REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 39 of 2005

PENINAH ATIENO ONYANGO ……...……..APPELLANT

VERSUS

CATHERINE ONYANGO …… RESPONDENT

JUDGEMENT

The appellant has raised the following five grounds of appeal in her Memorandum of Appeal;

" *1. The learned trial magistrate erred in law and fact in failing to hold that the appellant had a reasonable defence as she was not the owner of the motor vehicle which caused the accident as the issue of ownership of the said motor vehicle had been determined in Kisumu High Court Civil Suit No. 161 of 1995 contrary to the evidence on record.*

2. The learned trial magistrate erred in law in failing to set aside the ex parte judgement contrary to the evidence on record.

3. The learned trial magistrate erred in law and fact in failing to hold that the circumstances upon which exparte judgement was obtained warranted it to be set aside.

4. The learned trial magistrate did not exercise his discretion judiciously and properly.

5. The ruling was against the weight of evidence on record."

As a consequence of all those grounds, the learned trial magistrate is faulted for having struck out the appellant's application, which was for the setting aside of the judgement that had been entered against the appellant.

It was the submission of Mr. Odunga, learned advocate for the Appellant that the parties were not given any opportunity to address the trial court on the ground upon which the said court founded its decision. The issue is said to have been raised for the first time, in the ruling of the court.

The appellant invited this court to invoke the provisions of section 78 of the Civil Procedure Act, and to proceed to determine the issue on merit. The issue which the court has been invited to determine is whether or not the defence on record raises any triable issues, which ought to be allowed to proceed to a full trial.

In answer to the appeal, the respondent's advocate, Mr. J.J. Masiga, submitted that the ruling against

which the appeal has been lodged, does not exist. It is his position that there was no ruling dated 24th May 2005.

But even if there was a ruling dated 24th May 2005, the respondent submitted that the striking out of the application was based on two issues. First, the trial court is said to have held that the applicant's advocate was not properly on record.

Secondly, the trial court is said to have held that the applicant had been guilty of laches. In other words, the respondent is saying that the trial court cannot be faulted for the decision it made, as the said decision is based on the merit of the application.

In any event, it is the respondent's contention that the provisions of Order 3 rule 9A were couched in mandatory terms. Therefore, the learned trial magistrate is said to have correctly invoked the said provisions.

In reply to the respondent's submissions, the appellant pointed out that the decision she was challenging was definitely dated 24th May 2005. In her view, the ruling cannot have been dated 24th May, 2004, as by that date, the application in respect to which the ruling was made, had not yet been filed in court.

Finally, the appellant pointed out that the application was struck out; it was not dismissed, as alluded to by the respondent.

Having given due consideration to the appeal before me, I first note that at the tail-end of his ruling, the learned trial magistrate, Hon. Mr. J.R. Ndururi, RM, expressed himself thus;

"*Having said that, it follows that this application filed by Athunga & Co. Advocates is incompetent and must be struck out with costs to the Respondent. It is so ordered."*

The reasons given by the court, for holding that the application was incompetent were that as there was already a judgement on record, there could be no change of advocates without leave of the court, pursuant to Order 3 rule 9A of the Civil Procedure Rules.

From the aforegoing, there is no doubt at all that the learned trial court did not determine the application dated 21st February 2005 on its merits.

The said application was simply struck out because it was filed by a firm of advocates who had come on record after judgement had been entered, but who did not seek leave of the court to replace the advocates who had been on record prior to the entry of judgement.

Order 3 Rule 9A of the Civil Procedure Rules provides as follows;

"*When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record"*

As the decision by the learned trial magistrate was not founded upon the merits of the application to set aside the judgement, it does appear to me that the grounds of appeal do not address the decision itself.

In the ruling by the trial court, the only reference to delay, is in relation to the time taken by the appellant before she took any action to challenge the firm of Aboge and Co. Advocates, for purporting to act for her, yet she had not given them any instructions. In effect, the trial court made a finding that Messrs Aboge & Company Advocates were duly instructed for and on behalf of the appellant herein. That having been the position as at 1st September 2000, when the appellant swore an affidavit to support an application filed by her, with a view to setting aside the interlocutory judgement entered on 14th August 2000, the trial court held that the said advocates were acting for the appellant, at the time. The trial court

so held because Messrs Aboge & Co. Advocates came on record as advocates for the defendants, and then had the exparte judgement set aside.

Having had the benefit of the services rendered by Messrs Aboge & Co. Advocates, the appellant's subsequent attempts to dissociate herself from the same advocates, did not impress the learned trial magistrate. He therefore concluded that those advocates were properly on record, for and on behalf of the appellant herein. It is for that reason that he concluded that it was irregular for another firm of advocates to come on record for the appellant, whilst Aboge and Co. Advocates were still on record.

Having given due consideration to the appeal, I find and hold that the learned trial magistrate cannot be faulted for arriving at the conclusion he made.

And once he had concluded that the application was incompetent, he did not have reason to delve into the merits or otherwise of the application.

However, if I were wrong in that respect, I would not have hesitated to hold that the appellant appears to have an arguable defence to the claim against her. I so hold because the only basis of the said claim is the alleged ownership of the motor vehicle registration number KYZ 707, an Isuzu lorry.

The respondent asserted that that vehicle belonged to the appellant herein. But the appellant denies ownership. He then went further to assert that the vehicle belonged to one GEORGE OWUOR ONYANGO.

On the face of the ruling in Kisumu HCCC No. 161 of 1995, it would appear that the appellant was indeed not the owner of the vehicle registration number KYZ 707.

Had the application been competent, I would have allowed the appeal, set aside the order striking out the application dated 21st February 2005, and granted to the appellant, unconditional leave to defend the suit.

But, as the firm of Aboge & Co. Advocates were on record as advocates for the appellant at the time when the court granted judgement in favour of the respondent herein, I hold that the only proper manner for that firm of advocates to be replaced was if the court granted leave to enable another advocate come on record. As no such leave was sought or granted, the learned trial magistrate was right to have struck out the application.

I uphold the said ruling, and dismiss the appeal herein. The appellant will pay the costs of the appeal, to the respondent.

Dated, Signed and Delivered at Kakamega, this30th day of April, 2009.

FRED A. OCHIENG

JUDGE