



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT BUSIA  
CIVIL APPEAL NO. 13 OF 2000

(FROM THE ORIGINAL CIVIL SUIT NO. 490 OF 1999)

**AMOS AKELJO OGUTU.....APPELLANT**  
**-VERSUS-**

**1. JOSEPHAT MAGIO ).....RESPONDENTS**

**2. KABARI MUTHEMBA)**

**JUDGEMENT**

Appellant, AMOS AKELLO OGUTU, hereby appeals against the order of the Senior Resident Magistrate's Court, Busia setting aside a consent order entered into by the parties on the grounds inter alia that the order had not been validated by the insurers of the respondents, JOSEPHAT MAGIO and KABARI MUTHEMBA.

The facts leading to this appeal are not in dispute. The appellant, a fare-paying passenger suffered injuries in a vehicle owned and driven by the respondents on 21st August, 1999. The vehicle was insured by an insurance company called Lakestar Insurance Company. On 6th October 1999, he filed suit against the respondents for damages sustained in the said accident without joining the Company. After serving the summons on the respondents, Messrs. Oye Ashioya entered an appearance on behalf of the respondent together with a defence on 2nd November 1999. The case was then fixed for hearing by consent on which date a consent judgement was entered against the respondent in the presence of the appellants advocate and Mr. Otonga for Mr. Ashioya for the respondents. The appellant then caused a decree to be drawn and proceeded to execute the decree by issue of an attachment order on the insurers.

On being jolted by the execution, the company instructed M/s Wasilwa and Company Advocates to act on its behalf. Although the company was not a party to the proceedings, the counsel chose to enter a change of advocates and installed themselves as the advocates for the respondents. He also filed an application to set aside the consent judgement entered into by the earlier advocates. It was based on grounds inter alia that the advocate did not have authority to act for the insurers or the respondents. In the supporting affidavit, the advocates, averred that the insurers had not instructed the earlier advocates but is silent on as to whether the respondents had at any time instructed the earlier advocates nor did they support the application with the respondents affidavit denying authority. The supporting affidavit merely states that even if the counsel had been instructed by the respondents, the consent order was subject to the approval of the insurers before it could take effect. After hearing the parties and setting up the rival contentions, the trial Learned Magistrate S.O. Omwenga merely ordered the consent judgement to be set aside without giving reasons for doing so!

At the hearing, the parties reiterated their respective cases made before the trial magistrate, with Mr. Wanga for the appellants contending that the ruling was defective as it gave no reasons and that in any case the company's affidavit had not shown that the respondents had not instructed counsel who entered the consent judgement. On its part the company's counsel, Mr. Makali submitted that as the company's affidavit had not been opposed, the court was entitled to go by the averments in the supporting affidavit and grant the orders sought.

I have no quarrel with the respondent's counsel's submission that the application was

undefended. What is of concern is that the company was not a party to the suit and does not say in its affidavit that the respondent on whose part it is now agitating did not authorise counsel to enter into a consent judgement. As there is an appearance and defence by the counsel on record, in the absence of contrary evidence, the only conclusion is that he had authority to act. The court therefore had no grounds to set aside the ex parte judgement against the respondents. That the insurers approval was not obtained prior to the entry of the consent judgment is a matter between it and its insured and not with a third party whose liability arises by operation of Insurance Act.

In view of the above, I find that the trial court erred in setting aside a consent judgment without any grounds on which a contract could have been set aside. I therefore allow this appeal and set aside the order setting aside the consent judgement. In place thereof, I enter an order dismissing the application dated 14th March, 2000 with costs. I also award the costs of the appeal and in the lower court to the appellant.

Orders accordingly.

Dated at Busia this.....day of .....2002.

G.P. Mbito

JUDGE