

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 189 of 2003

LINEAR COACH CO. LTD.....APPELLANT

VERSUS

SAMSON K. M. BICHANGA.....1ST RESPONDENT

RONGAI WORKSHOP LTD.....2ND RESPONDENT

JUDGMENT

This is an appeal from the Ruling of the Senior Principal Magistrate given on the 30th October 2003 in Mombasa CMCC No. 83 of 2003 in which the learned trial magistrate allowed the Appellant's application to set aside the ex-parte judgment which had been entered against the appellant on condition that the Appellant deposited a sum of Sh. 1 million. The facts of the case which do not seem to be in any dispute are quite short. The Respondent was traveling as a fare-paying passenger in the defendant's bus registration number KAM 088Z along Mombasa/Nairobi road on the 28th December 2000. At Jomvu Kuu the bus collided with lorry registration number KLS 255 trailer ZA 1598 and the plaintiff was seriously injured. He filed the said case against the Appellant and M/S Rongai Workshop Ltd, the owner of the lorry but later withdraw the case against the latter.

The hearing of the case against the Appellant commenced on the 12th June 2003 and went on the following day when it was adjourned to the 16th June 2003. On that day, for reasons that are not clear from the record, the case did not go on. Neither the Appellant's representative nor its advocate were in court on that day. It was adjourned to the 19th June 2003 when the Appellant's representative and advocate again did not go to court. The hearing was completed on that day and judgment was reserved to the 27th June 2003, when it was delivered and the Respondent was awarded Sh.1 million general damages and special damages of Sh. 4,600/=.

It is not in dispute that the Appellant was not served with a hearing notice for the 19th June 2003 when the hearing was completed, neither its representative nor advocate having not been in court on the 16th June 2003, when the case was adjourned to that date. Mr. Bosire, counsel for the Appellant argued that the failure to serve the Appellant with a hearing notice for 19th June 2003 rendered the ensuing judgment irregular and that the same should have been set aside *ex-debito justitiae* and unconditionally. Mr. Mabeya for the Respondent saw it differently. He said that the Appellant had no viable defence and the trial magistrate was right in setting aside the judgment on condition that the Appellant deposited Sh. 1 million.

I have considered these arguments. It is now well settled that the court has no discretion in an application to set aside an ex-parte judgment entered against a defendant who has not been served with the summons to enter appearance but to set it aside *ex-debito justitiae* – see **Pithon Maina- Vs Thuku Mugiria(1982-88) 1 KAR 171** and **Remco Ltd – Vs – Mistry Jakra Parbat & Company Ltd and others [2002] 1 EA 233**. The same principle in my view applies to a judgment obtained following a hearing on a date when

the defendant did not have notice like in this matter. The learned trial magistrate should therefore have set aside the judgment unconditionally. Consequently I allow this appeal and set aside the condition requiring the Appellant to deposit a sum of Sh. 1 million and the ex-pare proceedings of 19th June 2003. As the case had been heard inter-parties on 12th and 13th June 2003 I remit the matter to the Chief Magistrate's Court and direct that the hearing proceeds from where it had reached on 13th June 2003. The Appellant shall have the costs of this appeal.

DATED and delivered this 26th May 2006.

D. K. MARAGA

JUDGE