REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL APPEAL NO.95 OF 2001

1. HAROLD KIDEMA MGANGA &

2. DONALD HERMAN MUGAU …….…… APPELLANTS

VERSUS

CONSTANCE MWAI MTOTO ……..……....…. RESPONDENT

(From a ruling in Civil Case 5020 of 1999 of the Chief Magistrate Mombasa

F.M. Muchemi delivered on the 10th August 2001)

JUDGEMENT

On the 11th November 1999 one CONSTANCE MWAI MTOTO (to be referred herein as "the Respondent") instituted Civil Suit No.5020 of 1999 in the Chief Magistrate's Court Mombasa through a plaint drawn on the 25th August 1999 by her advocates M/S KANYI, JUMA & COMPANY. It was a suit against HAROLD KIDEMA MGANGA (First appellant) DONALD HERMAN MUGAU (Second appellant) and The Attorney General (third defendant) for general and special damages. In the cause of action pleaded at Clause 6 of the said plaint, the Respondent averred that, on or about the 31st August 1998 she was lawfully travelling as a fare paying passenger in the first appellant's motor vehicle Registration Number KAG 231K along Mwatate Road when the Second appellant so negligently and carelessly drove, managed and/or controlled it that it rammed into the third defendant's motor vehicle Registration number GK X848 – AK – V420 which was also negligently parked on the said road by the third defendant's authorised driver or agent, as a direct result whereof she sustained serious injuries, loss and damage.

Summons to enter appearance were issued on 12th November 1999 and were duly sent to Mr. George Mgalla, a Coast Process Server who received them on the 15th November 1999. From an affidavit of Service filed on the 25th January 2000, Mr. George Mgalla deponed that on 13th December 1999 he proceeded to Wundanyi where the first appellant lived. He approached a matatu tout who happened to be personally known to the first appellant. That matatu tout, whose name was not given, directed him to the first appellant's house within Wundanyi town. In that house he met the first appellant and served him with a copy of the summons and plaint at 4.30 p.m. There is indeed an endorsement to that effect on the summons which was returned to court.

Mr. George Mgalla further deponed in his affidavit of service that the first appellant accepted service on behalf of the second appellant. The record of appeal shows that the first and second appellants did not file any appearances to the Respondent's claim. Thereupon on the 25th January 2000 the Respondent's said advocates filed a Request for judgment pursuant to the provisions of Order IXA Rule 3 of the Civil Procedure Rules and indeed an interlocutory judgment was entered on the same 25th January 2000 as

prayed. The said interlocutory judgment reads:

> *"The defendants having been duly served and having failed to enter appearance and file defenc e on the application by the Plaintiff's advocates I enter judgment as prayed.*
>
> *J.S. Mushelle*
>
> *Principal Magistrate*
>
> *Mombasa*
>
> *25.1.2000"*

Thereafter the case proceeded on formal proof on the 28th March 2000 before F.M. Muchemi, senior Principal Magistrate. The Respondent gave evidence and Judgement was delivered on the 8th May 2000, in which the respondent was awarded Sh.140,000/- general damages and Sh.1,600/- special damages against the first and second appellants only. With regard to the third defendant the learned trial magistrate had this to say in the said judgment.

> *"This is a case where there is interlocutory judgment in favour of the Plaintiff against all defendant. However, the plaintiff' evidence does not put any blame on the third defendant whose vehicle was stationary on the side of the road. I therefore absolve the third defendant from liability."*

The appellants made an application to set aside that judgment entered in default of appearance and defence but it was dismissed on the 24th May 2001, the trial magistrate holding that the appellants had been duly served with summons to enter appearance.

The appellants then drew an application by a Notice of Motion dated 26th June 2001 which was filed on 5th July 2001 seeking orders of Review under Order 44 Rule 1 of the Civil Procedure Rules and leave to unconditionally defend the suit. However, in a ruling delivered on the 15th August 2001 the trial magistrate dismissed this motion. This appeal is now filed against the order of dismissal of that motion.

The appellants have taken the point of service of the summons as their first ground of appeal. Mr. Stephen Macharia Kimani has argued quite vehemently that the trial magistrate erred by holding that service of summons to enter appearance on the appellants was valid despite the fact that the second appellant was never served. He submitted that the Respondent did not tender an iota of evidence to satisfy the requirements of Order V Rules 12 and 17 of the Civil Procedure Rules.

Mr. S.M. Kimani further submitted that the trial magistrate erred in law by holding that service of summons to enter appearance on the first appellant was sufficient and satisfactory notice to the second appellant of the institution of the suit, a holding which he said sanctioned grave irregularity which goes to the very foundation of Civil Process and litigation.

Miss Osino, advocate, however supported the holding by the trial magistrate, submitting that Order V Rule 7 and Rule 12 of the Civil Procedure Rules had been complied with. She pointed out that the first appellant was duly served as his supporting affidavit on page 12 of the record of appeal shows. He was the registered owner of motor vehicle Reg. No. KAG 231K and that the second appellant was his authorised driver and/or agent. She referred to page 35 of the record of appeal to the second appellant's supporting affidavit Clause 2 thereof in which the second appellant deponed that in August 1998 he was indeed the driver of a public service vehicle Reg. No.KAG 231K. Therefore the relationship between the appellants was that of Principal and agent, she submitted, thus applying Order V Rules 9 and 12 Civil Procedure Rules which essentially provides that, where in any suit a defendant cannot be found, service may be made upon an agent of the defendant empowered to accept service.

I have given due consideration to the above submissions. The cardinal principle of law is that process,

wherever it is practicable, must be served personally on those to whom they are addressed. With reference to the first appellant, he has conceded in his supporting affidavit filed on page 12 of the record of appeal that on the 13th December 1999 at 4.30 p.m. he was served with the summons to enter appearance in the suit, and that he immediately delivered the said summons to his insurance Brokers Ltd. Who forwarded the same to his insurers, STALLION INSURANCE CO. LTD. I hold that there was effective service of summons on the first appellant to entere appearance.

The position of the first appellant is therefore that he did not enter appearance and defence because he had believed that Stallion Insurance Company would engage lawyers to represent him in the suit but to his astonishment they never did so; that he has a strong defence to the suit and it is only fair and just that the judgment in default entered against him be set aside.

With reference to the second appellant, he too has conceded that in the month of August 1998 he was the driver of a public service vehicle Reg. No. KAG 231K. There is undisputed evidence on record that this vehicle was at all material times registered in the names of, and owned by, the first appellant. In law therefore the relationship of principal and agent or master and servant existed between them.

I have already stated herein above that wherever it is practicable, service of court process should be made personally on the person it is addressed unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.

In the present instance, service of summons to enter appearance addressed to the second appellant was served upon his principal or his employer, the first appellant. Evidence of such service comes from Mr. George Mgalla to the effect that the first appellant accepted service on behalf of the second appellant. Further evidence comes from the affidavit of the second appellant on page 35 of the Record of appeal to the effect that the first appellant informed him that a suit had been filed against them and that they should meet, though according to him this information was given to him on the 25th June 2001.

I hold that service of Court Process on the first appellant for and on behalf of his employee (second appellant) in the circumstances of this case where the cause of action arose in the said employee's course of employment, was sufficient and effective service.

For the above reasons there is no merit in the first ground of appeal, which is hereby dismissed.

The appellants' second ground of appeal is that the trial magistrate erred in law in holding that the default judgment entered against them and the 3rd defendant without leave of court as required by Order IXA Rule 7 was regular or could be regularised by the Respondent's request to absolve the third Defendant from liability at the formal proof stage.

Mr. Kimani submitted, in an apparent explanation of this ground that judgment in default was entered against all the defendants. Since the third defendant was the Attorney general, a default judgment could not be entered against him without leave of the court.

Miss Osino's reply was that a default judgment was only entered against the first and second appellants who had been served with the summons. As there had been no such service upon the attorney General, it could not have been said that the unserved Attorney General was in default.

I find favour with Miss Osino's submission. There is no proof that the Attorney General had been served before the interlocutory judgment was recorded. It can only mean that an interlocutory judgment was entered only against the first and second appellants. For this reason I do hereby hold that there is no merit in the second ground of appeal as well. The third ground of appeal is that the trial magistrate acted without jurisdiction when she moved "suo moto" and set aside an irregular default judgment to the great prejudice of the appellants.

Mr. Kimani's submission is that once a court pronounces itself on a matter it cannot proceed suo moto, (of its own) to set aside or vary that pronouncement, whether it is right or wrong. He cited the case of

COHEN VS. JOSESCO 1926 C.A. as his authority for submitting so.

Miss Osino replied and submitted that as the third defendant had not been served with a summons to enter appearance, the purported interlocutory judgment entered against him without leave of the court was irregular, and that the third defendant was entitled to apply for its setting aside "Ex debito justitiae" (in the interest of justice) and the court was entitled to set it aside in the exercise of its inherent jurisdiction.

Miss Osino relied on the case of ***GRAIG VS. KANSEEN (1943) 1 ALL E.R. 108*** where it was held that an order which can properly be described as a nullity is something which the person so affected by it is entitled EX DEBITO JUSTITIAE to have it set aside, and for the procedure, the court in its inherent jurisdiction can set aside its own order.

The inherent jurisdiction of the court is enacted in Section 3A of the Civil Procedure Act in the following words:

> *"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."*

Where therefore an injustice to a party is bound to be occasioned by the issuance of a particular court order, then it seems to me that such an order ought not to be issued under the inherent jurisdiction of the court.

Mr. Kimani's point is that by absolving the third defendant from blame, the trial magistrate placed blame for the accident solely on the shoulder of the second defendant, and yet the Respondent has pleaded in her plaint that the Third Defendant's authorised driver had also been negligent. Therefore, according to him, an injustice was done to the appellants.

The issue is whether, by absolving the third defendant from blame, the appellants have suffered injustice. The answer is simple and it is contained in the first appellant's supporting affidavit on page 12 of the record of appeal i.e. that his claim has been settled by the insurance company through payment of a cheque in the sum of Sh.191,995/-. It would seem to me therefore that no prejudice or injustice has been occasioned to the appellants. There is no merit in the third ground of appeal as well.

I have given due consideration to the remaining grounds 4, 5, and 6 and I find also no merit in them.

The appeal is dismissed, with costs to the Respondent.

It is so ordered.

Dated and Delivered at Mombasa this 29th July 2003.

A.G.A. ETYANG

JUDGE