REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 216 of 1997

JOSEPH NJUGUNA MUNIU..... APPELLANT

AND

MEDICINO GIOVANNI..... RESPONDENT

(Appeal from the Ruling of the High Court of Kenya Machakos (Hon. Mr. Justice Mwera)

dated 19th June, 1996 In H.C.C.C. NO. 477 OF 1994)

JUDGMENT OF THE COURT

On or about 6th April, 1990 at about 5.45 a.m. Medicino Giovanni (the respondent) was travelling along Limuru Road to Nairobi as a passenger in motor vehicle registration No. KXX 138 belonging to Joseph Njuguna Muniu (the appellant) and driven by his servant and or agent when the said vehicle was involved in a collision with another vehicle. As a result the respondent suffered serious personal injuries. The accident was caused as alleged by the respondent, through the negligence of the defendants servant or agent as he was driving at the time of the accident at a speed which was excessive in the circumstances, without having any proper control of the vehicle, failing to keep any look out and driving (interalia) without due care and attention. By his plaint dated 12th October, 1994, the respondent sued the appellant for *general and special damages.*

By his defence dated 24th November, 1994 the appellant admitted that at the^material time he was the owner of the said motor vehicle and that his vehicle was involved in the accident subject matter . of this-suit but (denied/ that there was any *denied negligence* alleged or at all on the part of his servant or agent. The appellant also denied that the respondent was a lawfully travelling passenger in his vehicle. He specifically limitation as the alleged cause of action subject matter of the suit had not arisen within 3 years before the action was brought to court. He went on to plead that as such the suit was barred by virtue of s.4(2) of the Limitation of Actions Act {Cap.22) of the Laws of Kenya.

It was also alleged in the defence that the accident was contributory caused or substantially contributed to by the negligence of a third party driving motor vehicle No. KYB 425. The appellant also denied that the respondent had suffered any injuries or was entitled to any general or special damages.The suit was set down for hearing in the superior court for 15th November, 1995. J

Counsel for the appellant was served with hearing notice for that date. However on 15th November, 1995 there was no appearance by or on behalf of the appellant. The suit proceeded to hearing in the absence of the appellant. On 29th November, 1995 Osiemo J judgement entered judgment for the respondent for shs .783,980/= by way of general and special damages together with costs and interest.

On 15th December, 1995, the appellant applied by a chamber summons under O IX B r.8 and O. XXI . 22 of the Civil Procedure Rules for orders to get aside the said judgment and all consequential orders. The respondent also sought an order for stay of execution pending determination of the chamber summons.

Here, we may remark that Order O. XXI r. 22 can be invoked only if the decree has been sent for execution to a court other than the court by which the decree was passed; then the executing court may grant a temporary stay of execution of such decree for a reasonable time to enable the judgment debtor to apply to the court which passed the decree or to any court having appellate jurisdiction in respect of that decree or the execution thereof for an order for stay of execution:

in the instant case O. XXI t. 7.7. would have no application as-the executing court is going to be same as the one which passed the decree. We have noted that quite many advocates mis-read this rule. Of course the court which has passed the decree may stay it, if the circumstances warrant, in the exercise of its inherent powers. The advocates should note it for future guidance.

Now going back to the appellants chamber summons, Miss Zaherabanu Janmohamed by her affidavit filed on the said 15th December 1995 in support of the chamber summons stated that although she had been engaged to conduct the hearing of the suit on behalf of the appellant, she did not attend at the hearing, because *i* by mistake, the hearing date had not been noted in her diary and consequently she was not aware that the suit was to be heard on the 15th November, 1995. Mwera J. who heard the said chamber summons by his ruling delivered on 19th June, 1996, dismissed that application with costs. The learned Judge said:

"Having considered all the above i.e. the submissions, the affidavits the cases cited and particularly the plaint and defence, this court is not satisfied that the orders herein be granted. For whatever defence was worth, it was filed on 20th November, 1994. Looking at it shows that the real point of contention was that another motorist was the cause of the accident in which the plaintiff herein was injured. As for limitation of action the court heard that due orders were obtained and served on the defendant. This was not denied or rebutted. So in essence only the shifting of blame to the driver of motor vehicle KYB 405 remains. Now this could be a subject of 3rd party notice which the defendant/applicant has never taken out.

The learned judge went on to say:

"A hearing notice was issued and received. Only it was not entered in the main diary. This was forgotten or overlooked. The court does not know by who and why. A due affidavit could have assisted but there was none. So should it go that since an advocates error or oversight should not be visited on his client and for that alone the judgment herein be set aside? What of the indolent, reckless indifferent or otherwise unjust acts of some lawyers to the detriment of one party? Some concrete justifiable and excusable reason ought to be put forth for this court to exercise its jurisdiction under O.IXB r. 8. And here there appears none."

Aggrieved by the said ruling of the superior court the appellant appeal now appeals. The burden of the appellant's memorandum of appeal is that the learned Judge erred in law in failing to find that no good ground had been shown by the appelant for setting aside the exparte judgment and that the learned Judge failed to find that the question of limitation could have been argued only at the hearing of the suit.

On the issue of limitation the learned Judge held that as the respondent obtained and served the appellant with "due" exparte order extending the period of limitation under s.27 of the Limitation of Actions Act (Cap.22) which the appellant neither denied nor rebutted, the only issue remaining as raised by the appellant's defence was that the driver of motor vehicle No. KYB 405 was to be blamed for the accident and not the appellant which could be subject to 3rd party notice which the appellant had not taken out. Obviously what the learned Judge meant was that once an exparte order under s.27 has been obtained by a plaintiff, and served on the defendant the defendant must take steps at an interlocutory stage before the hearing of the suit to set it aside and if he does not do so, the order although obtained exparte becomes final. With due respect to the learned Judge such an order obtained exparte is merely provisional and

there is nothing final about it. Defendant served with that order can only have it set aside at the trial of the suit. In COZENS v. NORTH DEVON HOSPITAL MANAGEMENT COMMITTEE [1966] 2 All E.R. 799 Lord Denning M.R. said at p.801.

"Now I quite agree that in general a party affected by an ex parte order can apply to discharge it. We applied this rule as of course in R v Morley (Valuation Officer) e.p. Peachev Property Corporation Ltd recently; but the procedure under the Limitation Act 1963 is altogether exceptional. It says in terms that an application shall be made ex parte. This is a strong indication that the Judge is to decide the application on hearing one side only. No provision is made for the defendant being heard; and I do not think that we should allow it to be done at this stage. It must be remembered that, even when the Judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The Judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the Judge in chambers who gave leave."

And Dankwerts L.J. at page 804 said:

"It appears to me that it would be contrary to the clear intention of the Act of 1963 if, once an ex parte order has been made, an application to set that order aside could be made before the trial of the action. In the result the general principle in regard to ex parte orders has, in my opinion, been excluded."

So, by refusing to set aside the exparte judgment, the learned Judge deprived the appellant of the opportunity to argue at the trial that the respondent was not entitled to leave of the court within the framework of s.27 of the Act to file the suit out of time and as such the respondent's suit notwithstanding the exparte order was barred by limitation. The appellant's defence is by means a sham or frivolous defence.

Ms Mwangangi counsel for the respondents submitted that the learned Judge had after going through the matter fully, decided not to exercise his discretion in favour of the appellant. We are aware that we should not interfere with the discretion of a Judge manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result, there has been misjustice (Per Newbold P. in Mbogo vs. Shah 1968 EA 93).

But, here is an officer of the court with an impeccable record as an advocate on standing in Ms. Janmohamed. She applied to set aside the exparte judgment within two weeks of it having been pronounced. She has admitted that a hearing notice for 15.11.1995 was received in her office. She has said that she had every intention to appear at the hearing of the suit but through a mistake in her office the hearing date was not noted in her diary. We know that administrative mistakes of this kind do occur in the offices of busy practising advocates and yet they have to depend upon their clerical staff for every routine or secretarial matter.

The learned Judge was not impressed with her explanation because *in* his view the person who failed to enter the date in Miss Janmohamed's diary, should have given his or her affidavit to say how and why he or she had failed to enter it in her diary. Once the Judge had accepted that somebody had forgotten or overlooked to do so, as he did, in our view, it is not material to know who that person was and how or why he or she had forgotten. In our view the explanation given by Miss Janmohamed was good enough to show why she failed to attend at the hearing of the suit. There is no evidence that Miss Janmohamed was reckless or indifferent or that whatever she had said in her affidavit was not true. There was therefore no basis on which the learned Judge held that no justifiable and excusable reason had been offered to account "Tor

Ms. Janmohamed's failure to appear at the hearing of the suit.

Lord Atkin in EVANS vs BARTLAM (1937) 2 All ER. 646 at p.650

said:

"It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake accident fraud or the like. I do not think that any such rule exists though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising the discretion the principle obviously

is that unless and until the court has pronounced judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."

In PATEL VS. E.A. CARGO HANDLING SERVICES LTD 1974 E.A. 75 at page 76 C and E Duffus P said:

“There are no limits or restrictions the Judge's discretion except that if he doesnt vary the judgment, he does so on such terms as may be just the main concern of the court is to do justice between these and parties."

In SHAH vs MBOGO (1967) EA 116 Harris J. said:

"I have considered, in relation topresent application, the principles governingthe exercise of the court's discretion to setaside a judgement obtained exparte. The *discretion is intended to be exercised* to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course. of Justice."

There was no evidence before the learned Judge to show that the appellant was trying to delay or obstruct the course of justice.

We are therefore satisfied that the learned Judge; was clearly wrong in the exercise of his discretion and as a result there has been misjustice.

During the pendency of this appeal, the respondent passed away on 21st July, 1997 and his widow Esther Wanjiku Medicino has been made a party in the place of the deceased under r.96 of the Court of Appeal Rules.

The upshot is that we hereby allow the appeal and set aside the order made on 19th June, 1996 by the superior court. We conditionally set aside the exparte judgment and decree dated 29th November, 1995 and all orders consequential thereto and order that the suit be heard on merits only in respect of the issue of limitation and extension of time and those issues of fact of which the onus is on the appellant. We grant to the appellant the costs of this appeal but the appellant shall pay the respondent's costs of the chamber summons of 15th December, 1995, as ordered by the superior court.

Orders accordingly. Dated and delivered at Nairobi this 26th day of June, 1998

P**.K. TUNOI JUDGE OF APPEAL**

A.A. LAKHA JUDGE OF APPEAL

G.S. PALL JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR