REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 320 of 2005

RHINO SAFARIS LIMITED……..……..APPELLANT

VERSUS

SULEIMAN NJUGUNA……..RESPONDENT

(An appeal from the ruling of the Honourable Senior Resident Magistrate delivered on 22nd April, 2005 in CMCC No.6849 of 2002 at Milimani Commercial Courts, Nairobi)

J U D G M E N T

1. Rhino Safaris Ltd (hereinafter referred to as the appellant), is aggrieved by the ruling delivered by a Senior Resident Magistrate, in Nairobi CMCC No.6849 of 2002. In the ruling the trial magistrate dismissed the appellant's application seeking to have the judgment entered against it on 1st March, 2005 set aside. The appellant filed a memorandum of appeal setting out 9 grounds against the ruling as follows:

   (i) That the learned trial magistrate erred in fact and law in finding that the firm of Mereka & Company Advocates, and Hudson Wafula & Company Advocates, were properly on record for the appellant during the hearing of the suit in the lower court, in the absence of any Affidavit, document or

evidence to show how the said advocates were instructed by the appellant to act on its behalf in the said suit.

(ii) That the learned trial magistrate erred in law and fact in finding that the firm of Mereka & Company Advocates was properly on record for the appellant during the hearing of the suit, merely because a consent letter allowing Kagwimi Kang'ethe & Company Advocates to take over the conduct of the suit was signed, and field in court on 24th March, 2005 and failed to appreciate and find that the consent was purely for the purpose of fulfilling the requirements of Order III Rule 9A of the Civil Procedure Rules and not an acknowledgement that Mereka & Company Advocates was properly on record previously.

(iii) That the learned trial magistrate erred in finding that the appellant was properly represented by Mereka & Co. Advocates during the trial of the suit without any proof or Affidavit from the said firm and failed to properly weigh and analyze the evidence of the appellant and find therefrom that the said firm was never instructed by the appellant.

(iv) That the learned trial magistrate erred in law and fact in finding that the judgment entered against the appellant on 1st March, 2005 was a regular judgment without any evidence to show how the appellant was served with the summons to enter appearance in the suit and/or without any evidence showing how the appellant was notified by the respondent of the existence of the suit.

(v) That the learned trial magistrate erred in fact and law in finding that the judgment entered on 1st March, 2005 was a regular judgment and failed to appreciate and hold that in the absence of proof of service of the summons to enter appearance the judgment was irregular and the appellant was entitled to have the same set aside *ex debito justitiae*.

(vi) That the learned trial magistrate failed to comprehend and appreciate the meaning and import of the provisions of Order V Rules 8, 9 and 15 of the Civil Procedure Rules and to find that the judgment entered against the 1st defendant was irregular *abinitio* for want of compliance with the said legal provisions.

(vii) That the learned trial magistrate erred in law and fact by failing to consider at all the evidence presented by the appellant in its affidavit and to make a prima facie finding that the appellant had already transferred the ownership of motor vehicle Registration No.KAB 930Y to a third party and to accordingly allow the appellant to defend the claim.

(viii) That the learned trial magistrate erred in law and fact in finding that the appellant was the owner of motor vehicle registration NO.KAB 930Y merely because a certificate of registration was produced by the respondent during the trial and failed to appreciate that under Section 8 of the Traffic Act Cap 403 of the Laws of Kenya, the fact of registration is not conclusive evidence of ownership of a motor vehicle and is rebuttable by evidence.

(ix) That the learned trial magistrate failed to apply and consider the usual legal principles supposed to be considered in an application seeking to set aside a judgment and generally failed to properly analyze and weigh the evidence presented before her thereby leading to an error and a wrong decision.

2. In the chamber summons dated 23rd March, 2005, which was subject of the ruling under appeal, the appellant sought *inter alia* three main orders:

> Firstly, that the firm of Kagwimi Kang'ethe and Co. Advocates be and is hereby granted leave to take over the conduct of the case on behalf of the appellant;
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> Secondly, that the judgment entered against the appellant on 1st March, 2005 be set aside, and the appellant be granted unconditional leave to defend the suit; and
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> Thirdly that pending the hearing of the application, there be a stay of execution of the judgment until further orders of the court.

3. The main grounds upon which the application was anchored as stated on the body of the application and a supporting affidavit sworn by the appellant's general manager, Lacty De Souza were as follows:

(i) That the appellant was not aware of the suit against it as it was not served with summons to enter appearance nor was it served with any hearing notice.

(ii) That the appellant never instructed the firms of Hudson Wafula and Co. Advocates, or Mereka and Company Advocates, who purported to appear for the appellant in the suit.

(iii) That the appellant had a good defence to the suit filed against it as it was not the owner of motor vehicle KAB 930Y nor was Andrew G. Nganga an employee or agent of the appellant.

4. The appellant further annexed to the supporting affidavit documents showing that the motor vehicle was sold by the appellant to DT Dobie & Company Ltd in 1995.

5. The application was opposed by Suleiman Njuguna who was the plaintiff in the lower court, (hereinafter referred to as the respondent). In a notice of preliminary objection filed on 1st April, 2005, it was contended that the application was incompetent, and bad in law, having been filed by an advocate not properly on record, and that it was an abuse of the process of the court, having been brought by way of a wrong procedure.

6. In a replying affidavit the respondent swore that the appellant was properly served with summons to enter appearance, and that the respondent duly entered appearance and filed a defence. It was maintained that the appellant was the registered owner of the subject vehicle and the documents referred to in the supporting affidavit were only meant to mislead the court.

7. In support of the appeal, both counsels have filed written submissions upon which this court is urged to determine the appeal. For the appellant it was submitted that the trial magistrate was wrong in

finding that the Firms of Hudson Wafula and Co. Advocates, and Mereka & Co. Advocates, were properly on record. It was pointed out that the memorandum of appearance filed by Hudson Wafula showed that he was entering appearance for 1st and 2nd third party, and not for the appellant who were named as 1st defendants. It was argued that there were no 3rd parties to the suit and therefore the memorandum of appearance, filed by Hudson Wafula & Co. Advocates was a nullity.

8. It was further submitted that the firm of Mereka & Company Advocates who purported to take over the conduct of the suit on behalf of the appellant from Hudson Wafula & Co. Advocates, had no legal capacity to conduct proceedings on behalf of the appellant. It was maintained that the evidence of the appellant under oath that it never gave instructions to the said firms to represent it, were not controverted. It was pointed out that the consent signed by Mereka & Co. Advocates and Kagwimi Kang'ethe & Co. Advocates, allowing Kagwimi & Co. Advocates to take over the case for the appellant, was not an admission that Mereka & Co. Advocates were properly on record, but was merely done in compliance with Order III Rule 9A of the Civil Procedure Rules. It was submitted that no affidavit of service was filed to prove that summons to enter appearance was served on the appellant. Accordingly, it was argued that the judgment entered against the appellant was irregular and ought to have been set aside unconditionally.

9. Further it was submitted that the trial magistrate failed to consider the evidence contained in the appellant's supporting affidavit. The affidavit showed that the appellant had a good defence to the respondent's suit, as it had transferred the ownership of the subject vehicle to a 3rd party. The affidavit also showed that the person sued as the 2nd defendant was not the appellant's agent or servant. The court was

therefore urged to find that the trial magistrate erred in failing to set aside the judgment against the appellant and in refusing to allow the appellant leave to defend the suit unconditionally.

10. For the respondent, it was submitted that all the three advocates who handled the suit in the lower court on behalf of the appellant were properly on record. It was maintained that there was no evidence to show that the advocates who appeared for the appellant in the lower court had no instructions from the appellant. Nor was there evidence that any complaint was made to the police or the Law Society of Kenya against any of the advocates.

11. Regarding the memorandum of appearance filed by Hudson Wafula & Company Advocate, it was noted that the appearance entered for the 3rd party was a mistake which should not be visited upon the respondent. It was maintained that the filing of the documents on behalf of the appellant by the advocates was sufficient to confirm their authority. Therefore, if the appellant suffered any prejudice, his remedy lies upon the said advocates.

12. With regard to service of summons, it was contended that the filing of an affidavit of service only becomes mandatory where a plaintiff is proceeding under order IXA Rule 2 of the Civil Procedure Rules. It was maintained that that was not the case herein. Moreover, the appellant's application filed in the lower court was brought under Order V Rule 8 & 9, Order IXB Rule 8 & 9, Order XXI Rule 22, Order III Rule 9A of the Civil Procedure Rules, none of which provided for setting aside of the *ex parte* judgment due to lack of service. It was therefore argued that the judgment was regular and should not be set aside.

13. As regards the ownership of motor vehicle KAB 960Y, it was submitted that the appellant's remedy if any, lied in an appeal against the

judgment of the lower court, and not by way of moving the lower court to set aside that judgment. It was further maintained that the ownership of the subject vehicle was established by a copy of records from the Registrar of the motor vehicles. It was maintained that that the motor vehicle was transferred from the appellant to DT Dobie and not vice versa. The court was therefore urged to dismiss the appeal.

14. I have carefully considered the proceedings of the lower court and the submissions made before me. I do note from the record that a memorandum of appearance was filed by Hudson Wafula & Co. Advocates on 20th August, 2003. In the memorandum of appearance, Hudson Wafula & Co. Advocates indicated that they were appearing for 1st and 2nd third party whom they did not name. That memorandum of appearance was defective as there was no third party in the suit.

15. Nevertheless, Hudson Wafula and Co. Advocates did file a defence on 2nd September, 2003 on behalf of the appellant and Andrew G. Nganga who were the 1st and 2nd defendants. That defence was filed before any judgment was entered against the defendants. Therefore, Hudson Wafula & Co. Advocates properly came on record on behalf of the appellant and Andrew G. Nganga as at 2nd September, 2003.

16. It is evident from the court record that Mereka & Co. Advocates filed a notice of change of advocates on 17th December, 2003, indicating it was coming on record for the appellant and Andrew G. Nganga in place of Mesrs Hudson Wafula & Co. Advocates. That document was properly filed. Thus it is the firm of Mereka & Co. advocates who were on record for the defendants when the hearing of the case proceeded on 21st January, 2005, and an advocate, Mr. Mutua, indicated that the defence had no evidence to offer. Although the appellant denies having instructed

the firm of Mereka & Company Advocates, and Hudson Wafula & company Advocates, there is nothing to confirm that the two firms had no instructions to represent the defendant.

17. As was observed by the respondent's counsel, there is no evidence that the appellant has lodged any complaint to any authority regarding the alleged misrepresentation by the two firms of advocates. Advocates are officers of the court and the allegation made against the two firms of advocates is a serious allegation which would not only call for disciplinary action by the Law Society, but can also lead to the advocates being committed for contempt of court. It is not therefore enough for the appellant to make a bare allegation.

18. It is apparent that the appellant has found itself in a tight spot after judgment was entered against it and it is not beyond it to disown the advocates who were on record, merely to avoid the judgment against it. Moreover, assuming that the appellant had not instructed the two firms of advocates, the appellant has a remedy against the two firms of advocate.

19. I find that the trial magistrate was right in rejecting the appellant's contention that it never instructed the two firms of advocates or that it was not aware of the suit against it. Further, the appellant's advocate having participated in the hearing of the suit, the appellant had ample opportunity to call evidence in support of his defence but chose not to do so. The trial magistrate was therefore right in rejecting the appellant's contention that it had a good defence to the respondent's suit as the appellant failed to substantiate that defence when given an opportunity to do so at the trial. For the aforestated reasons I find no merit in this appeal and do therefore dismiss it with costs.

Dated and delivered this 3rd day March, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Githinji H/B for Kangethe for the appellant

Musyoki for the respondent

Eric - Court clerk