



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Case 138 of 2001

AGGREY ODANGA ::: PLAINTIFF

VERSUS

JOSHUA SIAMBE ::: DEFENDANT

RULING

The Defendant, JOSHUA SIAMBE, seeks three substantive orders, namely;

- (a) Stay of execution of the Decree;
- (b) Setting aside of the ex parte judgement; and
- (c) The transfer of the case from the High Court to the Chief Magistrate's Court, Kakamega.

It is the defendant's case that he did not attend court on 7th March 2005, when the case was heard, because he never received word from his advocates, M/S Kulecho & Co. Advocates.

The defendant points out that his said advocates could not, in any event, have notified him that the trial was scheduled for 7th March 2005, as the advocates did not have that information.

It is clear from the court records that the defendant has had a change of advocates. First, on 15th October 2002, the firm of Muhoro Muriuki & Co. Advocates filed a Memorandum of Appearance for the defendant.

Then on 10th February 2004, M/S Kalya & Company Advocates filed a Notice of Change of Advocates, indicating that they had replaced M/S Muhoro Muriuki & Company Advocates.

A few months later, on 21st July 2004, M/S Kulecho & Company Advocates, replaced Kalya & Company Advocates, as the advocates for the defendant.

Notwithstanding the fact that Kulecho & Company Advocates did replace Kalya & Co. Advocates, from 21st July 2004, when the plaintiff's advocates had fixed the case for hearing on 17th February 2005, M/S Kulecho & Co. Advocates were not served with a hearing notice. Instead, it was Kalya & Company Advocates who were served with a hearing notice.

It is little wonder that Kalya & Co. Advocates endorsed the back of the hearing notice with the following remarks;

“Received under protest as M/S United Insurance Company Ltd. withdrew instructions.”

From the judgement of my learned brother Hon. G. B. M. Kariuki, J., it is evident that the issue of service of the hearing notice was given consideration. This is what he said;

“The affidavit sworn on 27.1.2005 by James K. Alusiola, a process server shows that Kalya & Company Advocates were served with a hearing notice, as was the defendant and his Insurers, United Insurance Co. Ltd. On 7.3.2005, neither the Defendant nor his advocate appeared. The hearing proceeded ex-parte on the footing that they had been served.

It is patent from the court record that the firm of Kalya & Company Advocates was served on 17.2.2005 with a hearing notice. This was the firm that was on record for the Defendant as at that time.”

A perusal of the record of the proceedings shows that M/S Kulecho & Company Advocates came on record on 21st July 2004.

Clearly therefore, as at 17th February 2005, when the trial judge says that Kalya & Company Advocates were served with a Hearing Notice, the advocates on record were already Kulecho & Company, and not Kalya & Company, as the learned judge held.

Furthermore, if, as the trial judge held, Kalya & Company Advocates were served on 17th February 2005, there is no way that the process server would have sworn his affidavit of service on 27th January 2005.

In those circumstances, I am satisfied that the learned trial Judge was misled to believe that the Advocates for the defendant, at the material time, had been served. I am convinced that had he been made aware that Kalya & Company Advocates were no longer representing the defendant, he would not have found, as he did, that the advocates on record had been served.

However, the defendant does not deny having been personally served with the hearing notice. Therefore, he did not need his advocates to tell him that the case had been set down for hearing on 7th March 2005. He already had that piece of information.

On the other hand, once the defendant had appointed an advocate to represent him in the case, the plaintiff was obliged to serve any hearing notice upon the said advocate. Therefore, the fact that the defendant had been personally served, did not exonerate the plaintiff from serving the defendant's advocates.

Another issue that was raised by the defendant was the fact that the plaintiff made an oral application for leave to amend the Plaint. That application was made on 7th March 2005, in the absence of the defendant and his lawyers.

By virtue of Order 6A rule 8 of the Civil Procedure Rules, an application for leave to amend a pleading may be made orally or by summons in chambers. Therefore, the fact that the application herein was oral is not significant.

The significant fact is that the application was made ex-parte, without any proof that the defendant had had notice of it.

In effect, by allowing the amendment, in the absence of the Defendant, and in the absence of proof that he had had notice of the amendment, the learned trial judge permitted the plaintiff to proceed with a case, about which the defendant had no notice whatsoever. The defendant had been accused of negligence in the manner in which he drove a vehicle registration No. KAG 378A.

In his Defence, he had made reference to that particular vehicle. One of the grounds of his defence was that he did not own that vehicle, nor did he drive it at the material time.

In those circumstances, when the plaint was amended, on the date of the trial, and when the particulars of the vehicle in issue was changed to KAG 328A, the case which was then proved against the defendant was in relation to a vehicle to which he had not had any opportunity to put forward a defence.

In MBOGO VS. SHAH [1968] E.A. 93 the Court of Appeal upheld the following words which had been uttered by the High Court in SHAH V. MBOGO & ANOTHER [1967] E.A. 116;

“(iv) Applying the principle that the court’s discretion to set aside an ex-parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”

In determining the application before me I need to ask myself if the defendant had deliberately sought to obstruct or delay the cause of justice. I also need to weigh that possibility as against the possibility that there had been an accident, inadvertence or excusable mistake or error.

In this case, the advocates acting for the defendant were appointed by his insurers, United Insurance Company Limited. That insurance company had been placed under receivership, by the time the case came up for hearing. Therefore, when the defendant visited the offices of Kulecho & Company Advocates, with a view to ascertaining the circumstances which had led to judgement being entered against him, the defendant was told that the said advocates could no longer act for the defendant, as their instructing client, United Insurance Company Limited, was under receivership.

In my considered view those developments at the company which had provided insurance cover for the defendant’s vehicle, are matters which were beyond the control of the defendant. Therefore, that the advocates appointed by the said insurers opted not to continue looking after the defendant, is a matter which cannot be deemed to have been a deliberate attempt, by the defendant, to delay or obstruct the cause of justice.

In CMC HOLDINGS LIMITED vs. JAMES MUMO NZIOKI, CIVIL APPEAL NO. 329 OF 2001, the Court of Appeal said;

“It would, in our mind, not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”

In this case there appears to be 2 distinct issues raised by the defendant. The first one is that he had not been properly served with the Hearing Notice.

Secondly, assuming that the hearing notice was duly served, the defendant is saying that the failure by his advocate to attend court was due to the fact that the insurer of the defendant had been placed under receivership, resulting in the advocate deciding not to continue acting for the defendant.

In MAINA v. MUGIRIA [1983] KLR 78, at page 80, the Court of Appeal held, inter alia, that;

“The court has no discretion where it appears there has been no proper service.”

In such instances, the ex-parte judgement ought to be set aside, as a matter of right.

Accordingly, as I have held herein that the hearing notice was not properly served on the defendant’s advocate on record, it follows that the exparte judgement herein should be set aside.

But, in the event that the service on the defendant personally could be deemed to have cured the issue of service, (although I have held that it did not), the law provides the court with a wide discretion in

determining the question whether or not to set aside the ex parte judgement.

In my considered opinion, the defendant has put forward a reasonable explanation for his failure to attend court on the date when the case was scheduled for hearing. That too, is a good enough reason to warrant the setting aside of the Judgement herein.

In the event, I find and hold that the application herein is meritorious.

The ex parte judgement entered on 11th November 2005 is hereby set aside, with costs to the defendant.

Finally, as the plaintiff did not dispute the contention that the magistrate's court would have jurisdiction to hear and determine the suit herein, and because the magistrate's court does have the requisite jurisdiction, I hereby order that the suit be transferred to the Chief Magistrate's Court, Kakamega, for hearing and determination.

Dated, Signed and Delivered at Kakamega, this 30th day of September, 2008.

FRED A. OCHIENG

J U D G E