 2008 and summons to enter appearance were issued on the day. They were reissued on 14th April 2009 and I deem it an important point to reproduce the affidavit of service sworn on 7th May 2009 by Geoffrey Odera Nyambaka.

It reads thus;

“I, Geoffrey Odera Nyambaka of P. O. Box 940, Mumias make oath and state as follows;

1. That I am a licensed court process server of the High Court of Kenya authorized to swear this affidavit.
2. That on 22nd October 2008 I received copies of **Plaint, Summons to enter Appearance and Verifying Affidavit** from M/s. Akwala & Co. Advocates with instructions to serve upon the defendants herein.
3. That on the same day I proceeded to the Mumias office at Shibale – Angola area where I found their clerk who is authorized to receive all court processes. His name is Wilson.
4. That the said office and the clerk were all know to me at the time of service since I had earlier served them with other documents.
5. That I introduced myself and the purpose of my visit then served him.
6. That he accepted service for and on behalf of the 1st defendant by stamping and signing

on my returned service copy.

7. That on 17th April 2009 I went back to Shibale-Angola area where Ima Hauliers office is situated and after inquiry to the above mentioned clerk who is well known to me, he proceeded to call the 2nd defendant.

8. That the 2nd defendant identified himself as Silvanus Benard Onyango to who I introduced myself and the purpose of my visit then served him.

9. That he accepted service but declined to sign on my returned service copy.

10. That what is deponed to herein is true to the best of my knowledge, information and belief.”

3. There being no appearance, interlocutory judgment was entered on 3rd June 2009 and formal proof was conducted on 27th July 2009 while judgment was delivered on 22nd September 2009. The Respondent, who was the Plaintiff, was awarded Kshs.184,000/- plus costs and interest.

4. In the Application to set aside the judgment, the Appellant by an Affidavit sworn on 30th September 2009 by Ms. Linda Olweny, “an in-house Lawyer for M/S Occidental Assurance Company” stated that although service of summons was not denied, it was its case that the delay in entering appearance and defence was occasioned by;

(i) Futile attempts at negotiating settlement out of court.

(ii) Investigations by M/S Zakache Security Services Limited, into the accident, and which took “a considerable amount of time”.

(iii) Failure by the Insurance Company to take action on the file after receiving the Investigation Report.

5. It was further admitted that no action was taken by or on behalf of the Respondents for a period exceeding one year and that action was only taken after judgment had been delivered and execution had commenced.

6. In his short but precise Ruling, the learned magistrate stated that the Insurer had not shown what prejudice it has suffered and the draft statement of Defence raised no triable issue. He promptly dismissed the Application with costs.

7. I have taken into account submissions by advocates for the parties and for me the matter is straight forward. I say so because;

Firstly, there is no denial, inspite of certain anomalies in the Affidavit of Service, that indeed the summons to enter appearance was served and as is the practice, the 1st Respondent forwarded the same to his Insurers. The expectation was that the Insurers would appoint a lawyer to take up the matter and defend the interests of the insured. That did not happen.

8. Secondly, it was admitted that the Insurers were wholly to blame for the delay in entering appearance within time and the delay was admittedly inordinate.

9. Thirdly, the law on the subject was settled in Shah vs. Mbogo [1967] E.A. 16 where in restating the wide discretion to set aside an ex-parte judgment, Harris, J. stated as follows;

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist the person

who has deliberately sought, whether by evasive or otherwise, to obstruct or delay the course of injustice”

10. Further, in Tree Shade Motors Limited vs D.T. Dobie Company Limited C.A. No.38 of 1998 it was stated as follows;

“Even if the service was valid, judgment will be set aside if [the] Defence raised triable issues”.

11. I have looked at the draft statement of Defence (annexture “L02”) and it raises the following issues;

- (i) whether the accident in question actually took place,**
- (ii) whether the allegations of negligence on the part of the 2nd Defendant in the suit could be proved to the required standard,**
- (iii) whether motor vehicle registration number KAR 825 – ZB 5533, New Holland, was in poor or unsafe mechanical condition during the alleged accident,**
- (iv) whether the Respondent was solely or wholly negligent for the alleged accident,**
- (v) whether there was in fact a cause of action against the Appellants.**

12. To my mind, these issues are triable and unlike the learned magistrate, one cannot wish them away at all. In any running down case, there are serious issues for trial and should be determined on the merits.

13. Fourthly, whereas the insurer has come forth to take the blame for the predicament that befell its insured, it is also true that the insured who is the 1st Appellant and its servant, the 2nd Appellant will suffer undue prejudice if the judgment against them is sustained while they took the necessary steps to inform their insurer of the suit against them.

14. In conclusion, I accept the arguments that on the law and the facts, the appeal has merit and is allowed as prayed. The Ruling of the subordinate court is set aside, the ex-parte judgment entered on 22nd September 2009 is also set aside and the Appellants shall file their appearance and Defence within twenty one (21) days of this judgment.

15. However, as to costs, the Appellants shall pay Kshs.20,000/- thrown away costs to the respondent.

16. Orders accordingly.

I. LENAOLA

JUDGE

**DELIVERED, DATED AND COUNTER-SIGNED BY L. KIMARU, JUDGE AT KAKAMEGA
THIS 13th DAY OF JUNE, 2011**

L. KIMARU

JUDGE