REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Appeal 12 of 2005

CENTRE SHOP …….....……. APPELLANT

VERSUS

PHARIS NKARI GITARI …….. 1ST RESPONDENT

ROSEMARY GACERI ……...2ND RESPONDENT

(Being an appeal from the ruling and order of the Hon. Mr. A.N. Kimani P.M. in Chuka Principal Magistrate's Civil Suit No. 8 of 2003 delivered on 8/3/2005)

JUDGMENT

The respondents (plaintiffs) in the lower court filed a plaint on 4th April 2003 where they named, "*The Diocese of Marsabit*" as the defendants. On 30th June 2003, they amended that plaint by adding 2nd defendant namely "*Selasio Kaburu"*. That plaint was entitled, "*Further amended plaint"*. By that amendment, the respondent struck the name of the Diocese of Marsabit. It should be noted that the said defendants, that is, the Diocese of Marsabit had filed their defence prior to that amendment which removed them from that action. Their defence was filed on 30th April 2003. In that defence, they denied ownership of motor vehicle registration number KVP 573 which caused the accident the subject of the court action in the lower court. That aside, by yet another amended plaint filed on 24th October 2003 which was entitled, "*Further amended plaint"* the respondents again amended plaint. By this further amendments, the respondents restored the name of Selesio Kaburu as the 1st defendant. The 2nd defendant was "*Center Shop"* which by that amendment was made the 2nd defendant. The Center Shop is the appellant in this case. All the amendments made by the respondents were made without the leave of the court. The respondents just filed the amended plaints and summons were then issued by the court. The appellant made an application dated 7th February 2005 seeking to set aside an *ex parte* judgment entered against it in default of memorandum of appearance. The *ex parte* judgment was entered on 7th June 2004. In the application to set aside that *ex parte* judgment, the appellants argued that the summons and plaint had not been served on them. It was stated in that application that the appellant was a firm and that it came to know of the suit when it received a letter from the respondents dated 13th January 2005 by which a demand of Kshs. 490,032/= was made. The appellant annexed a certificate of registration of the Center Shop which showed that it was a firm whose business was carried out by Silas Murithi and Tsillah Karegi Murithi as partners. The application was opposed. The respondents in opposition stated that the appellant had been served with the summons and plaint and that the *ex parte* judgment that was entered

against them was regular. The court rejected the application and the said dismissal is the subject of the present appeal. The appellant filed the following grounds of appeal:-

1. ***That the learned trial magistrate erred in law and fact in failing to set aside the ex parte judgment entered against the appellant inspite of overwhelming evidence that the summons to enter appearance and the amended plaint were not served upon the appellant.***

2. ***The learned trial magistrate erred in law and fact in failing to exercise his unfettered discretion by giving the appellant leave to defend the suit inspite of the numerous triable issues shown by the appellant.***

3. ***The learned trial magistrate erred in law and fact and in that he injudiciously disregarded the judicial authorities tendered by the appellant when applying to set aside the ex parte judgment.***

4. ***The learned trial magistrate erred in law by finding that the appellant did not show and disclose a valid defence inspite of the overwhelming evidence by the appellant.***

5. ***The learned trial magistrate erred in law and fact in that he decided the application to set aside the ex parte judgment on extraneous matters.***

The lower court under Order IXA Rule 10 of the Civil Procedure Rules was empowered to set aside or vary *ex parte* judgment upon such terms as were just. That Rule is in the following terms:-

"***10. Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."***

In the lower court, dismissing the appellant application it was exercising its discretion under that Rule. This court can only interfere with that exercise of discretion where the lower court misdirected itself leading to a wrong decision or manifest wrong decision leading to injustice. See the case of **Patel Vrs. E.A. Cargo Handling Services Ltd** [1974] E.A. 75 and case of **Waweru Vrs. Ndiga** [1983] KLR 236. The principles relating to the exercise of that discretion have received various judicial interpretations. The discretion is intended to avoid injustice or hardship resulting from accidents, in advertenceness, or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. See the case of **Patel Vrs. E. A Cargo Handling Services Ltd** (supra) In exercising the discretion under that Rule, the court should consider, amongst other things, the fact and circumstances both prior and subsequent and all the respective merit of the parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by the setting aside of the judgment should be considered and it should always be remembered that to deny a person a hearing should be the last resort of the court. See the case of **Shah vrs. Mbogo** [1967] EA 116 and **Pithon Waweru Maina Vrs. Thuku Mugiria** [1982-88] 1. KAR 177. In the case where the *ex parte* judgment is found to be regular judgment and it is found to be devoid of any irregularity the court has discretion to set aside such a judgment if the applicant discloses a reasonable defence. Indeed that was the finding in the case **Kingsway Tyres Automart Ltd Vs Rafiki Enterprises Ltd** [1985-98] 1EA 143. The court in that case made the following finding:-

"***There are ample authorities to the effect that, not withstanding the regularity of it a court may set aside an exparte judgment if a defendant shows he has reasonable defence on the merits. The respondent did not annex to its application in the lower court a draft defence. A director of the company did, however, swear an affidavit to state that the appellant claim was based on certain LPOs which had been stolen from it (the respondent) by its employees. Too that the employees had been arraigned in court on criminal charges relating thereto. In view of that, it did not think the claim, properly, lay against it. It was desirable, we think, for the respondent to annex to its application a draft defence to include all that and any other defences it may have had to the appellant's claim."***

Similarly, the Court of Appeal in the case of **Ceneast Air Lines Ltd Vrs. Kenya Shell Ltd** [2000] 2EA 362. It was held:-

"***The court had a wide discretion to set aside a judgment on terms that were just but it would not usually set aside a regular judgment unless it was satisfied that there was a prima facie defence which should go to trial for adjudication."***

In the case where ex parte judgment is irregular, the court should set aside such a judgment. What is the position here? On the affidavit of service, which I find were two, but the contents which are the same are as follows:-

"***That on 25th October 2003 I proceeded to the 2nd defendant's offices located in its premises within Meru town and popularly trading under the name and style of Center Shop and running a wholesale with copies of further amended plaint dated 24th October 2003 and summons to enter appearance for service upon the said 2nd defendant.***

That I introduced myself and the purpose of my visit to a lady receptionist who in turn told me that she had instructions to accept service.

That at around 10.15am on the date herein above, I tendered copies of the plaint and summons to enter appearance upon the said receptionist who accepted service but declined to sign on my copy return duly service."

The fact that there are two affidavits of service relating to the same service which were commissioned by different commissioners of oaths and bore different dates is not material as far as this appeal is concerned. What is material is the disclosed manner of service. In my view, that service was not proper because it failed to comply with Order XXIX Rule 3(1) (a) and (b) of the Civil Procedure Rules which provides as follows:-

"***3. (1) Where persons are sued as partners in the name of their firm, the service of the summons shall be effected either-***

(a) upon any one or more of the partners; or

(b) at the principal place at which the partnership business is carried on within Kenya upon any person having at the time of service, the control or management of the partnership business there"

The server of the summons and plaint failed to serve either of the partners of the firm. He also failed to state that he had served those documents at the firm's principal place of business. According to the certificate of the registration of business name of the appellant attached to the appellant's application to set aside *ex parte* judgment, the principal place of business is seen as plot Number 2/42 Harambee Street, Meru. Failure for the process server to specify the place of service in my view, rendered the service to be ineffective. Service could very well have been on another business bearing the same name as the appellant. On that basis alone, I find that the appellant was not served and the entry of *ex parte* judgment against it was in error. The other ground upon which I find that the *ex parte* judgment should have been set aside is that the respondent failed to obtain the leave of the court when amending the plaint herein. This is because the pleadings had closed by the time the respondent begun to amend the plaint. The only defendant in the original plaint was the Diocese of Marsabit. That defendant filed a defence on 30th April 2003. The first amendment to the plaint was on 30th June 2003. That was two months after the defence had been filed by the said defendant. Order VIA Rule 1(1) provides:-

"***A party may without the leave of the court, amend any pleading of his <u>once</u> at any time before the pleadings are closed."*** (Underlining mine)

The respondent amended the plaint contrary to that Rule since as it can be seen, amendments were more than once. Under Order VIII Rule 17(1) and (2) pleadings closed 7 days after the diocese of Marsabit filed its defence, that is 7th May 2003. That Rule provides:-

"(1) A plaintiff shall be entitled to file a reply within 7 days after the defence or the last of the defences has been delivered to him, unless the time is extended.

(2) No pleading subsequent to the reply shall be pleaded without leave of the court, and then shall be pleaded only upon such terms as the court thinks fit." (Underlining mine)

The respondent filed its first amended plaint on 30th June 2003. That was without the leave of the court. By that amendment, the respondent without notice to the Diocese removed its name. the respondent again filed another amended plaint in September 2003. This too was without the leave of the court and on this occasion brought into the proceedings the appellant and removed the name of Selasio Kaburu as a defendant. Again without leave of the court, the respondent on 24th October 2003 filed an amended plaint bringing back Selasio Kaburu as the first defendant. All those amendments undertaken by the respondent were not backed by the Civil Procedure Rules and in my view were unlawful. In addition to those irregularities, I note that the respondent failed to abide by Order VIA Rule 7(1) (2) and (3). That rule provides:-

"7. (1) Every pleading and other document amended under this Order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made.

(2) All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.

(3) Colours other than red shall be used for further amendments to the same document."

(Underlining mine).

In all the amended plaints, the plaintiff did not state the number of the Civil Procedure Rule that allowed him to make the amendments. Further as can be seen from Rule 7(3) the respondent should have used different colours in the subsequent amendment of the plaint. This the respondent did not do. In all amendments, he used red colour. It is however clear that the appellant was made a party in the lower court's action without leave of the court being granted. That being so, the interlocutory ex parte judgment of 7th June 2004 was irregular and should have been set aside *ex debito justitiae* and without condition. The said judgment will be set aside because in my view the judgment entered against the appellant was irregular. The learned magistrates in rejecting appellant's application misdirected himself. The appellant in my view by the affidavit in support of the application to set aside the *ex parte* judgment disclosed the defence to the claim. The defence disclosed in that affidavit was that the vehicle that caused the accident did not belong to the appellant. That disclosed defence should not have been ignored by the learned magistrate. I need to refer here to the submissions of the respondent which I found to be strange. The respondents stated that the appellant admitted service of the summons but wanted to "hide under the provisions of the law". We are all, like it or not, governed by the rule of law. The appellant in relying on that rule of law cannot be faulted in my view. On the whole when I consider this appeal I find that the appellant's appeal must succeed on all grounds of the memorandum of appeal. Accordingly, the judgment of this court is as follows:-

1. I allow the appellant's appeal and to that end the dismissed chamber summons dated 7th February 2005 made in SRMCC Chuka Number 8 of 2003 on 8th March 2005 is hereby set aside and is substituted with an order allowing the prayers in that chamber summons that is that the judgment of RMCC 8 of 2003 Chuka of 7th June 2004 be and is hereby set aside. The appellant is granted costs of the chamber summons dated 7th February 2005.

2. The amended plaints filed in RMCC 8 of 2003 Chuka amended on 24th June 2003 on the 1st September 2003 and on the 24th October 2003 are hereby struck out for having been filed without the leave of the court. In the end the appellant is therefore not a party in the lower court's action henceforth those plaints having been struck out.

3. The costs of this appeal are awarded to the appellant.

Dated and delivered at Meru this 6th November 2009.

MARY KASANGO

JUDGE