REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.3 OF 2006

(CONSOLIDATED WITH CIVIL APPEAL NO.2

AHMED HASHI ADEN T/A

TORRY TRANSPORTERS…….....…….…. APPELLANT

VERSUS

MOSES KIPKEMOI SIONGOK..…..……1ST RESPONDENT

NICHOLAS RONO SIGILAI……....….2ND RESPONDENT

(An appeal from the Ruling in Molo SNR.R.M..C.C.NO.45 of 2005

By Hon. R. K. Kirui, Senior Resident Magistrate, Molo dated 18th October, 2005)

JUDGMENT

The court below (Kirui, Esq.) entered judgment after exparte hearing in the sum of Kshs.496,552.00 plus costs and interest against the appellants in Molo R.M.C.C.No.45 of 2005 on 18th October, 2005.

Being aggrieved by the proceedings and the judgment, the appellant moved the court below with an application dated 25th October, 2005 asking that court to set aside its judgment in question and in the meantime stay execution of the decree.

After hearing the arguments in the application, the learned magistrate dismissed the same prompting this consolidated appeal, in which three grounds have been raised. The ruling dismissing the application has been challenged on the ground that the learned magistrate erred in entertaining an application for amendment of the plaint without notice to the appellants; that the hearing of the suit was fixed prematurely. The appeal was opposed and the respondent through his counsel has filed what is headed *"Reply to Memorandum of Appeal"* in which it is averred that the amendment complained of was initially sought by the appellants; that the learned magistrate acted in accordance with the law; that the learned magistrate used his discretion judiciously; that the appellants have not been prejudiced by the amendment; that the appellants have admitted liability and ; that they have themselves to blame for failing to amend their defence and to attend court.

I have considered the appeal, the submissions by counsel as well as the authorities relied on. Whether or not to set aside a judgment obtained in default of appearance or filing of defence in time or not at all or in

default of attendance at the hearing of the suit as was the case in this appeal, is a matter of judicial discretion. As an appellate court, I will not interfere with the exercise of the learned magistrate's discretion unless I am satisfied that the magistrate erred in principle or that he acted perversely on the facts. See **Bourchard International (Services) Ltd.** Vs. **M'Mwereria** (1987) KLR 193.

For example, this court will interfere with the discretion of the learned magistrate if he took into account matters he ought not to have taken into account or in the converse, omitted to take into account matter which he ought to have taken into account, or if he

misapprehended the evidence before him or he reached a perverse conclusion on the facts before him, or he acted on a misapprehension of the law governing the matter before him.

I reiterate that the discretion to set aside a default judgment is unfettered and the primary concern of the court is to do justice to the parties. I may add that the discretion is intended to be exercised in order to avoid injustice or hardship resulting from accident or in advertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice (See **Shah** V. **Mbogo** [1967] E.A. 116). In exercising the discretion, the court usually considers the reason, if any, given for the default and the merits or otherwise of the case of the party against whom the judgment was entered but is not limited to only those considerations. (See **Express (K) Ltd** Vs. **Patel** (2001) 1 EA 54.

Looking at the ruling of the learned magistrate, which is impugned in this appeal, it is clear that the learned magistrate considered both questions raised in this appeal, namely that the appellants had 15 days after service with the amended plaint to amend their defence but failed to do so; that the amendment had infact been sought earlier by the appellants. Secondly, the learned magistrate considered the question of oral application for amendment and held that he had jurisdiction to entertain and grant such application. Finally, the learned magistrate was of the view that the appellants' defence did not appear to raise any issue. The first thing being challenged are the proceedings of 6th and 27th September, 2005. The record is clear that on 6th September, 2005 the appellants were not present or represented. Yet learned counsel for the respondent addressed the court thus:

"We have agreed to have with (sic) the defence counsel to adjourn the matter. We have also agreed that the plaintiff amend (sic) his pleadings to delete/remove the first defendant as we have been unable to serve him. We have also agreed to amend the special damages to read Kshs.470,000.00 for the value of the property and Kshs.5,452/= as the valuation fees. We have also agreed to have the matter heard on 27/9/2005 as I am leaving for studies in Sound (sic) Africa.

ORDER:

By consent, the plaintiff granted leave to amend his plaint as prayed. Hearing on 27/9/2005"

It has been held in the case of **Kasuit Wesonga Onguma and Another** Vs. **Ismael Otoicho Wanga**, Civil Appeal No.25 of 1986 that the purpose of entering a consent by parties is to inform the court that they have composed their difference or (I may add) part of their differences in a manner suitable to themselves without asking the court to make any further decision on the matters compromised. Can there be a consent without confirmation of its terms by the other side? It is such questions that prompted learned justices of Appeal in the **Kasuit Wesonga** case to observe that the terms of a consent order must be settled and agreed to by the parties to the action and there must be evidence of such settlement and agreement. The court introduced a practice of requiring parties or their counsel to sign or thump print the consent before the court. The practice has been adopted by courts as being prudent.

The learned magistrate did not exercise his discretion properly by failing to take into account a relevant fact, namely that the appellants had denied being a party to a consent which was presented to the court by only one side. From the alleged consent, flowed the rest of the matters complained of. An amendment in

the nature endorsed by the court (on special damages) when the same had been denied by the appellants could not have been made orally.

The date for hearing the main suit was also allegedly agreed on by consent. The hearing proceeded *exparte* on 27th September, 2005 on the basis of the alleged consent.

I am satisfied that the appellants had good and sufficient explanation for their failure to attend court. On the merit of the defence, and without going into the details, the defence raises issues such as unavoidable accident; that no notice to sue was given. It also denies any loss or damage to the respondents. These are matter that cannot be described as frivolous.

In conclusion, from the circumstances of this matter, the appellants do not appear to me to be parties who had sought to delay or obstruct the course of justice.

For those reasons, I allow this appeal with costs to the appellants.

Accordingly the lower court's order made on 3rd January, 2006 is set aside and the respondent's suit is hereby remitted for hearing by a magistrate with jurisdiction other than Mr. R. K. Kirui.

Those then are the orders of this court.

Dated, Signed and Delivered at Nakuru this 15th day of January, 2010.

W. OUKO
JUDGE