



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 261 OF 1999

BLUE SHEILD INSURANCE CO. LTD APPELLANT

VERSUS

1. RICHARD MWANIKI THUKU

2. J.G. CHEKA'S CO. LTD RESPONDENTS

J U D G E M E N T

This appeal is against the orders of the Principal Magistrate, (B. Rashid (Mrs.)) in Nairobi Resident Magistrate's Court Civil Case No.8323 of 1995 made on 10th March, 1999.

In that case, the respondent had insured his motor vehicle registration number KWR 934 with the appellant during 1993.

On 10th December, 1993 an accident occurred in which this motor vehicle was involved and the respondent was sued in R.M.C.C No.1329/95. He forwarded summons thereof to the appellant for necessary action but that the latter took no action whereupon judgement was entered against the respondent.

That arising out of this judgement a firm of auctioneers was sent to attach the respondents property for a debt of Kshs.88,279/40 but that in order to avoid this attachment, the respondent paid to the firm of auctioneers, Messrs Linda Auctioneers and Court Brokers that amount.

Then the respondent sought indemnity of this sum from the appellant who took no action and the respondent sued it for recovery of this sum in the above mentioned case.

The case was fixed for hearing on 9th February, 1999 and though the plaintiff and his witness turned up, the appellant or his advocate did not turn up

The other defendant who had been sued with the appellant appeared and the case was heard. The respondent testified on the basis of the pleadings in the plaint and he called one witness.

The other defendant also testified and his evidence was on the basis of how he forwarded summons of the case subject to this appeal to the appellant for further action.

The learned Acting Principal Magistrate delivered her judgement on 17th February, 1999 and found the appellant liable to indemnify the respondent in the sum of Kshs.88,279/40.

An attempt by the appellant to have that application set aside was dismissed on 10th March, 1999 and this

is the origin of the present appeal. There were three (3) grounds of appeal raised in the Memorandum of appeal.

The appeal was placed before this, court on 13th June, 2002 for hearing when counsel for the appellant complained that this Magistrate erred in taking into account the evidence of the 2nd respondent which was given *ex parte* and that she did not exercise her discretion properly.

Counsel then explained why on the hearing date he did not appear in court – because the hearing date was not noted in his diary due to inadvertence and that this is a situation where the lower court should have exercised its discretion in favour of the appellant as the client should not be made to suffer due to the fault of his counsel.

Counsel for the 1st respondent opposed the appeal submitting that the Magistrate was justified in refusing to set aside the judgement because the application was fatally defective.

That the appellant should have shown cause why the *ex parte* judgement should be set aside and that he did not do so and that confusion within counsels' office was not a *bona fide* mistake. He prayed to the application to be dismissed with costs.

Counsel for the 2nd respondent also opposed the appeal and said his client had been awarded costs against the appellant.

That his client had reported the accident to the appellant on 11th December, and that he was also notified of the application. He too prayed for the appeal to be dismissed.

I have heard and recorded these submissions from counsel for both parties and perused the record of proceedings and ruling subject to this appeal.

The only reason the appellant gave for not turning up in court during the hearing of the case was that though his clerk was at the registry at the time of taking a hearing date, that date was not entered in counsel's diary hence he did not know of it.

Counsel must be saying then that this was sufficient cause to have prevented him from attending court, or as he put it, this was a *bona fide* mistake.

The mistake, if at all, was by counsels clerk, who unfortunately swore no affidavit to say exactly what might have happened; or what made him not record the hearing date in the correct diary. I would expect if an advocates clerk goes to the registry to take a hearing date he does so with the relevant diary otherwise if for some reason the diary is not available he has to wait until it is available for him to do so.

It would, to my mind be gross negligence for the said clerk to purport to fix a hearing date on a piece of paper hoping to go back to the office and enter that date in the diary when he goes back to the office as anything can happen to that piece of paper along the way.

I would not consider this a *bona fide* mistake or sufficient cause to warrant the court exercise its discretion in a situation like one in favour of the appellant in the application subject to this appeal.

Rather I would call it lack of proper office management or as counsel for the first respondent called it "confusion in the advocates office".

It is true time and again courts have held the view that mistakes of counsel should not be blamed on their clients. But it is now time to realize that when a client instructs counsel to act for him in any litigation he gives him/her full mandate to apply all his wisdom, energy and legal knowledge to do the right thing in that litigation.

All he does, right or wrong is for and on behalf of his client. Thus the client must be prepared to suffer the

consequences of the mistakes of his counsel just as he enjoys the fruits of a job well done. So when counsel submit before courts that mistakes of counsel should not be attributed to the client, they should not forget the doctrine that the Principal is usually held liable for acts of his agent.

In my view, the learned Principal Magistrate exercised her discretion correctly when she dismissed the application to set aside the ex parte judgment and I do not find any justified reason to dismiss this decision.

I dismiss this appeal with costs.

Delivered this 5th day of July, 2002.

D.K.S AGANYANYA

JUDGE