



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO.30 OF 2012

MONICA M. NDUNGU1ST APPELLANT

VINCENT OTABA2ND APPELLANT

VERSUS

ZEBIO JUMA KWEYURESPONDENT

J U D G M E N T

1. This Appeal arises out of interlocutory proceedings. A plea by the Appellants (hereinafter the 1st and 2nd Defendants) asking the Subordinate Court to set aside an *exparte* judgment entered on 6th October 2009 was rejected.
2. In the Memorandum of Appeal, the following grounds are raised:-

“1. THAT the Learned Magistrate erred in fact and law in deciding in favour of the Respondent without having properly analysed the issues that were in dispute.

2. **THAT the Learned Trial Magistrate erred in fact and law in failing to appreciate the law with regard to the issues that were under consideration.**
3. **THAT the Learned Trial Magistrate erred in law and fact in dismissing the application as against the Applicant by heavily relying on an alleged grounds that the case was an old one.**
4. **THAT the Learned Trial magistrate erred in fact and law in failing to accord the appellant a chance to be heard simple and clear.”**

3. This is the short background to the matter. In an amended plaint dated 1st October 2007, the Respondent (hereinafter “the Plaintiff” as in the Lower Court matter) sued the 1st and 2nd Defendants together with another for General and Special Damages in respect to a road accident that occurred on 18th January 2005 in which one Boniface Ouma Kweyu met his death. The 1st and 2nd Defendants had entered appearance through the firm of Eboso and Wandago Advocates on 14th November 2006. In reaction to the Amended plaint, the said firm filed an Amended Defence dated 16th June 2008 this time for all the Defendants.
4. The Court record shows that the matter came up for hearing on 11th February 2009 and proceeded *exparte* after the Trial Court remarked,

“The Defendant is duly served and the Affidavit of service is filed accordingly. The Defendant Counsel is absent. I therefore order that the case proceeds *exparte*.”

On that day the Plaintiffs evidence was heard. Further hearing was reserved for 1st April 2009.

5. On April fools day the Defendants Counsel was again absent and the Court being satisfied that they had duly been served again proceeded ex parte and received the evidence of Alice Omoyekhu Onyango. Both the Plaintiff and Defence case were marked as closed and judgment reserved for 13/5/2009. Judgment was subsequently delivered on 6th October 2009 in favour of the Plaintiff for damages of ksh.984,500/=.
6. It was an attempt to enforce that judgment by way of attachment of the 1st Defendants property that prompted the 1st Defendant to file summons dated 1st February 2009 seeking to set aside the judgment. That application was supported by the grounds on its face and affidavits by the 1st Defendant and of his Counsel Bernard Mweresa Eboso. The 1st Defendant made some rather unhelpful averments that he never instructed the firm of Eboso & Wandago Advocates. Yet Mr. Eboso did confirm he had the conduct of the joint Defence.
7. Anyhow, the said Counsel stated that his firm was aware of the hearing date of 1st April 2009. That he had a day earlier spoken to a Mr. Shitemi of the firm of Maloba & co. appearing for the Plaintiff in which they agreed to take out the matter. A letter following up that conversation was attached to the said affidavit and shown to Court. He then assumed that the matter had been taken out as agreed.
8. Responding to the application, Betty Maloba for the Plaintiff sworn an affidavit on 14th February 2012. In it she emphasized that the 1st Defendants Counsel was well aware of the hearing dates and even the judgment date. She also argued that the Application was without merit as the Applicant had not made any offer for security. She further lamented about the cost of reassembling the witnesses if the matter was to be rebooted. Lastly she made mention of an earlier application of similar nature which had been rejected by Court. She pleaded res-judicata. However, this latter point does not appear to have been pressed at the hearing.
9. In a ruling dated 26th April 2012 the Learned Trial magistrate dismissed the Application. Basically she was satisfied that the 1st Defendant was fully aware of the matter and of the hearing dates. She also noted that the matter was an old one having commenced in 2006.
10. In the Appeal, the 1st and 2nd Defendants rehashed the arguments made before the Lower Court and added that the Defence revealed a serious and triable issue. That is the question of the ownership of the motor vehicle.
11. Importantly, I think, the point was made that there was no rebuttal by Counsel for the Plaintiff that there was indeed an agreement with the Defendants Counsel to have the matter taken out of the list of 1st April 2009.
12. In response, the Plaintiff urged this Court to find that the judgment was regular and that the Trial Court properly applied the principles set out in the renowned case of (**Shah -vs- Mbogo** [1998] EA 93).
13. The Application must necessarily attract a short answer from this Court. There cannot be a dispute that the 1st and 2nd Defendants Counsel was fully aware of the hearing dates of 1st February 2009 and 1st April 2009. In respect to the former that was not denied. As to the latter, there is an affirmation that they were well aware of it. What however sways me away from the conclusion reached by the Trial Court is Mr. Eboso's averments that he had agreed with the Plaintiff's Counsel that the matter would not proceed on 1st April 2009. There is then this follow up letter by the said Counsel,

“Or Ref: V9/016/1

2 April 2009

Maloba & Co. Advocates

New County Council Building

1st Floor, Rooms 2 & 5

P.O. Box 308-50400

Busia (K)

Dear Sir(s)

RE: BUSIA PMCC NO.400 OF 2006

ZEBIO JUMA KWEYU –VS- MONICA M NDUNGU & ANOTHER

Refer to the Shihemi/Eboso telephone discussion of 31/03/09 during which it was agreed that the above matter would be taken out of the hearing list of 01/04/09.

Kindly, let us know the fresh hearing date so that we advise our Clients early enough to instruct a Busia-based law firm to handle their defence.

Yours faithfully

For: EBOSO & WANDAGO ADVOCATES

B M EBOSO (MR)

/mnw

c.c. 1 Clients

2 The Principal Magistrate

Busia Law Courts

Busia (K)”

14. Neither the agreement nor the contents of the letter were rebutted by the Plaintiff’s Counsel. On this critical matter there was a palpable silence from the Plaintiff’s Counsel. Whilst I would be aware that the Trial Court was entitled to reject the agreement by Counsels not to proceed, I hold that the Plaintiff’s Counsel should have been candid enough to bring this to the Court’s attention. Instead, Mr. Ipapu then appearing for the Plaintiff said,

“The Defendant was duly served and is absent. I wish to proceed.”

It was on that basis that the Court then conducted an *ex parte* hearing.

15. It is for this lack of candour that the Plaintiff must suffer a setback. I allow the Appeal in its entirety with costs. The judgment of 6th October 2009 is hereby set aside. The matter shall proceed *denovo* before any other Magistrate other than those who heard the matter substantively, delivered judgment or dealt with the Application.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 15TH DAY OF MAY 2014.

INTHE PRESENCE OF:

KADENYI.....COURT CLERK

N/A.....FOR 1ST APPELLANT

N/AFOR 2ND APPELLANT

MALOBA.....FOR RESPONDENT