

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

Civil Appeal 265 of 2001

MATHEW MUGO

T/A SUPER GIBS TOURS & TRAVEL APPELLANT

VERSUS

SAMUEL KAMAU NJOGU RESPONDENT

(An Appeal from the Ruling of C. O. Kanyangi,CM
in Milimani Commercial Courts Civil Suit No. EJ 126 of 2000
delivered on 27th April, 2001).

JUDGMENT

By a Plaintiff dated 18th February, 2000, and Amended on 7th August, 2000, the Respondent (Plaintiff in the lower court) sought refund of Kshs.500,000/= being part payment of the purchase of a motor vehicle, which he claimed was never delivered by the Appellant. On 6th November, 2000 interlocutory Judgment was entered in the lower court in his favour in default of Appearance and Defence. When execution commenced, the Appellant filed an application to stay execution and set aside the interlocutory Judgment on the grounds that he had never been served with summons to enter appearance and that he had a valid defence. In a Ruling delivered on 27th April, 2001, the lower court held that the Appellant had indeed been served with the Summons to enter appearance, and further that he had not raised any triable issues for his defence to go to a full hearing.

Aggrieved by that decision, the Appellant has appealed to this Court on the following five grounds:

- 1. Having correctly found that the vehicle was stolen, the learned Magistrate erred in fact in finding that the vehicle was stolen while in the possession of the Appellant, when there was sufficient evidence confirming that the Respondent had taken possession of motor vehicle Nissan Caravan Chassis No. VYGE – 23 – 610400.***
- 2. The learned Magistrate erred in fact in finding that the appellant was in possession of the above motor vehicle at the time it was stolen yet it was very clear that there were suspects arrested and a criminal case No. 1055 of 1999 was pending at the Makadara Law Courts.***
- 3. The learned Magistrate erred in law and in fact in finding that the appellant was served in the absence of a confirmation of service from the Respondent and the Process Server.***
- 4. The learned Magistrate erred in law and in fact when he decided that the appellant's application dated 22nd February, 2001 lacked merit yet it raised a prima facie case and the annexed defence raised triable issues.***
- 5. The learned Magistrate erred in law and in fact in determining the entire suit on the basis of sworn affidavits alone even when it was clear service of summons to enter appearance had not been effected and the draft defence raised a counter-claim and triable issues. The learned Magistrate erred in law and in fact in failing to take into consideration all matters in question when exercising his discretion in granting a stay of execution and setting aside the Interlocutory Judgment.***

With regard to the service of summons, Ms Gwaro, Counsel for the Appellant, argued that the Respondent in his own affidavit in reply (Page 58 of the Record) had deponed that he had been “advised” by his advocate that the Appellant had been served, while the Process Server, in his deposition dated 20th

March, 2000, had stated that at the time of service, he was accompanied by the Respondent. This contradiction gave rise to the belief that the Appellant was never served. With regard to the Defence, Counsel argued that there were triable issues to allow the suit proceed to full hearing. For example, the motor vehicle had been delivered as per the Delivery note exhibited on Page 30 of the Record; that accordingly the vehicle was not stolen while in the Appellant's possession. She submitted that the draft Defence not only raised these triable issues, but also a counter-claim. She relied on the cases of *Remco Ltd vs Mistry Jadva Parbat and Co Ltd and Others (2002) I E A 127*, *Momanyi vs Hatimy and Another (2003) I E A 600* and *National Industrial Credit Bank Ltd vs Mutinda (2003) I E A 194*.

Mr Musyoka, Counsel for the Respondent, submitted that service was proper; that the Appellant had failed to summon, and examine, the Process Server regarding the affidavit of service, and had failed to deny that he was present in the office when he was said to have been served; and in any event there were no triable issues to let this case proceed to hearing.

The court has wide discretion to set aside a judgment, if the interest of justice require that that be done. The discretion has to be exercised judiciously "to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought to obstruct or delay the course of justice". (See *Shah vs Mbogo (1967) E A 116*).

Here, in this case, the Appellant says that he was not served with the Summons to enter appearance. The Process Server says he served him in the presence of the Respondent. The Respondent does not corroborate this. Instead, the Respondent says he was "advised" by his advocate that the Appellant was indeed served. With this kind of contradiction, the Appellant ought to have been believed by the lower court. He was entitled to the benefit of doubt, simply because it is too drastic a step to remove a litigant from the seat of justice without a strong and just basis. Here, in my view, there was no such basis. And service of summons is fundamental to litigation. If the court is not fully convinced that a party has been served, the doubt shall be resolved in that party's favour. After all, the only prejudice to the other side would relate to costs, which can be easily remedied by an appropriate Order. I, therefore, find that the lower court erred in its decision that the Appellant had been served with the summons to enter appearance. With regard to the other issue – whether the draft defence disclosed any triable issues, I am satisfied that it did. Whether the motor vehicle had been "delivered", as evidenced by the delivery notes, and whether it was in "possession" of the Appellant, and whether title had passed when it was stolen are all triable issues which could not be determined on the basis of affidavits alone. In addition, the Appellant has demonstrated that he has a counter-claim, giving rise to more triable issues. Accordingly, I am satisfied that this is not a proper case for summary judgment.

I would, therefore, allow this appeal; set aside the Ruling of the lower court, and order that the Appellant have unconditional leave to defend this suit. All costs, here and in the lower court, shall be in the cause.

Dated and delivered at Nairobi this 24th day of May, 2005.

ALNASHIR VISRAM
JUDGE