

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 811 of 2005

JOHN WABORO MUNGAI APPELLANT

VERSUS

LUCY WANJIRU MWANIKI RESPONDENT

(Being an Appeal from the Ruling of the Principal Magistrate at Kikuyu,

Mrs Mary

Murage dated 7th October, 2005 in PMCCC No. 153 of 2003)

JUDGMENT

By a Plaintiff dated 23rd July, 2003 the Respondent (Plaintiff in the Lower Court) claimed general and special damages from the Appellant arising from a motor vehicle accident on 23rd July, 2001.

The Appellant reported the accident to his insurer, United Insurance Company Limited, who promptly retained the services of Njenga Mbugua & Company Advocates to defend the Appellant in accordance with the terms of its policy of insurance with the Appellant.

The case came up for hearing in the lower court on 4th June, 2004. The Appellant was never informed of the hearing date, and did not attend Court. Nor did his advocate. The Advocate's instructions had apparently been withdrawn after the Insurer was placed in Receivership. However, neither the insurer, nor the Advocate informed the Appellant about the hearing date, and the fact that he needed to secure the services of his own Advocate. The case proceeded ex parte, and Judgment was entered against him for Kshs.210,328/=.

It was not until the 15th July, 2005, when execution proceedings were commenced, that he actually found out about the Judgment. He promptly filed an application (on 22nd July, 2005) to stay execution, and set aside the ex parte Judgment. By a Ruling dated the 7th October, 2005 the lower court disallowed that application, mainly on the grounds that the Appellant had offered no explanation whatsoever for his Advocate's non-attendance in Court on the date of the hearing, and secondly that his defence was a mere denial. It is that Ruling which is the subject of appeal here, and is based on nine grounds of appeal.

In his submissions before this Court, Mr Makori, Counsel for the Appellant, argued that his client had been condemned without a hearing; that he knew nothing about the hearing date; that his Counsel's mistake should not be visited upon him; and that he had a good defence. He relied on the cases of *Mbogo & Another vs Shah* 1968 E. A. 93; *Haji Ahmed Sheikh vs Highway Carriers Limited Mombasa Civil Appeal No. 46 of 1986 Unreported*; *African Safari Club Limited & Another vs Walter Oluoch Seko Mombasa Civil Appeal No. 14 of 1989 Unreported* and *Waiboci & Another vs Pashito Holdings Limited & 7 Others Nairobi Civil Suit No 921 of 1998*.

Opposing the Appeal, Mr Karuga, Counsel for the Respondent, argued that the lower court was correct in observing that the Appellant had not offered any explanation for his non-attendance, and that in any event

he had no good defence to the claim. He urged that the appeal be dismissed.

Having noted the facts and reasons giving rise to this appeal, I am satisfied that the lower court erred in not setting aside the ex parte Judgment, and in not ordering the case to be heard on merit. Clearly, the Appellant was let down by his Advocate, who actually had been retained by his Insurance Company, under the insurer's subrogation rights contained in the policy of insurance. The insurer was placed in Receivership and withdrew its instructions. Both the insurer and the Advocate had a duty to inform the Appellant of their decision not to defend the case. Neither of them did so. The Appellant knew nothing of the hearing date, and did not attend Court. That, to me, is a reasonable explanation of his absence from Court.

Secondly, having perused the defence on record, I am satisfied that it is not a mere denial; that he has disputed both liability, and the extent of the injuries allegedly suffered; and is clearly entitled to a hearing on merit.

Accordingly, I allow this appeal, set aside the Ruling and Judgment of the lower court, and order that the matter be heard afresh before a different magistrate. All costs shall be in cause.

Dated and delivered at Nairobi this 12th March, 2008.

ALNASHIR VISRAM

JUDGE