REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 30 OF 2002

DANIEL ELUIS MBITI :::::::::::::::::::::::::: APPELLANT

VERSUS

PHILIP MAKAU :::::::::::::::::::::::::::::::: RESPONDENT

J U D G E M E N T

The appellant Daniel Elvis Mbiti was the defendant in Machakos SPMCC 430/2001 where he had been sued by the respondent (plaintiff) for damages following a road accident in which Regina Ndinda was fatally injured. An exparte judgement was entered against the appellant on 27.8.2001 and the matter set down for formal proof and judgement entered for the respondent on 13.12.2001. By an application dated 17.1.2002 the appellant sought an injunction to restrain Belpoint Auctioneers from executing the decree against him and in the alternative to set aside the interlocutory judgement plus all subsequent orders. In the lower court's ruling of 11.2.2002 the appellants application wasdismissed. It is against this ruling that the appellant preferred this appeal. The memorandum of appeal contains 8 grounds which were argued by counsel in pairs of 1 and 2, 3 and 4, 5 and 6 and 7 and 8. I will consider the first 4 grounds together.

It seems that the appellant was satisfied with the dismissal of the 1st prayer for injunction against Belpoint Auctioneers.

The gist of the first 4 grounds is that the court failed to exercise its discretion judiciously by failing to look at whether the appellant had a good defence that raised triable issues and whether the appellant had been served with summons to enter appearance or not.

The question of service is very crucial in all civil matters. The appellant denies having been served with the summons to enter appearance. The Return of Service filed pursuant to Order 5 Rule 15 is found at page 13 of the Record of Appeal. A perusal of it clearly shows that it falls short of the provisions of Order V Rule 15. The said rule provides that the Return of Service shall state the time of service, the manner of service, the name and address of the person identifying the person served. It further provides that the affidavit of service shall be in Form No.8 of appendix A with such variations as circumstances may require. In this Return of Service filed, the time of service is not indicated, the person who identified defendant is only said to belong to defendants congregation; it did not state the specific place of service in Machakos town. The process server was cross examined during the hearing of the application. Again he never stated what the time of service was, he never identified the woman who identified the defendant. He referred to the defendant as owning a Peugeot 305 vehicle but the registration number was not given. In cross examination he said that he served Daniel Mbithi. It has transpired that the appellant is Daniel Mbiti, the question of whether the two are the same. The lower court found that the contents of the return of service were scanty but the court believed that there was no doubt that the appellant was served. In my view the return of service as filed by the process server offends provisions of Order 5 Rule 15 Civil Procedure Rules and his cross examination did not add anything to the return of service. The service of summons on appellant was improper if at all any service was done.

The appellant is one Daniel Eluis Mbiti. In the pleadings in the lower court, he was referred to as Daniel A. Mbithi or Daniel Mbithi. Infact the process server claims to have served Daniel Mbithi but not Mbiti. It is very crucial that the party's names to a suit be properly spelled. In the present case the names were quite different. Even the middle initial was A instead of E. It would have been possible that these were totally two different people. However, a look at the police abstract gives the appellants address as 1024 Machakos. It is the same address that appears in the purported vehicle purchase agreement dated 30.5.01

that forms defence. In the circumstances, I do find that the appellants name was misspelled and he is the same person named in the lower court pleadings of Daniel Mbithi or Daniel A. Mbithi.

Counsel for appellant submitted that the summons purportedly served on the appellant were invalid and that therefore offends provisions of Order 4 Rule 3 (4). His contention is that the use of the word 'within' was wrong in that it invited the appellant to appear within 15 days. He relied on the authority of **CEMEAST AIRLINES LTD. VS. KENYA SHELL LTD CA 174/99**. That case considered the provisions of Order 4 Rule 3 (1) which provides that when a suit is filed a summons will issue to the defendant ordering him to appear within a specified time the summons and it goes further to provide under Rule 3 (4) that the time. The appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear provided the time for appearance shall not be less that 10 days. That court found that for appearance cannot be less than 10 days. In the presence case the appellant was given 15 days within which to enter appearance. It is more than 1o days. Mr. Makau misinterpreted the said provision to mean that the word 'within' is not supposed to be used. The important thing to guard against is the period of the days - it has to be more than 10 days.

In exercise of his discretion the magistrate had to look at the appellants defence. There was a proposed defence annexed to the application dated 17.1.2002. In it the appellant denied ownership of the vehicle at the time the accident occurred. His contention is that it belongs to Dove Christian Fellowship International. He annexed a vehicle purchase agreement which is found at page 24 of record of appeal. In the purported agreement the vehicle was bought by the appellant on behalf of Dove Christian Fellowship using a loan he obtained from his work place Kenya Commercial Bank and it was agreed that the vehicle would be registered in his name until the money was repaid to appellant.That the Fellowship was responsible for the licenceinsurance. Section 8 of the Traffic Act provides that the person ins whose name a vehicle is registered shall unless the contrary is proved, be deemed to be the owner of the vehicle. At the time of the accident the vehicle was registered in the name of the appellant. According to the respondent the log book was changed to the name of Dove Fellowship on 15.6.2001 after the accident. Unfortunately the appellant never displayed to court this log book with the date of change of ownership. I do believe appellant must have been registered as the owner. In light o f the purported agreement of sale of vehicle between appellant and Dove Fellowship it was only fair that the appellant be allowed a chance at a hearing to prove that though registered in his name, he was not the owner of the vehicle. I do find that that the draft defence did raise an arguable defence with triable issues that appellant should have been allowed to ventilate at a hearing.

From the foregoing it is only proper that the ruling of 11.4.2002 be quashed and it is hereby quashed. The ex parte judgement entered by the lower court in default of defence and all consequential orders thereto are set aside.

The appellant do have leave to file a defence and case be heard in the lower court inter parties. Costs of appeal and below be borne by the respondents.

Dated, read and delivered at Machakos this 6th day of May, 2004.

R. V. WENDOH

JUDGE