**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**
**CIVIL APPEAL NO. 394 OF 1999**

**DANIEL CHEGE MWANGI ……….…………………………APPELLANT**

**VERSUS**

**DEL MONTHE KENYA LTD. …….………………………..RESPONDENT**

**J U D G M E N T**

The appeal is against the ruling of the Senior Resident Magistrate R.E. Ougo, (Mrs) delivered on 2nd September, 199 in which she set aside a default judgment entered in the Chief Magistrate's Court Civil Case No. 23 (5 of 1995 at Milimani Commercial Courts, Nairobi).

In her ruling, though the magistrate found that the appellant had been served with summons to enter appearance but he had not done so, she, however, thought he had raised an important issue about the ownership of the motor vehicle which was alleged to have caused the accident subject to the lower court case and this is why she exercised her discretion to set aside the default judgment and to allow him to file a defence within 15 days.

However, in granting the order to set aside exparte judgment the learned magistrate imposed terms, one of which was to deposit half the decretal amount in court in ***joint names of counsel*** for both parties within 21 days from the date of the ruling.

The appellant was unable to meet those terms, hence he appealed to this court.

The appeal was placed before this court on 11th June 2002 when counsel for both parties appeared and submitted either for or against it.

Counsel for the appellant stated that his client was not served with summons to enter appearance – hence default judgment should not have been entered.

That though judgment was set aside, harsh and punitive terms were imposed and that if service of summons was not proper, the exparte judgment could not have been set aside.

That if service of summons was proper, then there was no need to impose terms for setting the exparte judgment aside.

Counsel stated that if service was improper, there was no reason for ordering the appellant to pay costs in the decision to set aside exparte judgment.

And that since the appellant was not the owner of the motor vehicle and that the person driving it was its purchaser, the question of vicarious liability could not arise. Counsel prayed that the appeal be allowed with costs.

Mr. Kirimi for the respondent opposed the appeal and said the same was not as a result of refusal by the lower court to set aside the exparte judgment but failure to meet terms imposed.

According to him this was a case where an application for review would have been appropriate but not an appeal.

That the learned magistrate believed the process server after observing demeanour of the parties who appeared before her. According to him the terms imposed were proper. He prayed for the dismissal of the appeal with costs.

This appeal is really against the terms imposed on the order for setting aside the default judgment.

From the face of the record, and subject to what may be said hereinafter, the respondent's claim against the appellant in the lower court was Kshs.175,589/75.

This is the sum over which a default judgment was entered for the respondent on 29th November, 1997.

However, that judgment was set aside on 2nd September, 1999 by the lower court on conditions amongst others, that the appellant deposits into court half of the decretal amount.

By the time of the order the decretal amount was around Kshs.240,000/= in which case if the order on terms was valid, the appellant would have been required to deposit something like Kshs.120,000/= into court.

Nowhere in his memorandum of appeal or the submissions does the appellant say he was unable to raise this amount but s concerned with the harshness of the terms.

And though the merits of the case have not yet been gone into, the appellant has attempted to bring them to the fore in this appeal.

Order IX(A) rule 10 of the Civil Procedure Rules gives the court a discretion to set aside judgment entered in default of appearance and/or defence upon such terms as are just.

The learned magistrate decided that the appellant had been served with summons – and may be this is why never the less, in exercise of her discretion, she granted the order sought upon terms.

However, she was doubtful about the ownership of the accident motor vehicle and that the appellant had not been personally served with the execution warrant.

I think this is why counsel for the appellant seems to insist that the Order for setting aside exparte judgment should not have been made on terms. But how does this effect the discretion of the magistrate?

There is really no averment that the learned magistrate exercised her discretion unlawfully or improperly to warrant the appellate court to interfere.

This aside, this court has held in the case of ***Peter Kimani Njiriri Vs Priscilla Naliaka Walikhe (HCCC No. 103 of 2002 )*** that if an order of the lower court on terms of security is appealed against, then the appellate court would expect leave to be obtained from the lower court before such an appeal is lodged.

There is no evidence on the lower court file that this was done in respect to this appeal, and if this be so, the competence of this appeal is seriously in question.

There are quite a number of flaws in the lower court record, including whether the judgment recorded was a final one given that the claim is that form was in the nature of special damages which required strict

proof – but with the issue over the competence of the appeal unresolved, there is no way this court can give assistance to the appellant. I dismiss this appeal with no order for costs.

Delivered this 18th day of July 2002.

**D.K.S. AGANYANYA**

**JUDGE**