



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 78 of 2004

NICHOLAS K MBEVA APPELLANT

VERSUS

KIOKO NTHAISU RESPONDENT

(Being an appeal from the Judgment of Honourable Miss D.W. Nyambu SRM dated 23rd August 2004 in Machakos Chief Magistrate CMCC No. 523 of 2002)

JUDGMENT

1. The background to this Appeal is this;

On 14/2/2003, S.S. Pareno Esq, SRM entered judgment in favour of the Plaintiff in **SRMCC No. 523/2002** (one Nicholas K Mbeva) in the sum of Kshs.84,560/= plus costs and interest being general damages for injuries suffered when the Defendant, one Kioko Thaisu, allegedly without reasonable cause assaulted him and caused physical injury to him. Of immediate interest is the fact that the suit was undefended and the learned magistrate noted as follows:-

“Despite prayer service (sic) with the suit papers, the defendant failed to enter appearance or file defence and interlocutory judgment was entered.”

2. When the Plaintiff tried to execute the decree, the Defendant filed an application under Order IXA Rules 10 and 11, Order XXI Rule 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders that the judgment be set aside and leave to file a Statement of Defence out of time be granted.

3. The learned magistrate, D.W. Nyambu, SRM in a Ruling delivered on 23/8/2004 found that although the **“summons to enter appearance were properly served”** she nonetheless allowed the application for reasons that:-

i. the draft statement of defence raised triable issues.

ii. that a sum of Kshs.37,000/= earlier paid to the Plaintiff as compensation for his injuries was not taken into account when computing the sum payable in damages.

4. The Plaintiff who is now the Appellant was dissatisfied with the Ruling for reasons set out in the Memorandum of Appeal which are;

i. **“The Resident Magistrate’s Court erred and misdirected itself on the principle of setting aside judgment under the provision of the Civil Procedure Rules.**

ii. **The Resident Magistrate Court erred and misdirected itself in failing to find that the Defendant had no defence raising any triable issues as they had already admitted liability.**

iii. **The Resident Magistrate’s Court erred and misdirected itself in holding that the Plaintiff had not given a credit of Kshs.37,000/= to the Defendant when the judgment was being delivered. In so doing, the Resident Magistrate Court misdirected itself on the said issue as the same was canvassed before the Court and the Court took a cognizance of the same before it delivered the said judgment.**

iv. **The Resident Magistrate erred and misdirected himself in holding that the notice of the entry of judgment was not served or there was no evidence to show that it was not served. In so doing, the Resident Magistrate erred and misdirected himself on service of notice of entry of judgment under Civil Procedure Rules.**

v. **The Resident Magistrate erred and misdirected itself in law in finding that the summons was served, yet gave the Defendant unconditional leave to file defence without giving any consideration to the costs that had been incurred by the Plaintiff since the matter began.**

vi. **The Resident Magistrate erred and misdirected himself in failing to note that notice of entry of judgment was filed and served on the same address that was given by the Defendant at the time they were writing a similar letter to the Plaintiff’s Advocates.**

vii. **The Resident Magistrate Court erred in law in finding the defendant had a reasonable defence without enclosing what defence that the Defendant had to the claim by the Plaintiff yet it admitted that the Defendant had acknowledged the suit and had paid a portion of Kshs.35,000/= towards the deretal sum.**

viii. **The Resident Magistrate erred and misdirected itself in ordering all parties to bear their own costs and failing to consider that the mistake in not filing a defence in good time was the Defendant’s and they ought to meet the Plaintiff’s costs.**

ix. **The Resident Magistrate’s Court erred and misdirected itself in failing to note that the interlocutory judgment was regular.**

x. **The Resident Magistrate’s Court failed to note that the judgment it set aside was not interlocutory.**

xi. **The Resident Magistrate’s Court erred and misdirected itself in failing to find that the purported agreement to pay Kshs.37,000/= to the Plaintiff was entered prior to filing the suit herein.**

xii. **The Resident Magistrate’s Court erred and misdirected itself in failing to note that by paying Kshs.35,000/= after summons had been served, the Defendant had admitted liability.**

xiii. **The Resident Magistrate’s Court erred and misdirected itself in failing to note that**

the Defendant was guilty of laches in filing the said application.

xiv. In the premises, the Resident Magistrate's Court erred and misdirected itself in the exercise of its discretion and the provisions of the Civil Procedure Rules in general and in particular the provisions that were setting aside a judgment."

5. He now seeks orders that the Appeal be allowed and the judgment that was set aside be reinstated.
6. I have taken into account the submissions made by the advocates for the parties and for my part the only issue to address is this; did the learned magistrate exercise her discretion to set aside the ex-parte judgment judiciously?
7. I have perused the Affidavit of Service sworn on 3/10/2002 by Amos Mwiva and it is clear that the Respondent was properly served with the Summons to Enter Appearance and he was thereafter to blame for the consequences of his inaction. I am therefore of the same mind as the learned magistrate on the issue of service. Was it then open to her, having found that service was proper, to allow the application to set aside the resultant judgment?
8. The cause celebre on the subject of setting aside ex-parte judgment is **Shah vs Mbogo (1967) E.A. 116** where it was held that a court has an unfettered discretion to set aside such a judgment. In **Express (K) Ltd vs Patel (2001) I EA 54 (CAK)**, the Court of Appeal stated that the explanation for delay to enter appearance must be given and the same must, I dare add, be reasonable. In this case, there is in fact no explanation whatsoever and the subordinate court and this court have both found that the Respondent was in effect lying when he deponed as follows in his Affidavit sworn on 24/6/2004;
"That I was not served with summons to enter appearance, copy of the Plaintiff and Verifying Affidavit."
9. If that be so, how can any court then exercise discretion in his favour? The learned magistrate did so and I find that she was misdirected.
10. What of the alleged triable issues in the draft Statement of Defence? I have perused the record of the lower court and annexure "KN6" to the Affidavit sworn on 24/6/2004 is that document. In it, the assault is admitted save that the alleged claim was fully settled. Once the claim was admitted, other issues raised in the Statement of Defence cannot be said to be triable issues because there cannot be anything to be tried in any event. In view of the alleged payment of some money in compensation to the Appellant, what weight should be attributed to that issue? I have perused the notes taken during clan meetings to discuss the issue. They are all marked annexure "KNI". Sadly, for me, the documents are not conclusive of the issue whether in fact Kshs.37,000/= was paid to the Appellant. The last of those documents is a letter from one D Kivuva Isaac to Mrs Mbeva asking her to come and collect "**what is due to**" her. No evidence is given that it was ever collected and so sadly, whether in fact payment was made was neither properly shown to the learned magistrate nor to this court and the matter should not have influenced the outcome of the application to set aside the ex-parte judgment.
11. In the end, a party who receives summons to enter appearance, fails to act, waits for a judgment to be executed, runs to court, lies about service and admits the claim is not deserving of any discretion.
12. The Appeal is allowed, the learned magistrate's order is set aside and the original judgment is reinstated.
13. The Respondent shall pay the costs of this Appeal.
14. Orders accordingly.

Dated and delivered at Machakos this **28th** day of **April** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Kimeu h/b for Mr Kilonzo for Appellant**

Mr J.N. Kimeu for Respondent

ISAAC LENAOLA

JUDGE