



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL SUIT NO. 204 OF 2003 (RD)**

**JUSTUS NGETA MUSYOKA .....PLAINTIFF**

**VERSUS**

**ELDORET EXPRESS CO. LTD. ....DEFENDANT**

**RULING**

Chamber Summons dated 30/5/05 was filed by defendant seeking orders to set aside the ex parte judgment obtained herein on 4/5/05 against the defendant and all consequential orders resulting therefrom be vacated and in the meantime the ex-parte judgment be stayed.

The grounds are set out showing defence discloses triable issues, the investigation of the matter had not been completed, that the defendant would like to enjoin the owners of vehicle No. KVS 003d TRKV 7744L that the defendant has application to transfer this suit to Nairobi, that the defence has merit and ought to be allowed to proceed. Other grounds all numbering 15 are set out. The application is supported by the affidavit of Joseph Nganga Thinga who states that he is Operations Manager in the Defendant Company.

Upon a perusal of the grounds and the supporting affidavit no attempt has been made to explain failure to attend court on the date the suit was fixed for hearing.

On 10.2.05 the Plaintiff came to court for the hearing of his case. He informed the court that the defendant was served with a hearing notice. Affidavit of service is filed and there is exhibited a copy of notice stamped clearly with the official stamp of the office of Ratemo Oira advocates which was received 30/11/2004.

The said advocates did not attend court on the date stated therein (10/2/2005) and the absence is not explained save that there is“ application for transfer of suit pending in High court Nairobi.”

It appears the application is still pending in Nairobi (See par. 9 on the application”. There was sufficient time between 30/11/04 and 10/2/05 within which the Defendant should have pushed his application through the court but he did not. No such order to transfer the suit to Nairobi was on court file or served upon the Plaintiff.

Similarly this suit was filed on 26/8/2003 from that date no third party proceedings were taken up for a period of about 1<sup>1</sup>/<sub>2</sub> years the suit was not in connection with employment but with regard to driving negligence of the vehicle in which the Plaintiff was traveling causing him injuries and in any case

Plaintiff was able exhibit his employed staff Identity Card. The other issue is the allegation that accident was caused by a third party. For this he was to pursue and if seeking indemnity invoke third party proceedings. He has not done so. The other issue raised is that the accident was inevitable. It denies that the principle of *Res Ipsa Loquitar* is applicable .

The defendant swears that the statement of Defence raises triable issues. Issue of ownership of vehicle was raised in the defence but the Plaintiff was able to exhibit certificate of Registrar of Motor Vehicles, which confirms the defendant was the owner of the vehicle. The defence denies the employment of Plaintiff by defendant. However, these are mere allegations what defendant was expected to do is to appear in court and give evidence. Order 9B makes provision on what to do on the hearing date:

1. If no party appears court may dismiss the case.
2. When only plaintiff appears and notice of hearing is served court may proceed *exparte*.

If no notice served court shall direct another service of hearing notice and if it was not served within sufficient time for defendant to attend or do other sufficient cause the defendant was unable to attend court shall postpone the hearing.

In the present case notice was received on 30/11/2004 and the hearing was on 10/2/2005. I find that the notice was served in sufficient time for the Defendant to attend court. No sufficient cause has been shown why the defendant did not attend court on 10/2/05. That order mentioned above (1 X B) CPC empowers the court to proceed with the plaintiffs case in absence of the Defendant. Therefore the judgment sought to be set aside was obtained lawfully.

As to the merits of defence the denial that plaintiff was an employee of

Defendant there is clear evidence.

On the denial of accident the defendant admits that there was a collision between his vehicle and the other KVS 003 D TRKU 7744C. No third party proceedings were taken within the prescribed time.

On the denial of the ownership of the vehicle KAM 621T there is clear evidence that it belonged to defendant. The defendant shows no defence to plaintiff claim as it was shown that the plaintiff was traveling in the bus performing the work of a conductor. This is not a case for showing triable issues but giving the merit of defence of the plaintiffs claim and explaining why the defendant failed to attend court. The side issues of the transfer of court are irrelevant at this stage. No order was obtained before hearing and the High Court has jurisdiction in the whole country. The counsel for defendant has submitted several authorities.

1. HCC 2893 OF 1997 JOSHUA MUMO V. GIDEON MUTHINA

was on the transfer of the suit to High Court from subordinate court. It is not relevant here.

2. *JIWA V. JIWA & ANOR*. Court of Appeal decision [1990] KLR 284

This case was for substitution of a party order O.1.r.10(2). The facts disclose

that the suit the wrong person as plaintiff, the court held that the court could only effectively and completely adjudicate upon and settle all questions involved in the suit after the substitution of the plaintiff.

This case is on different facts. The defendant did mention a third party but the plaintiff did not wish to claim against the third party. No application was made to enjoin the third party.

3. *OMWOYO V. AFRICAN HIGHLANDS & PRODUCE CO. LTD* [2002] IKLR 698 concerning

transfer of a suit under section 18 of Civil Procedure Act.

It involved matters in subordinate courts. The court has no jurisdiction to transfer

cases filed where there is no jurisdiction. In case of High court the jurisdiction of High court is not limited.

4. HAJI V. MARAIR FREIGHTERS AGENCIES LTD. Court of Appeal Appeal No. 67/83 on negligence between two vehicles.

The trial court found there was no evidence that either party was negligent. In

This case the evidence available was of Plaintiff only there was no evidence of Defence.

5. KAGENYI V. MUSIRAMO & ANOTHER [1968] E.A. 43 regarding transfer of suit from a court without jurisdiction. Order refused.

6. ANNE WAMBUI NDERITU VS. JOSEPH KIPRONO ROPKOI & ANOR. CIVIL APPEAL NO. 345 of 2000.

In the case evidence was offered on behalf of defendant to show how the several vehicles were traveling. The deceased was not passenger of any vehicle but was riding on a motorcycle.

In this case the plaintiff was inside the defendant's vehicle, which collided, and he was injured. He said in evidence

“the driver was traveling speeding. He wanted to overtake a trailer in front of him” “He applied brakes which failed”.

In such circumstances the defendant's driver was negligent.

7. EXPRESS (KENYA) LTD. VS. MANJU PATEL Civil Appeal No. 158 of 2000.

This case was in connection of contract of bailment. In this case the court (Judgment of Shah, JA) stated “Judgment entered properly cannot be set aside on the mere say so of an applicant”.

On considering these authorities, I do not see any explanation given for failure to attend court on that day.

The applicants has tried to put forward possible reasons why he could have failed to turn up merely that he had applied to transfer the case to Nairobi courts but he did not come to court to explain. No order has been obtained to date and the authorities he has cited in this respect are on transfer of suits in subordinate courts.

In my considered opinion and under the above circumstances, I am not satisfied that the Applicant has a defence to the plaintiffs case. I am not satisfied that any reason or explanation is offered for non-appearance of Advocate on date of hearing suit.

I find the judgment and the issue of joining third party. No third party proceedings have been commenced to date, the issue of liability – the evidence of Plaintiff is clear the driver was speeding and brakes failed and he was overtaking. These are the possible reasons the applicant would like the court to consider to set aside judgment that was lawfully obtained. I find no merit.

I therefore dismiss the application with costs to the Respondent. Orders made under this application are

now vacated.

Delivered and dated at Mombasa this 19<sup>th</sup> day of January 2006

J. KHAMINWA

**J U D G E**

19/1/06:

Khaminwa, J

Kazungu – clerk

Ms. Opondo

No appearance

Notices given. Ruling read in her presence.

KHAMINWA, J