REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 590 OF 2002

MARTHA MUTEMI………………………………..PLAINTIFF

VERSUS

MOHAMMED ELZI NAROJ & ANOTHER……DEFENDANT

RULING

In this application filed on 19th July, 2002 the defendant/applicant seeks orders:

"3. THAT the exparte judgment entered herein against the defendant on

19th February, 2002 and all consequential orders be and is hereby set aside.

4. THAT the defendants statement of defence attached herewith be deemed as duly filed subject to the payment of the requisite court fees"

It is brought under O. 0. IXA Rule 10 of the Civil Procedure Rules, S. 3A of the Civil Procedure Act and all enabling provisions of the law and supported by the second defendants affidavit denying service of the summons.

The background to the application can shortly be stated on or about 28th April, 2000, the 2nd applicants motor vehicle No. KAM 174B driven by the 1st defendant as agent is said to have been negligently driven and overturned thereby causing fatal injuries to the plaintiff/respondents son who was a passenger therein. After the said incident, the respondent filed this suit on 11th April, 2001 and according to the affidavit of service filed on 11th June 2001, the summons thereof were served on the applicant on 8th May, 2001 at Wilson Airport in the presence of the plaintiff. It is also state that the summons were acknowledged by the applicants secretary on his instructions. As no appearnce or defence had been filed after 15 days, the respondent sought an interlocutory judgment which was entered on 19h June , 2001 and judgment entered for shs 1,660,565/= on 19th February, 2002 Execution proceedings were then commenced, leading to the application in which as stated already the applicant denies service and contends that the accident was not caused by negligence nor was the deceased entitled to be in the vehicle and as such contributed or voluntarily exposed himself to the perils which caused injuries for which he is not entitled to claim damages from the applicants.

The respondent however contends that the summons were duly served and that the applicant does not have any possible defence to the suit.

In considering application s to set aside exparte judgments and orders, the courts discretion is unfettered and is only subject to the interest of Justice. According to O.9A Rule 10:

"10. Where a judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just"

Although the discretion is wide and justice undeterminable, the discretion being judicial should be exercised on tested principles. In the case of Pithon W. Maina Versus Thuku Mungiria (1982-1988) 1KAR 171, at page 172 Pother JA stated as follows in the first paragraph :

"….As regards the exercise of that discretion, certain principle are now well established in our law.

Firstly, as was stated by Duffins P in Patel versus E.A. Cargo Handling Services Ltd (1974)E.A 75 at page 76 letter C and E:

"There are no limits or restrictions on the Judge's discretion except that if he does vary the judgment he do so on such terms as may be first. The main concern of the court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the inside discretion given to it by the rules"

Secondly as Harris J said in Shah versus Mbogo (1967)EA 116 at page 123 letter B:

"This discretion is intended so to be exercised as to avoid injustice or hardship resulting from accident, in advertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

Notwithstanding the above, it is not the practice of the court to lay down in detail the manner in which its discretion should be exercised. As stated in Shabir Din versus Ram Parkesh A (1955) 22 EA CA 48 by Buggs JA at page 51:

"I consider that under Order 9 rule 20(of 1948), the discretion of the court is perfectly free and the only question is whether upon the facts of any particular case, it should be exercised….. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised"

Finally, as stated by Sheridan J in Sebii Dirstrict Administrative versus Gesyali (1968) EA 300 at page 301 letter I and page 302 letters A to C:

"It is not disputed that the appellants have a defence on the merits of the case. Nor does it appear that they have been trying to abstract or delay the course of justice. As they become aware of the judgment by application for execution, they took steps to rectify the position. In this circumstances, the justice of the case required the defence to be heard on its merits. Kanji Pshatham Toptein versus KC patel (1958)EA 346. As was said by Ainly J (a he then was in Jammedess versus Sodha versus Gondhands Henry (1052) 7ULR at page 11: "………………. I yet think that in sufficient attention was paid by the …….. court to the fact that the applicant had a defence to put forward and to the fact that no great hardship would have been likely to result to the respondent if an appropriate order for costs had been made.

The nature of the action should be consider3ed the defence if one is brought to the notice of the court, however irreparably, should be considered, the question as to whether the plaintiff can be reasonable compensated by costs for any delay occasioned by the delay should be considered and finally I think it should always be remembered that to deny the subject hearing should be the last resort of a court"

On the facts of this case I have no doubt that the summons were served on the applicant. If this had not been the case, an affidavit should have been filed denying the alleged acknowledgement on the summons returned. As there is no proof that the refusal to sign was intended to delay or obstruct the cause of justice, I do not unduly hold this against the applicants.

The next issue that should be considered is there is a defence to the applicants suit. In this regard, it is not denied that the respondents was a passenger in the applicants vehicle. The mere fact that he had agreed or volunteered to have a lift or travel in the applicants vehicle is not in my view a defence to a suit for injuries caused by such a vehicle to a volunteer therein. Similarly as vehicles driven with due care and attention are not know to overturn and roll while being driven, I also see no merit in the defence of the alleged "act of God" as no particulars of the unforeseen actions were set out in the defence.

Despite the above it is observed that although the deceased was in receipt of a small ………… the amount awarded was fairly large. It was over 1.6 million. This suggest that a wrong principle could have been taken into account in computing the damages payable.

In view of the above, I find that in the light all the facts herein including this intended defence, would not serve any purpose other than delay for the interlocutory judgment to be set aside. I am however satisfied that the applicant could very well show that wrong principles were considered in arriving at the general damages. I therefore set aside the formal proof and the judgment entered there under and order that the matter do proceed to assessment of damages inter parties. I grant costs of this application and throw away cost to the respondent in any event. Orders accordingly.

Delivered and signed this 13th day of December, 2002

G. P. Mbito

JUDGE