REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 16 of 2003

BENJAMIN DEON MUSAU ..……..……..……. APPELLANT

VERSUS

MAGDLALINE WANJIKU THUMBI *(Suing as the mother & administratix of estate of*

JANE WATURI KAMAU …….…….…. RESPONDENT

(Being an appeal from the ruling of the Senior Resident Magistrate at Machakos (Honourable S.M. Kibunja) dated 27/01/2003 in Civil Case Number 455 of 2000.)

JUDGMENT OF THE COURT

1. The appellant herein, Benjamin Deon Musau was the defendant in Machakos CMCC No. 455 of 2000 in which he was sued in respect of a road traffic accident which occurred on or about 29/08/1997 involving PASCALINE JANE WATURI KAMAU (deceased) and the appellant's motor vehicle registration number KWB 284. The accident allegedly occurred at Kiima Kiu along the Nairobi-Mombasa road. The plaintiffs (respondents herein) alleged that the deceased died as a result of negligence on the part of the appellant's authorized driver, servant and/or agent in driving, managing and/or controlling of motor vehicle registration number KWB 284 by permitting the said motor vehicle to collide with the deceased's motor vehicle registration number KAD 616 U. The plaintiff in that suit prayed for judgment against the defendant (appellant) for:

A. Special damages – Kshs. 45,270/=.

B. General damages under the Fatal Accidents Act (Cap 32) and the Law Reform (Misc. Provisions) Act (Cap 26)Laws of Kenya.

C. Costs and interest.

2. The appellant having failed to enter appearance and file defence, interlocutory judgment against him was entered on 19/06/2000 and the matter then proceeded to formal proof. Consequent upon the said interlocutory judgment being entered, the appellant through his advocates M/S Mutua Mboya & Nzissi & Co. filed a Chamber Summons application on 20/11/2001 seeking orders:-

A. that the interlocutory judgment entered on 19th June 2000 and all consequential orders made thereafter be set aside;

B. that the defendant herein be given leave to file his defence;

C. the costs of this application be provided for.

3. The grounds in support of the application were among others, that the appellant was not served with summons to Enter Appearance and that he only became aware of the suit after he received notice to commence execution. The other ground was that the appellant had a good defence with a strong probability of success. Finally it was stated that since the plaintiff's notice to commence execution had been served, there was a genuine likelihood that the plaintiff was prepared to proceed with execution which if allowed to go on, would cause the appellant substantial loss. The appellant's application was brought under Orders 21 Rule 22 (1) and 9B Rule 8 of the Civil Procedure Rules (CPR) and section 3A of the Civil Procedure Act.

4. The appellant swore a Supporting Affidavit in which he reiterated the grounds in support of the application and also said that he had long sold the bus that caused the alleged accident and therefore that he had been wrongly sued.

5. From the record that application was subsequently withdrawn and substituted with the application dated 10/05/2002 also brought under Orders 21 Rule 22 (1) and 9A Rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. This fresh application included a prayer for stay of execution of the decree/order and also sought leave of the court to file a defence and to deem the draft defence annexed to the application as duly filed and served. The same grounds and reasons were given in support of the application.

6. The application was heard on 25/11/2002 with the appellant contending that he was not served with Summons to Enter Appearance and further that the motor vehicle in question was not registered in the name of the appellant. Counsel for the appellant cited the following authorities in support of the application:-

i. Patel vs E.A Cargo Handling Services (1974) EA 75.

ii. Njagi Kanyunguti & Others vs David Njeru Njogu - Court of Appeal – Civil Appeal No. 181 of 1994.

iii. Tree Shade Motors Ltd vs D.T. Dobie & Co. Ltd Court of Appeal – Civil Appeal No. 38 of 1998.

7. That application by the appellant was opposed on the ground that there had been an inordinate delay in bringing the application and that the application was intended to deny the plaintiff the fruits of her judgment. It was also contended that contrary to the appellant's contention, he had been duly served with Summons to Enter Appearance and that having failed to do so, the application should not be allowed. It was also contended that the appellant having failed to offer security, it meant that he had brought the application in bad faith.

8. In reply Mr Kyalo for the appellant submitted that there was no delay by the appellant. He urged the court to exercise its unlimited discretion under section 3A of the Civil Procedure Act and to do justice to both parties.

9. The learned trial magistrate, Mr S.M. Kibunja in his ruling of 27/11/2003 found that there was no merit in the applicant's application dated 10/05/2002. He stated that though the appellant alleged to have sold the subject motor vehicle to a third party, there was no evidence of the transfer form showing that the alleged transfer had been effected. The learned trial magistrate also found that there was inordinate delay in bringing the application and that the application was not brought in good faith.

10. It is from that ruling that this appeal arises. The Memorandum of Appeal, filed in court on 6/02/2003 has 8 grounds of appeal as follows:-

A. The Learned magistrate erred and misdirected himself in law in failing to appreciate that, once

service of summons was disputed the ex parte judgment was prima facie irregular and an investigation by the court became necessary to establish whether the said allegation had a basis or not.

B. The learned magistrate erred and misdirected himself in law by failing to appreciate that where service of a summons is disputed the exercise of court's discretion is guided by the provisions of O.V. R.16, Civil Procedure Rules which requires the court either to examine the process server or make such further inquiry as necessary which court failed to do.

C. The Learned magistrate erred and misdirected himself in law in failing to appreciate that the exercise of his discretion must be on the basis of sound judicial principles and not on a whimsical basis.

D. The Learned Magistrate erred and misdirected himself in law by failing to appreciate that he could only consider whether there was merit in the draft defence once a finding had been made after the necessary investigation as to whether the ex parte judgment on record was regular or not.

E. The Learned Magistrate erred and misdirected himself in fact by failing to appreciate that the motor vehicle registration No. KWB 284 having been involved in a Road Traffic Accident prior to the registration of the transfer in favour of Philip Matheka Ndunda, the latter would not be eager to execute an affidavit to show his ownership thereof.

F. The Learned Magistrate erred and misdirected himself in law by failing to infer from the fact that the alleged purchaser, Philip Matheka Ndunda had insured the subject motor vehicle at the time of the accident in question that possession and the ownership thereof had changed.

G. The Learned Magistrate erred and misdirected himself by finding that the application of 10th May 2002 was brought in bad faith thereby failing to appreciate that the continued registration of applicant as the owner of motor vehicle registration No. KWB 284 was a deliberate act on the part of Philip Matheka Ndunda to deflect liability from himself as the lawful owner thereof.

H. The Learned Magistrate erred and misdirected himself in law by failing to find that the draft defence annexed to the said application of 10th May 2002 prima facie raises triable issues of law and fact which should go to trial for adjudication.

11. At the hearing of the appeal, Miss Kamande compressed the 8 grounds of appeal into 4 major grounds as follows:-

A. Grounds 1 and 2 together.

B. Ground 3 alone.

C. Grounds 4 and 8 together.

D. Grounds 5, 6 and 7 together.

12. On ground I Miss Kamande contended that since the Summons to Enter Appearance was not served upon the appellant, the consequent exparte judgment was irregular and that the appellant should be given a chance to be heard on his case on its merits. She also contended that the learned trial magistrate failed to appreciate that in order to resolve the issue as to whether service of summons was effected or not. The trial court should have had the process server cross examined on the same under Order 5 Rule 16 of the C.P.R which provides as follows:-

"**16. On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit and shall either declare that the summons has been duly served or order such service as it thinks fit."**

13. In this case the trial court make a finding that summons were served on the basis of the Affidavit of Service sworn by one Boniface M Mutinda on 12/06/2000 showing that the appellant was served with summons on 3/05/2000, but I was not able to see a copy of the said Affidavit of Service either in the Record of Appeal or on the file. No reasons were given by the trial court as to why he did not have the process server examined either by himself or by another court.

14. In the second ground Miss Kamande argued that the learned trial magistrate did not give any reasons for refusing to exercise his discretion in favour of the appellant, and that failure by the trial magistrate to assign reasons for his refusal was an affront to the provisions of Order 20 Rule 4 of the Civil Procedure Rules which provides:-

"**(4) Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."**

15. In the ruling which is the subject matter of this appeal, the learned trial magistrate went straight to a finding and then his conclusion. The only reason the learned trial magistrate seems to have given was that he was satisfied that the appellant had been served, though he did not give a basis for such belief or satisfaction. Miss Kamande contended on behalf of the appellant that it was wrong for the learned trial magistrate to conclude that the subject motor vehicle had not been transferred to a Third Party without hearing substantive evidence from all the parties to the dispute.

16. Miss Kamande also contended that the learned trial magistrate fell into grave error when he failed to consider whether or not the draft defence raised any triable issues, particularly in view of the fact that ownership of the subject motor vehicle was in dispute. It was also contended that the learned trial magistrate ought to have found that the third party, Philip Ndunda to whom the appellant said he had sold the subject motor vehicle would not have been eager to swear an affidavit confirming that he was the owner of motor vehicle when saying so would have meant taking on the responsibility for the accident.

17. Miss Kamande also contended that it was draconian to condemn the appellant unheard. She relied on the following authorities:-

A. Patel vs EA Cargo Handling Services Ltd (1974) EA 75 in which the court held that an application to set aside should ordinarily be allowed where the draft defence raises a triable issue. Miss Kamande argued that the appellant's draft defence raised a triable issue namely whether the appellant was still the owner of the subject motor vehicle as at the time of the accident.

B. Waweru vs Ndiga (1983) KLR 237 in which the court held, inter alia,

a. Order IXA rule 10 of the Civil Procedure Rules empowers the courts to set aside or vary ex parte judgment upon such terms as are just and there is no requirement of showing sufficient cause.

b. In applications under Order IXA rule 10 of the Civil Procedure Rules,

i. The court has an unfettered discretion to do justice between the parties;

ii. it may be just on the facts of the particular case to avoid hardship or injustice arising from inadvertence or mistake even though negligent; but the discretion should not be exercised to assist anyone to delay the course of justice;

c. an application to set aside an exparte judgment by a defendant may be allowed if the court is satisfied that the summons to enter appearance were not duly served or that he was prevented by any sufficient cause from appearing when the suit was called for hearing.

C. Njagi Kanyunguti alias Karingi Kanyunguti & 4 others vs David Njeru Njogu – Court of Appeal C.A. No. 181 of 1994 in which it was held, interalia, on the basis of Shah vs Mbogo & Another (1967) EA 116, that:-

"**It is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or errors, and will not assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice."**

18. It was also observed in the same case that courts are entitled to look at both sides of the highway before making a decision. Miss Kamande argued that unless this court takes time to look on both sides of the highway, the appellant is bound to suffer hardship.

19. Mr Musyoka Mbithi for the respondent did not agree with Miss Kamande. He contended that the appellant is the author of his own misfortune for failing to call the process server for cross-examination. Mr Musyoka also submitted that the learned trial magistrate considered all the evidence that was placed before him including the Affidavit of Boniface M Mutinda, the transfer documents and that all in all, it was clear that the appellant was the owner of the subject motor vehicle and that he had to bear the burden of the judgment that was lawfully obtained by the respondents. Mr Musyoka also contended that contrary to the appellant's contention that it was to a Mr Philip Ndunda that he (appellant) had sold the subject motor vehicle, the police abstract showed that the registered owner of the subject motor vehicle was Sunset Bus Co. Finally, Mr Musyoka contended that the appellant's prayer to be allowed to put in a defence came in too late in the day. He relied on the same authorities cited by the appellant including TREE SHADE MOTORS LIMITED VS D.T. DOBIE & COMPANY (K) LTD – Court of Appeal Civil Appeal No. 38 of 1998 in which it was held that once a draft defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claims and that if it does, the defendant should be given an opportunity to enter and defend. It is clear from the record that the appellant herein annexed a draft defence to his application to set aside.

20. The question that arises is whether on the evidence before the court, the learned trial magistrate reached the correct conclusion when he dismissed the appellant's application for both stay and leave to enter and defend. I am under a duty to reconsider the whole of the evidence and evaluate it afresh with a view to reaching my own conclusions in the matter (see Peter's vs Sunday Post, (1957) EA 424.)

21. I have carefully considered the whole of the evidence, the learned trial magistrate's ruling, the law and the submissions made to me and have reached the conclusion that the learned trial magistrate did not exercise his discretion judicially in dismissing the applicant's application dated 10/05/2002. In particular, I find that the learned trial magistrate did not comply with the provisions of Order 5 rule 16 of the Civil Procedure Rules and as such the court's mere assertion that the appellant had been served with Summons to Enter Appearance had not basis.

22. Secondly, I do find and hold that had the learned trial magistrate properly directed his mind to the draft defence that was annexed to the appellant's application, he would most likely have reached a different conclusion. In my view, the appellant's draft defence raised triable issues that could only be determined during a full trial and not by way of summary procedure. The learned trial magistrate reached the conclusion that the subject motor vehicle Registration Number KWB 284 belonged to the appellant, yet he also alluded to the fact that had the alleged third party, Philip Matheka Ndunda sworn an affidavit to the contrary, he (learned trial magistrate) would have been prepared to reach another conclusion.

23. I hasten to add that the discretion of the court in applications of this nature is wide and unfettered to set aside under Order 9A Rule 10. Unless it is obvious that the applicant is trying to obstruct the course of justice. In the circumstances of this case, and for the reasons that I have given above, I agree with appellant's counsel that the learned trial magistrate misdirected himself in dismissing the applicant's application and that the appellant should now be given an opportunity to enter appearance and to file defence in accordance with the rules, for to do otherwise would be draconian and would cause the appellant undue hardship.

24. In the result, I would allow this appeal with costs to the respondents.

25. Orders accordingly.

Dated and delivered at Machakos this 8th day of February, 2008.

R.N. SITATI

JUDGE