



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 671 of 2004**  
**JOSEPH MUSAU WALI.....APPELLANT**  
**VERSUS**  
**RAJESH H. MALDE.....RESPONDENT**

*(Being an appeal from the Ruling and Order of the Senior Resident Magistrate's Court at Nairobi of the Hon. Senior Resident Magistrate Mrs. Ongeri, made on the 17<sup>th</sup> August 2004 in RMCC No.3068 of 1997.)*

**J U D G M E N T**

1. This appeal arises from a suit which was filed by the appellant, Joseph Musau Wali in the Chief Magistrate's Court at Nairobi. The appellant had sued Rajesh Malde, who is now the respondent in this appeal. The appellant's claim was for special damages of Kshs.159,229/25 arising from damage caused to the appellant's motor vehicle in a road traffic accident, which the appellant maintained was caused by the negligence of the respondent.
2. The court record reveals that the respondent entered appearance and filed a defence through an advocate Ramesh Manek. By a chamber summons filed on 4<sup>th</sup> September, 1998, Ramesh Manek sought leave of the court to cease acting for the respondent on the grounds that the respondent had failed, refused or neglected to furnish the advocate with instructions or pay a deposit in respect of costs. The application was served on the respondent on 25<sup>th</sup> September, 1998 as per the affidavit of service which was filed in court on 23<sup>rd</sup> October, 1998. The application was heard and the advocate granted leave to cease acting for the respondent.
3. Thereafter the appellant's suit was fixed for hearing on 17<sup>th</sup> November, 1999. This was done by consent of both parties' advocate including Ramesh Manek who had earlier been granted leave to withdraw from acting for the respondent. On the 17<sup>th</sup> November, 1999, the respondent's advocate applied for adjournment on the grounds that they had not been able to serve the respondent with the order of the court granting leave to Ramesh Manek to cease acting for him. It was explained that efforts to trace the respondent were not successful as he had closed down his business. The court therefore adjourned the hearing. Thereafter the matter came up for hearing but again the respondent's advocate claimed they had no instructions. The court ordered the respondent's advocate to serve the respondent with the order for counsel to cease acting.
4. On 19<sup>th</sup> June, 2002 the appellant's counsel attended the registry and fixed a hearing date ex-parte, for 10<sup>th</sup> December 2002. The appellant served Ramesh Manek with a copy of the hearing notice. The appellant also served the respondent through registered post. An appropriate affidavit of service was duly filed in court on 4<sup>th</sup> December, 2002. On 10<sup>th</sup> December 2002, when the case came up for hearing there was no appearance for the appellant. Hearing therefore proceeded ex-parte and judgment was subsequently entered in favour of the appellant as against the respondent.

5. On 23<sup>rd</sup> July, 2004 the respondent filed a chamber summons through the firm of A.B. Patel and Patel Advocates seeking orders to have the judgment entered against him and all consequential orders set aside, on the grounds that although he had a good defence to the respondent's suit no proper notice of the hearing was served upon him, and therefore he was denied a chance to be heard on merit. The respondent swore an affidavit in which he denied having been served with a hearing notice.
6. The application was objected to by the appellant who maintained that it was incompetent having been filed by an advocate who was not properly on record. It was contended that the appellant's previous counsel, Ramesh Manek, not having complied with Order III Rule 12 of the Civil Procedure Rules, they were still the advocates properly on record for the appellant and were properly served with the hearing notice. It was contended that the firm of A.B. Patel and Patel advocates not having obtained leave to come on record as required under Order III Rule 9A of the Civil Procedure Rules, they were not properly on record.
7. In the ruling which is now subject of this appeal, the Senior Resident Magistrate found that the respondent's advocate ceased to act for him on 19<sup>th</sup> January, 1999 when the advocate was granted leave to cease acting. The trial magistrate found that this information was within the knowledge of the appellant and therefore the appellant had no justification for failing to serve the respondent personally with the hearing notice. The trial magistrate therefore found that service of the hearing notice was not properly done and set aside the ex-parte judgment entered against the respondent together with all consequential orders.
8. Being aggrieved by that judgment the appellant has filed this appeal raising 8 grounds as follows:
  - (i) That the learned trial magistrate erred in law and in fact in failing to find that the application dated 21<sup>st</sup> July, 2004 was incompetent as it had been filed by an advocate not properly on record for the respondent.
  - (ii) That the learned magistrate erred in law and in fact in failing to find that the respondent's advocates Ramesh Manek Advocate had not legally ceased acting for him as they had not fully complied with the provisions of Order III Rule 12 of the Civil Procedure Rules.
  - (iii) That the learned magistrate erred in law and in fact in failing to find that all through the conduct of this suit, the court had accepted the respondent's advocates to be Ramesh Manek Advocate, as the proper advocates on record for the respondent.
  - (iv) That the learned magistrate erred in law and in fact in failing to find that service of the hearing notice upon the respondent's advocates, Ramesh Manek Advocates, who were still the recognized agents of the respondent was proper and adequate service.
  - (v) That the learned trial magistrate erred in law and in fact in finding that the appellant's advocates submission that they served the hearing notice upon Ramesh Manek Advocate as the said advocates had not complied with the provisions of Order III Rule 12 was "simply an excuse for non-compliance with personal service."
  - (vi) That the learned trial magistrate erred in law and in fact in failing to find that the respondent's advocates, Ramesh Manek Advocates, were negligent in failing to fully comply with the provisions of Order III Rule 12 to enable them cease acting as the respondent's advocates and further negligent in failing to attend court on 10<sup>th</sup> December 2002 when the matter proceeded to hearing despite having been served and properly accepted service of the hearing notice.
  - (vii) That the learned magistrate erred in law and in fact in failing to find that the respondent's conduct was geared at delaying the hearing and finalization of the suit and the appellant should not be penalized for the same.
  - (viii) That the learned magistrate erred in law and in fact in granting the application to set aside the judgment and all consequential orders as the hearing notice had been properly served.
9. Pursuant to consent agreed to by the parties, written submissions were duly filed, on the basis of which this court is invited to determine the appeal. For the appellant it was argued that Order III Rule 12 provides that an

advocate shall be considered to be advocate of the party to the final conclusion of the case or appeal unless the advocate has: “served on every party to the cause or such parties that the court may direct; a copy of the order granting the advocate leave to cease acting, and, procure the order to be entered in the appropriate registry and left at the said court a certificate signed by him that the order has been duly served.”

10. Counsel for the appellant noted that although Ramesh Manek advocate was granted leave to cease acting, the advocate failed to comply with Order III Rule 12 with regard to service and therefore continued appearing for the respondent. It was submitted that the respondent’s said advocate was served with a hearing notice, copy of which was forwarded to the respondent by registered post. It was therefore maintained that service was properly effected on the respondent.
11. Counsel for the appellant further pointed out that the firm of A.B Patel and Patel advocates did not seek leave of the court to come on record. It was argued that that firm could not purport to appear for the respondent while there was still another advocate on record. It was submitted that the respondent used the non-compliance of his advocate to delay the hearing of the suit, as the respondent evaded service and ignored the communication sent to him by registered post. The court was therefore urged to allow the appeal as the appellant was deserving of the ex-parte judgment.
12. For the respondent it was submitted that the appellant’s advocate were estopped from denying that they were aware that Ramesh Manek advocate had ceased acting for the respondent from 19<sup>th</sup> January, 1999. It was submitted that Box No.86470 Mombasa belonged to the respondent’s business Ragjib Motors and not the respondent personally.
13. Counsel for the respondent maintained that personal service was the best form of service recognized in law, and that where service was improper or doubtful the court has no option but to set aside an ex-parte judgment. Counsel relied on the following authorities:
  - ***Dim Properties Ltd vs J.R. Egesa, Mombasa HCCC No.45 of 2003***
  - ***Kabutha vs Mucheru 2004 eKLR***
  - ***Al Maaly vs New Mombasa Dry Cleaners.***
14. It was submitted that the conduct of the appellant was tainted with lack of candour and bad faith. It was maintained that Ramesh Manek advocate had effectively ceased to act for the respondent in the subordinate court. It was maintained that any doubt regarding this question and non-compliance with Order III Rule 12 of the Civil Procedure Rules, was settled by the respondent’s personal attendance in court on 13<sup>th</sup> June, 2000. The court was urged to find that the appellant and his advocate acted *malafide*, firstly, in their action of continuing to wrongly effect service by registered post at an address they knew to be a business which had shut down. Secondly, in attempting to fallaciously rely on Order III Rule 12 and 9 when the facts show that the respondent was appearing in person. The court was therefore urged to dismiss the appeal.
15. In response to the submissions made by the respondent’s counsel, it was pointed out that the court itself declined to proceed with the hearing on 17<sup>th</sup> November, 1999 because Ramesh Manek advocate were still on record and had not complied with Order III Rule 12. It was submitted that although personal service is the best mode of service, it was not the only mode of service of court process. It was further argued that while personal service was necessary in the case of originating process, once appearance had been entered, service of documents and notices could be done through hand delivery or post. It was maintained that all the communication to the respondent were being made through the postal address and the respondent cannot therefore deny having received the mail.

16. Having carefully considered the record of the lower court, the memorandum of appeal and the submissions made, I find that it is not disputed that the firm of Ramesh Manek who were on record for the respondent, applied for and obtained leave to cease acting for the respondent. It is also not disputed that the firm of Ramesh Manek did not comply with the proviso Order III Rule 12(1) of the Civil Procedure Rules, with regard to service of a copy of the order for withdrawal by the respondent's counsel from appearing upon the respondent. The question that arises in this appeal is whether the withdrawal by the respondent's counsel from appearing for the respondent took effect and if so when. In order to answer this question, it is necessary to examine the proviso to Order III Rule 12(1) of the Civil Procedure Rules which states as follows:

***“Provided that, unless and until the advocate has –***

***(i) Served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and***

***(ii) Procured the order to be entered in the appropriate court; and***

***(iii) Left at the said court a certificate signed by him that the order has been duly served as aforesaid;***

***He shall (subject to this order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal.”***

17. In my considered opinion, the effect of the proviso is that although counsel may be granted leave by the court to withdraw from acting for a party, such withdrawal only becomes effective when the counsel has complied with the conditions set forth in the proviso. In this case, it is clear that the firm of Ramesh Manek did not comply with the proviso and therefore their withdrawal from the suit did not take effect. This explains why advocates from that firm continued to appear in court for the respondent even after the leave to withdraw was granted. The firm of Ramesh Manek having been properly served with the hearing notice, and that firm being the respondent's lawfully appointed agent, the hearing notice was indeed properly served upon the respondent. Indeed, as at the date of service of the hearing notice, the respondent had not given any other address for service and therefore service upon him could only be effected through the firm of Ramesh Manek who remained on record.

18. Moreover, it is evident that the appellant took the precaution of informing the respondent of the hearing date through the hearing notice served upon him by registered post. That was the address that the respondent had been using in correspondence with his advocate. The respondent cannot be heard to complain if there was a change of address which he never communicated. Moreover, the conduct of the respondent was such that he was not deserving of the exercise of the court's discretion.

19. As regards the appointment of the firm of A.B. Patel and Patel advocates, since that appointment was made, after judgment was entered against the respondent, the appellant had to comply with Order III Rule 9A of the Civil Procedure Rules, which is mandatory. The appearance of the firm of A.B. Patel and Patel without first obtaining leave of the court was therefore irregular and the chamber summons filed by that firm is for that reason incompetent.

20. I find that the trial magistrate failed to properly address crucial issues pertaining to the merits and the competence of the application which was before her and therefore erred in setting aside the judgment which was entered in favour of the appellant. Accordingly, I allow this appeal, set aside the order of the trial magistrate and reinstate the judgment in favour of the appellant. I award the appellant costs in the lower court and costs of this appeal. Those shall be the orders of this court.

**Dated and delivered this 18<sup>th</sup> day of March, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mwendar for the appellant

Oginde H/B for Kagram for the respondent

Eric - Court clerk