



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Appeal 190 of 2006

BENJO TRAVELLERS LTD. & CO. 1ST APPELLANT

STEPHEN MUTHINI NGANZI 2ND APPELLANT

VERSUS

MARY WANGAI MUTUKU RESPONDENT

JUDGMENT

1. The background to this Appeal is this; on 25/4/2005, interlocutory judgment was entered against the Appellants for reasons that they were allegedly served with summons to enter appearance but failed to respond to the same. On 12/7/2005, the matter proceeded by way of formal proof and judgment was entered for the Plaintiff, now Respondent, on 29/7/2005 in the sum of Kshs.84,980/= plus costs and interest thereon.

2. The Appellants having received notice of the ex-parte judgment, filed an Application dated 11/8/2005 seeking stay of execution of the resultant decree and setting aside of the entire judgment principally for reasons that the summons were not served on any authorized agent of the 1st Appellant company and that the interlocutory judgment was irregular. They also applied for a chance to defend the suit and for the suit to be determined on the merits. The Application was opposed and in a Ruling delivered on 17/10/2006, the Application was allowed but on the condition that the decretal sum assessed at Kshs.117,999/- be deposited in court within a month of that date and that the auctioneers fees were to be borne by the Appellants. If they failed to do so, the Application stood dismissed.

3. All the above proceedings were in **SRMCC No.382/2004 (Kitui)** and from the Memorandum of Appeal dated 10/11/2006 and the submissions by counsel for the Appellants, the only issues to be determined now are:-

i. whether the learned magistrate imposed harsh and severe conditions to the grant of orders of setting aside of the interlocutory judgment.

ii. whether it was proper to grant the Application and then make an order for its dismissal if the conditions were not met.

4. I have noted the position of the Respondent that the issues at hand were necessitated by the extraordinary circumstances obtaining in this matter in that the 1st Appellant, cunningly, had the attached motor-vehicle transferred to another company in a bid to avoid execution and that discretion was therefore properly exercised.

5. I have read the Ruling dated 16/10/2006 and I note that on service of the summons to enter appearance, the learned magistrate had this to say;

“the only issue in this matter is the copies of the affidavit (sic) whether the person referred to as the “manager” is the Secretary of the Company or Director. Its not in doubt that service was done to a personnel at the 1st Defendant company. To me the case issue here is service. It was effected per the return of service.”

Order V Rule 2 (a) of the Civil Procedure Rules provides as follows:-

“2. Subject to any other written law, where the suit is against a corporation the summons may be served-

(a) on the secretary, director or other principal officer of the corporation; or”

6. One of the issues raised in the Application to set aside the judgment was that it was unclear who the alleged **“manager”** was, as his name was not given and whether he qualified as a Principal Officer of the 1st Applicant company. It is clear to me that without a clear extrapolation as to the name and exact role of the so-called **“manager”** of the 1st Applicant, service was debatable and the Appellants were entitled to setting aside orders ex debito justitiae. The learned magistrate’s finding pm service cannot therefore be supported by the law as I understand it. He however reached the right decision in granting the orders and the question is whether he was then entitled to create conditions precedent to the setting aside and whether failure to abide by those conditions should lead to the dismissal of the Application.

7. In Maina vs Mugiria (1983) KLR 78 at 79, it was stated as follows:-

(a) “Firstly, there are no limits or restrictions on the judge’s discretion (to set aside) except that it should be based on such terms as may be just because the main concern of the courts is to do justice to the parties.

(b) Secondly, this discretion is intended so as to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has so deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

(c) ...

(d) ...

(e) A discretionary power should be exercised judicially and in a selective and discriminatory power, not arbitrarily and idiosyncratically.”

8. Earlier in Kimani vs McCuirel (1966) E.A. 547 it was stated thus:

“That a court in determining whether to set aside an ex parte judgment should consider whether any material factor appears to have entered into the passing of the ex-parte judgment which would not or might not have been present had the judgment not been ex-parte, and then, if satisfied, that such was or may not have been the case, to determine whether, in the light of all fact and circumstances both prior and subsequent and or the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary upon terms to be imposed.”

9. Having set out the law therefore, it was upon the trial magistrate seeing all circumstances prevailing to grant an order of setting aside upon such terms as he thought just. I have not been told what is unreasonable about the conditions imposed and I have not been told what prejudice the Appellants will suffer if those conditions are met. I say this because counsel for the Respondent has taken issue with the Appellants’ conduct in transferring M/V Registration number KAP 218 K which had been proclaimed in

execution of the decree. The learned magistrate was aware of that fact and was entitled to take it into account in exercising discretion are way or the other.

10. To mind the conditions attached to the order for setting aside were lawful and I see no need to interfere with the same. I see no merit in the Appeal and the three grounds raised are baseless.

11. The Appeal herein is dismissed with costs to the Respondent.

12. Orders accordingly.

Dated and delivered at Machakos this **11th** day of **November** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **N/A for Respondent**

Mr S.A. Makau h/b for Ms Njuguna for Appellant

ISAAC LENAOLA

JUDGE