



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

AT ELDORET
CIVIL CASE 22 of 2001

DR. BONIFACE OOKO GANDA PLAINTIFF

-VERSUS

STANLEY MAINA 1ST DEFENDANT

JORAM NGURE MURIRI 2ND DEFENDANT

RULING

This is an application dated 4th March 2005 brought by way of Chamber Summons. It is purported to be brought under section 3A, 15 and 18 of the Civil Procedure Act (Cap.21) and order 9A Rules 10 and 11 of the Civil Procedure Rules. It seeks for 8 orders, two of which have been spent that—

- 1. (Spent)**
- 2. (Spent)**
- 3. The default judgement entered herein with all the consequential orders be set aside.**
- 4. The defendants/applicants be allowed to enter appearance, file defence and defend the suit herein.**
- 5. The annexed copy of defence annexed herein be deemed duly filed and served on the plaintiff/respondent.**
- 6. This suit be transferred to Nairobi Milimani Law Court.**
- 7. Costs of this application be provided for in favour of the 1st defendant/applicant against the plaintiff.**
- 8. Any other or further relief the Honourable court may deem necessary in the interest of justice.**

At the hearing of the application Mr. Gacheru for the applicant submitted that the judgement and consequential orders of the court be set aside. That the applicant be allowed to enter appearance and file a defence. That the draft defence annexed to the application be deemed as filed and served. That the suit be transferred to Nairobi Milimani Court and that costs of the application be borne by the plaintiff.

He relied on the grounds of the application and supporting affidavit. He submitted that there was an error apparent on the face of the record. Judgement was irregularly entered. The 1st defendant was not served

with summons to enter appearance and file defence. The said 1st defendant had a good defence in the case.

He submitted that the accident occurred at a place called Mathore on the Nairobi Naivasha highway. The 1st defendant carried on business in Nairobi. The 1st defendant came to know about the case when he was served with a hearing notice for formal proof. The said service was by post.

Summons to enter appearance were served on the 2nd defendant who refused to sign for receipt of the summons. The 1st defendant did not know the 2nd defendant nor did he employ him or authorize him to receive summons. He sought to rely on Order 5 Rule 9(1) Civil Procedure Rules to support his assertion for inadequacy of service.

He further submitted that there was no evidence that the plaintiff acted diligently in trying to trace the 1st defendant. He sought to rely on a search form from the Registrar of motor vehicles dated 24th February 2005. He submitted that the 1st defendant, who was the applicant herein, was not the owner of the subject motor vehicle. He also sought to rely on section 8 of the Traffic Act (403).

He submitted that where service was improper, the court should not impose terms on the applicant. He sought to rely on the case of **Patel –vs- E. A. Cargo Handling Services Limited [1974] EA 75**. He also sought to rely on the cases of **Kimeu –vs- Kasese [1990] KLR 32; the case of City Service Station –vs- Njuguna [1990] 163** and the case of **Joseph Waweru –vs- Joel W. Ndiga (1982-88) I KAR 210**.

On the prayer for transfer of the case to Nairobi, he submitted that it was averred in the plaint that the cause of action arose on the Nairobi-Naivasha highway. Also the possible quantum of damages of Kshs.691,000/= averred in the plaint would mean that the case could be filed in Nakuru, Nairobi, Kikuyu or Limuru. He further submitted that the 1st defendant would incur a lot of expenses if the case remained in Eldoret. The expenses would include the advocate's costs as well as the witnesses costs. The 1st defendant intended to call the Registrar of Motor Vehicles as a witness in the case.

Mrs. Fundi for the respondent submitted that the case was filed way back in 2001. At that time the courts at Kikuyu and Limuru did not have jurisdiction to handle the claim. The High Court had original and unlimited jurisdiction in terms of section 67 of the Constitution. The application for transfer of the case was either premature or had been overtaken by events.

On the issue of service, though the applicants alleged that service was not effected on the 1st defendant, in terms of Order 5 Rule 10(2) of the Civil Procedure Rules, service could be effected on an agent. The 2nd defendant was a driver of the 1st defendant and was therefore an agent. The applicants had not challenged the affidavit of service. Under section 3A of the Civil Procedure Act (Cap.21), this court had inherent jurisdiction to make orders to prevent the abuse of the process of the court. She submitted that the application was an attempt to delay justice and abuse the process of the court.

On the issue of a good defence, she submitted that the search carried out with the Registrar of Motor Vehicles was dated 24th February 2005. The accident occurred in 2000. The search had not revealed the vehicle owner at the time of the accident, therefore it was not relevant in this matter.

I have considered the submissions of both counsel and the documents on record. In an application for setting aside judgement, the court has unfettered discretion to set aside or vary an ex parte judgement in terms of Order 9A rule 10 Civil Procedure Rules. However, that discretion has to be exercised on sound judicial reasons. There are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as are just (see **Patel –vs- E. A. Cargo Handling Services Ltd. [1974] EA 75 at page 76**). The applicant has stated that he was not served. The respondent has stated through his counsel that the applicant was actually served. Such service is said to have been effected through an agent who was the driver of the applicant.

The requirements for service on a party through an agent, were stated in the case of **Kimeu –vs- Kasese [1990] KLR 32**. In that case, Justice Bosire, as he then was, held that –

Whenever it is practicable, service of summons and any other process shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent may be effected.

The learned judge went further and held that –

It is not the relationship of the person served to the defendant but that he was in fact authorized to receive service. Also that the affidavit of serve should specifically state that that person was authorized to receive service.

From the records in the file in our present case, there is no evidence that Joram Ngure Muiruri (the 2nd defendant) was an authorized agent of Stanley Maina (the 1st defendant) to receive service of court documents. In fact it is deponed at paragraph 5 of the affidavit of service sworn on 31st July 2001, that the said Joram Ngure Muiruri stated that he was not authorized to sign court documents on behalf of the 1st defendant. In those circumstances I find that Joram Ngure Muiruri was not an agent of the 1st defendant, authorized to accept service, and the purported service was therefore not proper service.

On the issue as to the application having a good defence, I will rely and I am bound by the decision of the case of **Patel –vs- E.A. Cargo Handling Services Limited [1974] EA.73**. In that case the then Court of Appeal of East Africa held that –

“When a defence raises a triable issue, then there could be good reason to set aside or vary a judgement.”

I have perused the draft defence of the applicant. It raises triable issues. Those triable issues relate to the relationship between the 2nd defendant and 1st defendant, the ownership of the motor vehicle, and the occurrence of the accident. In those circumstances I find that the proposed defence is not a frivolous defence. On these two reasons I am of the view that this is a proper case for me to exercise my discretion to set aside the exparte judgement.

I now turn to the issue of transfer of the case to another court. It does not appear to be in dispute that the accident occurred between Nairobi and Nakuru. The address of both defendants as given in the plaint was also in Naivasha. The Civil Procedure Act (Cap.21) section 12 and 14 require that a suit to be filed in the nearest court where the defendant resides and near where the cause of action arose. Both these factors appear to favour Nakuru rather than Eldoret. The defendants are said to have an address at Naivasha and the cause of action also arose in that general area. Nairobi appears to be further away than Nakuru.

In those circumstances, I am of the view that the most convenient court, as provided by law, to try this suit is the Nakuru Court. The arguments that the magistrates in the courts near the place of accident did not have jurisdiction in 2001 does not now hold because if the case is transferred from Eldoret, there is a Chief Magistrate at Nakuru who has jurisdiction to hear the same. This court has powers under section 18 of the Civil Procedure Act (Cap.21) to transfer any case before it to a subordinate court having jurisdiction to try the same. I will therefore transfer this case to the Chief Magistrate’s court at Nakuru.

For the above reasons, I allow the application and order that –

1. The judgement entered herein and all consequential orders be and are hereby set aside.
2. The 1st defendant is hereby allowed to enter appearance and file and serve defence within 14 days from today’s date.
3. This case, after filing and serving defence, be transferred to the Chief Magistrate’s Court at Nakuru for hearing and final determination.
4. I award costs of this application to the 1st defendant/applicant.

Dated and delivered at Eldoret this 21st Day of June 2005.

George Dulu

Ag. Judge

In the Presence of: Mr. G. Kamau for applicant

Mr. Gumbo for respondent