



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL APPEAL 411 OF 2003

GREEN KURIA NJOROGE.....APPELLANT

VERSUS

FRANCIS KANGETHE THUO.....RESPONDENT

J U D G M E N T

1. Green Kuria Njoroje, (hereinafter referred to as the appellant), is dissatisfied with the ruling delivered by a Senior Resident Magistrate on 26th June, 2003, in which the trial magistrate dismissed the appellant's application to set aside the judgment, which was entered against him on the 6th March, 2003.
2. From the court record, the circumstances in which the judgment was entered against the appellant was as follows:

The respondent, Francis Kangethe Thuo, filed an action against the appellant seeking damages for personal injuries suffered by him as a result of the negligence and or breach of statutory duty on the part of the appellant and or his servants or agents. The appellant filed a defence in which he denied the respondent's claim. In the alternative the appellant maintained that if there was an accident, then the same was caused or substantially contributed to by the respondent's negligence.
3. Hearing of the suit commenced before the Senior Resident Magistrate on 30th January, 2001. Three witnesses testified in proof of the respondent's case. These were, Dr. Ann Marie Kabasomi Ochieng, Joseph Kibe Thuo and the respondent. Thereafter the advocate for the respondent applied for adjournment to call police officers from Kenyatta and Kikuyu to produce documents.
4. The case came up for hearing on several occasions but could not take off. On 29th May, 2002, the respondent's advocate applied for adjournment stating that his witnesses although served were not in court. The court allowed the application for adjournment. On the 8th January, 2003, a hearing date was fixed *ex-parte* by a clerk in the respondent's advocate's firm for 18th February, 2003.
5. On that date, i.e. 18th February, 2003, the respondent's counsel was present in court, but the appellant's counsel was absent. The respondent's counsel then informed the court that his witnesses though summoned were not in court. The respondent's advocate therefore asked the court to exercise its

discretion to allow the documents under Section 35 of the Evidence Act. The court accepted the documents and marked them as exhibits.

6. At that stage the respondent's counsel closed his case, whereupon the court noted that "*as the defendants are absent having been duly informed, the defence case is closed. Submissions on 28th February, 2003.*" On the next date, i.e. 28th February, 2003, the respondent's submissions were ready and the court fixed judgment for 6th March, 2003. Judgment was actually delivered in favour of the respondent on 7th March, 2003.

7. By an application dated 1st April, 2003, the appellant sought to have a stay of execution of the judgment and also the setting aside of the *ex-parte* orders made on 18th February, 2003 and the judgment delivered on 6th March, 2003. The appellant also sought an opportunity to defend himself. The appellant contended that the hearing notice was not served in time. He maintained that the respondent failed to call material witnesses and produced documents irregularly. The appellant further contended that he had a good defence to the respondent's suit.

8. That application was opposed by the respondent. On the 26th June, 2003, the trial magistrate delivered a ruling in which she found that the appellant was served with the hearing notice in good time and that the appellant's counsel ought to have at least attended court to apply for adjournment. She found that the appellant's counsel was negligent in not coming to court. She ruled that the appellant having had the opportunity to canvass his defence but failed to do so, there was no good reason for setting aside the judgment. That was the ruling which precipitated this appeal.

8. The appellant has filed a memorandum of appeal raising 13 grounds as follows:

- (i) The trial magistrate erred in law and in fact in finding the application to set aside her *ex-parte* hearing and judgment entered on 6th march, 2003 had no merit.
- (ii) The trial magistrate erred in law and in fact in failing to find that the appellant's application had good merits in law and in fact.
- (iii) The trial magistrate erred in law and in fact in failing to find that the respondent's counsel did not adequately challenge the application as regards inadequate service of the hearing notice.
- (iv) The trial magistrate erred in law and in fact in failing to find the hearing notice was not served in sufficient time for the appellant and his counsel to attend the hearing as required under Order IXB Rule 3(1) of the Civil Procedure Rules.
- (v) The trial magistrate erred in law and in fact in failing to appreciate the defendant and his counsel had sufficient cause to be unable to attend which was made known to the plaintiff and to the court.
- (vi) The trial magistrate erred in law and in fact in failing to appreciate that the court clerk made written misrepresentations to the appellant's counsel representative when the matter was yet to be heard.
- (vii) The trial magistrate erred in law and in fact in allowing the respondent's counsel application during the *ex-parte* trial to produce crucial objected to documents under Section 35 of the Evidence Act without valid excuse and in the absence of service of notice to produce as required under Section 68 of the Evidence Act.
- (viii) The trial magistrate erred in law in failing to exercise equity by appreciating the respondent's acted in bad faith after seeking several adjournments when appellant had been attending court regularly without fail.
- (ix) The trial magistrate erred in law and in fact in failing to consider the appellant had a good and sustainable defence and rights to a fair hearing and the trial.

(x) The trial magistrate erred in law and in fact in finding liability at 100% for the respondent when the facts did not prove the same.

(xi) The trial magistrate erred in law and in fact in rejecting the appellant's application for setting aside the ex-parte judgment and his prayer for the hearing to resume per last hearing made on 30th January, 2001.

(xii) The trial magistrate erred in law and in fact in ignoring all the credible issues raised in the appellant's application.

(xiii) The trial magistrate erred in law and in fact in dismissing the appellant's application when the same had merits in law and in fact.

9. In support of the appeal, Mr. Njuguna submitted that the court exercised its discretion contrary to law as it did not consider the primary objective which was to do justice. Counsel contended that the hearing notice having been served on the appellant's Counsel only 3 days to the hearing, the court ought to have allowed the application for adjournment. It was further contended that the court erred in admitting documents whose makers were not called to produce them. Counsel for the appellant cited **Civil Appeal No.329 of 2001 CMC Holdings Ltd vs James Mumo Nzioki**. Counsel further submitted that if there was any negligence on the part of the appellant's counsel the same should not have been visited on the appellant. In this regard, Counsel relied on **Maina vs Muriuki, Civil Case No.1079 of 1980**.

10. For the respondent, it was submitted that the appellant having been served with the hearing notice and having failed to attend court, the court was right with proceeding with the hearing. It was further maintained that there was negligence on the part of the appellant's Counsel. Counsel for the respondent maintained that Section 35 of the Evidence Act gives the court the discretion to allow documents to be produced without calling the maker. He therefore urged the court to dismiss the appeal.

11. I have carefully considered the proceedings and the submissions made before me. It is apparent that prior to 28th February, 2003, the suit had come up before the trial magistrate on several occasions during which time counsel for the appellant was always present. It is also evident from the record that the hearing of the suit was adjourned on 30th January, 2001 and 29th May, 2002, at the request of the respondent's advocate because he did not have his witnesses.

12. Indeed, even on the 18th February, 2003, when the matter proceeded *ex-parte*, counsel for the respondent did not have the witnesses hence his application to have the documents produced under Section 35 of the Evidence Act. Having accommodated the respondent on several occasions, the trial magistrate ought to have balanced the scale of justice by giving the appellant equal treatment in accommodating the appellant's counsel when he did not attend court.

13. Moreover, it is evident from the affidavit of service which was filed in court on 18th February, 2003, that the appellant's counsel was only served with the hearing notice on 13th February, 2003. Given that the hearing dated was taken ex-parte on 8th October, 2002, it was not fair for counsel for the respondent to serve the hearing notice just a few days to the hearing. Further, the court unfairly allowed the respondent to take advantage of the appellant's absence by improperly producing documents which the appellant had objected to.

14. I find that the trial magistrate exercised her discretion wrongly as she did not take all these relevant factors into account. In the circumstances, this court must interfere with the exercise of the trial magistrate's discretion. Accordingly, I set aside the order of the trial magistrate dismissing the appellant's application dated 1st April, 2003 and substitute it thereof with an order allowing the application. Costs of this appeal shall be costs in the lower court.

Dated and delivered this 20th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Njuguna for the appellant

Ms Ngare H/B for Khamati for the respondent