



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 332 of 2003

MOHAMMED SAID CHUTE.....APPELLANT

VERSUS

SORORO GUFU IBRAE.....RESPONDENT

J U D G M E N T

1. Sororo Gofu Ibrae (hereinafter referred to as the respondent) initiated these proceedings through a plaint which was filed in the SPM's Court at Nairobi on 2nd November, 1994. The respondent's action which was against Mohamed Said Chute (the appellant herein), was a claim for general and special damages for personal injuries suffered by the respondent whilst lawfully traveling in motor vehicle KZB 697 allegedly owned by the appellant.
2. On 21st July, 1995 interlocutory judgment in default of appearance was entered in favour of the respondent. Following formal proof, the Senior Resident Magistrate awarded the respondent general damages of Kshs.260,000/= and special damages of Kshs.1,100/=. By a chamber summons filed on 10th July, 2002 the appellant sought to have the judgment entered in favour of the respondent set aside unconditionally and leave granted to the appellant to file his defence. The application was supported by an affidavit sworn by the appellant in which he denied having been served with the summons to enter appearance as alleged by the process server. The appellant further maintained that he has a good defence to the respondent's claim which included the fact that no liability can accrue to him since he is not the registered owner of the motor vehicle subject of the alleged accident.
3. In response to this application counsel for the respondent filed a replying affidavit sworn on 8th July, 2002 in which he maintained that the appellant was properly served as deponed in the affidavit of service sworn by the process server.
4. On 22nd July, 2002 when the application came up for hearing counsel for the respondent sought an adjournment to enable him get the respondent who was said to be residing in Marsabit, to swear a replying affidavit, counsel also sought to have the appellant cross-examined. When counsel for the appellant observed that there was already a replying affidavit on record, counsel for the respondent indicated that the same was mistakenly sworn by counsel and they intended to withdraw it. The trial magistrate then granted leave for the replying affidavit which was on record to be withdrawn and another replying affidavit to be filed, and the matter was adjourned to 18th September, 2002.
5. Come 18th September, 2002 and counsel for the respondent again sought an adjournment on the ground that he had not been able to get his client. The trial magistrate rejected the application for adjournment and ordered the hearing to proceed at 9.40 a.m. The hearing of the application did proceed at 10.00 a.m. It is not however clear as to whether counsel for the respondent was present as there are no

submissions recorded from him.

6. In her ruling subject of this appeal the trial magistrate noted that the application was not opposed. She found that the appellant was properly served with summons to enter appearance and that the application to set aside the judgment was brought late. She however found that the appellant had put forward a defence which raises triable issues, and therefore set aside the judgment on condition that half the decretal sum is paid to the respondent's counsel within 7 days.

7. Being aggrieved by that order counsel for the appellant has filed a memorandum of appeal raising 5 grounds as follow:

(i) The learned magistrate erred in considering extraneous matter which had no relevance to the matters before her.

(ii) The learned magistrate did not exercise her discretion judicially, and misdirected herself as to the law applicable to Order 9A Rule 10.

(iii) The learned magistrate erred in appreciating that the appellant's application was opposed while no ground of opposition was filed nor replying affidavit by the respondent.

(iv) No documents or instruments were put forward during the hearing to the effect that the motor vehicle that caused the accident belonged to the appellant

(v) The magistrate committed an error of procedure in allowing the application and directing that the appellant do pay half decretal sums of money to the respondents, before the finalization of the suit.

8. In arguing of the appeal, counsel for the appellant abandoned ground 3. Counsel pointed out that the affidavit of service sworn by the process server which was the basis of the judgment against the appellant, did not identify the person who identified the appellant to the process server nor did he state the timing of the service. It was further contended that the trial magistrate relied on extraneous matters and failed to exercise her unfettered jurisdiction properly. It was maintained that the circumstances prior to and subsequent to the case were not considered. Counsel cited the case of **Remco Ltd vs Mistry Jadva parbat & Co. Ltd HCCC No.171 of 2001**. Counsel for the appellant submitted that the terms setting aside the judgment were not just and that the trial magistrate had no jurisdiction to order payment of the decretal sum, having found that there was a triable issue. Relying on the cases of

- **Philip Keipto Chemwolo & Mumias Sugar Co. Ltd vs Augustine Kubendo (1982 -88) 1 KAR 1036.**
- **Magunga General Stores vs Pepco Distributors Ltd**

Counsel submitted that the trial magistrate exercised her discretion perversely and urged the court to allow the appeal.

9. For the respondent it was submitted that the trial magistrate properly took into account all the circumstances of the case and properly exercised her discretion taking into account the interest of all the parties. It was submitted that the money paid was actually deposited in a joint interest earning account in the names of both parties advocate and the court should allow the money to remain in that account until the suit is heard and finalized.

10. I have carefully considered the arguments canvassed before me and the authorities cited. I have also considered the record of the lower court and the ruling under reference. I find that the issue before the trial magistrate was whether the *ex-parte* judgment entered against the appellant was regular or not. If the judgment was not regular (i.e. vitiated by improper service), then the trial magistrate had no option but to set aside the judgment and all consequent orders. If that judgment was regular then the trial magistrate had the discretion to set aside the judgment taking into account all the circumstances of the case. That is the purport of the decision of Ringera J (as he then was) in **HCCC No.171 of 2001 (Mimilani) Remmco**

Limited vs Mistry Jadva Parbat & 2 Others, which decision I entirely agree with.

11. In this case the trial magistrate found that service of summons was properly effected upon the appellant and that the judgment was regular. The trial magistrate did not however critically examine the affidavit of service but appears to have been unduly influenced by the fact that the appellant did not seek to have the process server cross-examined on his affidavit. I concur with the appellant that there is justification in that complaint regarding the approach taken by the trial magistrate. Nevertheless, having examined the affidavit sworn by the process server and filed on 17th July, 1995, I find that the process server did explain how he located the appellant and served him with the summons to enter appearance. The process server explained that the appellant identified himself to him at the time of service. Although the exact time of service is not indicated the affidavit of service is clear on the date, and that it was after the process server's visit to Crosslink International Ltd. I am satisfied that there was proper service of summons upon the appellant and that the *ex-parte* judgment entered upon him was regular.

12. In considering whether to set aside the *ex-parte* judgment the trial magistrate took into account the defence put forward by the appellant and noted that it raised a triable issue. The trial magistrate properly exercised her discretion in setting aside the *ex-parte* judgment to enable the appellant ventilate his defence. The question is whether there was justification for the condition imposed by the trial magistrate that half the decretal sum be paid to the respondent's counsel. In my considered view there was absolutely no justification given that the trial magistrate had found that the appellant had a good defence and had set aside the *ex-parte* judgment to enable the appellant ventilate that defence. The condition imposed negated the opportunity given to the appellant. I would therefore allow the appeal to the extent of setting aside this condition.

13. The upshot of the above is that the appeal is allowed only to the extent of setting aside the order requiring the appellant to deposit half the decretal amount into court. The amount if already paid should be refunded to the appellant. To that extent only does the appeal succeed. Each party shall bear his own costs in this appeal.

Orders accordingly.

Dated and delivered this 29th day of January, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Wairima for the appellant

Advocate for the respondent absent