REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1164 OF 2000

KELILI OLE KUNA……PLAINTIFF

VERSUS

JONATHAN OLE NGOUWA……DEFENDANT

RULING

This is an application to set aside an interlocutory judgment entered against the defendant on 30th October, 2002 for failure to enter an appearance and defence.

Briefly, the plaintiff filed the suit for damages for injuries suffered in a road traffic accident said to have been caused by the defendants tractor on 21st October 1999. On 8th October, 2000, the plaintiffs process server filed an affidavit of service that he had served summons on the defendants on 17th August, 2000 in a "small village called Siliita" in the presence of the plaintiff but referred to sign.

On the basis of the said affidavit, an interlocutory judgment was entered against the applicant on 30th October 2000. The final judgment was then entered against the applicant on 10th April, 2000 after formal proof and experte execution was embarked upon as a result of claim the applicant then filed the current application on 26th April, 2002 contending that he had not been served with summons and later he had come to know about the suit on 20th August, 2000 and that the tractor which allegedly caused the accident was not served by him but is hired. He further stated that he had no home at Solitu but lives at Uaso Nyiro. The application is however opposed on the grounds largely that the same violates rules of procedure and that the intended defence is a mere denial.

Mr. Kinyanjui for applicant submitted that it was doubtful if the applicant was served as he does not stay at such a place and as there was no independent witness to the service the court should not accept the affidavit of service. Learned Counsel also drew the attention of the court to the fact that in a letter affidavits.

The affidavits appear to have been signed by different persons though in the name of the process server was served the summons.

Mrs Mongere for the respondent strongly opposed the application. She submitted that the applicant was pointed out by the respondent to the process server and the plaintiff knew the defendant very well and the place said to be Salita was the place where the applicant was found.

On merits of the intended defence, she submitted that as it was agreed that the tractor was in the control and use of the applicant, he was thereby vicariously liable for the actions of its driver while doing work

for him. Hence even if the respondent had no right to be on the tractor, the owner of the tractor was still vicariously liable if such a person suffers injuries through the negligence of such agent. Accordingly in her view, the defence was a mere sham.

The manner in which the court should exercise its jurisdiction when dealing with applications to set aside an ex parte judgment for failure to enter an appearance or file a defence is now well established. Firstly, as was stated by Duffins P in Patel versus E. A Cargo Handling Services limited (1974) E.A 75 or 76 letter C and E:

"There are no limits or restriction on the Judge's discretion

except that if he does not vary the judgment he does as on such

terms as may be just …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 order discretion give to it by the rules"

Secondly, as was stated by Harris J in Shah versus Mbogo (1967) EA 116 at page 123 letter B:

"This discretion is intended so to be exercised to avoid

injustice or hardship resulting from accident, in…….. ,

or excusable mistake or error, but is not designed to assist

the person who has deliberately sought, whether by evasion

or otherwise, to abstract or delay the course of justice"

Proceeding with the above principles in mind, it is observed that service of summons is denied by the applicant as is the residence or a place called "Salita". On the other road, the respondent is known to the applicant and could not have been mistaken in identifying the applicant to the process server. However as he was an interested party, he may have had interest in not identifying the right person so as to obtain an easy judgment from the court against the applicant. On account of this and the lack of a contravening affidavit from the respondent, I am inclined to give the benefit of doubt to the applicant.

As regards the merits of the intended defence, its observed that while the defence is on breath denies ownership of the tractor and implicitly liability for actions of the driver, it also alleges that the drier had strict orders not carry passengers. He also states in the affidavit that the respondent had fallen down while trying to jump onto the tractor without knowledge of the driver. Although these contentions appear to be inconsistent, they also suggest that the respondent was either wholly to blame or substantially contributed to the accident. The intended defence therefore raises the issue of interlocutory negligence. It would therefore be unjust to deny the applicant the chance to defend himself in these circumstances.

In view of the above and for the aforesaid reasons, I hereby set aside the interlocutory judgment entered against the applicant on 30th October, 2000 and all subsequent proceedings, decree and subsequent process in this suit and grant the applicant leave to file his defence within 15 days hereof.

As it is not clear if the applicant has or was not served with the summons herein, I order that the costs herein and so far to be in the cause. Orders Accordingly.

Delivered and signed this 11th day of December 2002

G.P. MBITO

JUDGE

11.12.02

Coram: Mbito J.

Kahingu

Ngata for plaintiff/respondent

Kinyanjui for defendant/applicant

Order: Read and signed

G.P. Mbito

JUDGE