



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO. 21 OF 2012

**BOARD OF TRUSTEES,
NAIROBI PENTECOSTAL CHURCH.....APPELLANT**

VERSUS

JOSEPH ALWANDA.....1ST RESPONDENT

SAMMY MUGADI.....2ND RESPONDENT

STEPHEN LWANGU AVISTINU.....3RD RESPONDENT

(Being an Appeal from the Ruling of the Principal Magistrate's Court at Kericho delivered on 7th May, 2012 by the Hon. Ndururi Principal Magistrate)

JUDGMENT

The Board of Trustees, Nairobi Pentecostal Church, the appellant herein, filed an application dated 24th March 2012 in which it sought for *inter-alia* orders to set aside the ex-parte judgment and to be allowed to defend the suit. The aforesaid application was heard and dismissed on 7th May 2012 by Hon. Ndururi, learned Principal Magistrate. The appellant was aggrieved hence this appeal.

On appeal, the appellant put forward the following grounds:

1. **The learned Trial Magistrate erred both in law and in fact by failing to find that the Appellant had been served with summons to enter appearance and plaint.**
2. **The learned Trial Magistrate erred both in law and in fact by failing to find that the firm of Moronge and Company Advocates had acted for the Appellant without instructions.**
3. **That the learned Magistrate erred in in law and in fact in disregarding the Appellant's defence that it was neither the registered owner of motor vehicle registration number KAH 920K nor the insured.**
4. **That the learned Magistrate erred in law and in fact in failing to appreciate who between the Appellant and the 2nd Respondent was the registered owner and insured of motor vehicle registration number KAH 920K.**
5. **That the learned Magistrate erred in law and in fact in finding that the Appellant was liable in damages in the absence of evidence.**

6. **That the learned Magistrate erred in law and in fact in her failure to set aside the judgment and decree in the light of new evidence that the firm of Moronge & Company Advocates which had purported to act for the Appellant did not in fact have such instructions.**
7. **That the learned Magistrate erred in law and in fact in failing and or refusing to set aside the judgment and hear the case and on its merit.**

When the appeal came up for hearing, learned counsels appearing in this appeal, recorded a consent order to have it disposed of by written submissions. Before considering the substance of the appeal, let me set out in brief the case that was before the trial court. At all material times, the Board of Trustees, Nairobi Pentecostal Church, was the registered owner of Motor Vehicle registration no. KAH 920K until 7th July 2006 when the motor vehicle was sold to Sammy Mugadi, the 2nd Respondent herein who took possession from then on. On 16th September 2006, the aforesaid motor vehicle was involved in a road traffic accident along Kericho-Kisumu road. Among those injured as a result of the accident are **Joseph Awanda**, the 1st Respondent herein. It would appear at the time of the accident, the 2nd Respondent had not caused the aforesaid Motor vehicle to be transferred and registered in his name. Therefore, a search at the registrar of motor vehicles would still reflect the appellant's name as the registered owner of the vehicle. The 1st Respondent, filed a compensatory suit for the injuries he suffered vide Kericho P.M.C.C.C no.573 of 2006 against the appellant, 2nd Respondent and one **Stephen Lwangu Avistinu**. The firm of Moronge & Co. Advocates filed an appearance on behalf of all the defendants (Respondents) and even proceeded to file a defence. The case was heard, finalised and judgment entered against all the defendants (Respondents). On 22nd March 2012, the appellant's properties were attached. It is the appellant's contention that it was not served with process and that the firm of Moronge & Co. Advocates acted on behalf of the appellant without instructions. It is further the argument of the appellant that the accident occurred at a time when motor vehicle registration no. KAH 920K had been sold and possession given to **Sammy Mugadi**, the 2nd Respondent. The appellant has further cried foul that it was condemned unheard. For the above reasons, the appellant sought for the exparte judgment set aside to enable the appellant defend the suit.

Having set out in brief the history behind this appeal, let me now turn my attention to the merits or otherwise of the appeal. I have considered the rival submissions. It is the submission of Mr. Obae, learned advocate for the 1st Respondent that this appeal lacks merit and is meant to delay the conclusion of this matter. The 1st Respondent has raised doubt whether the 2nd and 3rd Respondents were served with the documents relating to this appeal. The 1st Respondent argued that the order appealed against was justified to be issued in the circumstances. It is said that a similar application was heard and dismissed by Hon. Okuche vide Kericho P.M.C.C.C no.575 of 2006 and no appeal was preferred hence Hon. Ndururi was right to dismiss the application for being *res judicata*. This later argument is not challenged. I think, it is appropriate for me to consider this issue as a preliminary point. It is apparent from the replying affidavit of Joseph Alwanda sworn on 29th March 2012 filed to oppose the Motion dated 24th March 2012 that the 1st Respondent had argued that the application was *res judicata* in view of the fact that a similar application was filed, heard and determined by Hon. Okuche vide Kericho P.M.C.C.C no.575 of 2006. It was argued that upon the dismissal of its application, the appellant proceeded to settle the decretal sum in full together with the auctioneers charges. A cheque for payment was annexed to the affidavit filed to support that application. It would appear the Appellant filed a further affidavit in which a search dated 16/04/2012 was annexed thereto showing that the aforesaid motor vehicle was registered in the name of the 2nd Respondent on 16th September 2006. Hon. Ndururi did not consider the merits of the application but proceeded to dismiss the same on the basis that it was *res judicata* since Kericho P.M.C.C.C no.573 of 2006 was the test suit. A test suit or test case or action is defined in **Blacks Law Dictionary, 9th edition** as follows:

“An action selected from several suits that are based on the same facts and evidence, raise some questions of law, and have a common Plaintiff or a common defendant. Sometimes, when all parties agree, the court orders a consolidation and all parties are bound by the decision in the test case.”

I have taken the liberty to peruse the file relating to **Kericho P.M.C.C.C no.575 of 2006, Joab Jairo Amwai =Vs= The Board of Trustees, Nairobi Pentecostal Church and Two others** and it is apparent

that the appellant herein had filed an application similar to the Motion which was heard and determined by Hon. Ndururi. That application was heard and dismissed by Hon. Okuche, learned Senior Resident Magistrate. There is no evidence to show whether the appellant filed an appeal to challenge that ruling. The question is whether that decision delivered in respect of a similar application made the test suit *res judicata*? I have agonised over the issue and I think Honourable Ndururi fell into error when he failed to appreciate the fact that it is only the decision made in the test case file that binds the rest of the cases and not vice-versa. The decision made by Hon. Okuche in a file which was not a test case did not affect the other files. The other issue which Hon. Ndururi fell into error is that he misapprehended the fact that the test case was only limited to the question of liability. The question as to whether or not there was proper service was never an issue captured in the consent order relating to the test suit file. Consequently, the learned Principal Magistrate should have considered the merits of the Motion. In view of the fact that the Merits of the Motion was not considered I do not intend to do so. The best is to allow the appeal and refer back the Motion for a fresh reconsideration by an independent Magistrate other than those who handled the matter.

In the end, the appeal is allowed. The order dismissing the Motion dated 24th March 2012 is set aside. The aforesaid Motion is restored and ordered to be reheard afresh before another Magistrate of competent jurisdiction other than Honourable Ndururi and Honourable Okuche. Costs of the appeal to be paid by the 1st Respondent to the Appellant.

Dated, signed and delivered in open court this 14th day of March, 2014.

J.K.SERGON

JUDGE

In the presence of:

Mr. Obae for the Respondents

N/A Mr. Onduso for Appellant