REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO 11 OF 1992

SECURICOR COURIER (K) LTD……..…. APPELLANT

VERSUS

OWINO…….. RESPONDENT

(From the original Civil Suit No 76 of 1992 of Principal Magistrate's

Court at Bungoma - D O Ondabu RM)

JUDGMENT

This is an appeal against the ruling of Mr Ondabu, Resident Magistrate Bungoma wherein he dismissed an application to set aside the *ex-parte* judgment in Civil Case No 76 of 1992. The ruling was delivered on 17th March 1992.

In a suit filed in that Court on 21st January 1992 the plaintiff, now the respondent, claimed from the defendant, now the appellant, both general and special damages for breach of contract. The respondent claimed that on 28th November 1991 she had entrusted a letter containing important personal documents with the personnel of the appellant's branch office in Bungoma for delivery to her husband in Nairobi. That although she paid the requisite charges, the letter was not delivered to her said husband as a result of which she suffered irreparable loss and/or damage.

Although it is alleged the summons were served upon the appellant to enter appearance, the latter neither filed appearance nor defence and the case was, on 25th February 1992, heard *ex-parte* and judgment delivered in favour of the respondent who was awarded Kshs 1,800/- special damages and Kshs 73,000/- as general damages plus costs of the suit and interest. The appellant applied that this judgment be set aside but the learned Resident Magistrate dismissed the application on 17th March 1992, hence the present appeal.

This appeal came for hearing on 23rd July 1993 and counsel for the appellant argued that the learned Resident Magistrate had erred in refusing to set aside the *ex-parte* judgment although the delay in filing a defence was only four days late. He said that although the delay was caused by an oversight on the part of the managing director of the appellant, this was not synonymous with deliberate negligence on his part.

Learned counsel also argued that as the respondent was a magistrate in the same Court where the case was heard, the learned Resident Magistrate who heard the case must have been unduly influenced by the said plaintiff. He also argued that the damages awarded in the case were exorbitant.

Mr Onchiri for the respondent argued that the managing director of the appellant became aware that of the summons 20 days after judgment had been delivered and that before them he did not bother to find out what they were all about. That this act amounted to negligence on his part to warrant the dismissal of the application to set aside *ex-parte* judgment.

This case was filed in Court by the respondent who in her evidence said that amongst the documents enclosed in the letter to her husband was a degree certificate for her said husband which he was supposed to use in securing a four bedroomed house at Nairobi in which he would occupy with his said wife and family. She also attached all birth certificates for three children which got lost in the parcel as well as a marriage certificate which she said she would obtain copies by paying a total of Kshs 1,800/-.

There was no real dispute about the replacement of the birth certificates and marriage certificates although the plaintiff does not appear to have proved the amounts claimed by tendering relevant notices of cost to show the prices of copies of those documents.

Then the learned Resident Magistrate went on to say on general damages that he considers the degree certificate as a very important document where the plaintiff's family has a living from. The certificate was not the respondent's and her husband was not a party to the suit in the lower court to base assessment of damages thereon. Furthermore the consideration of expenses of renting two houses one in Nairobi and another in Bungoma was not proved in evidence. There was no evidence of what rents were paid for the respective houses or who provided for what in either of them to grant a figure of Kshs 73,000/- in general damages.

Even then a decision on setting aside an *ex- parte* judgment is entirely within the discretion of the presiding Court which discretion remains unfettered; See order IX A rule 10 of the Civil Procedure Rules which provides that –

"Where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just"

Courts have been very liberal on applications of this nature and more often than not they would rather have the parties get full opportunity to be heard on the case for the ends of justice to be met than hear such cases *ex-parte*. There are no limits or restrictions of the judge's discretion to set aside an *ex-parte* judgment except that if he does vary any judgment he does so on such terms as may be just. In this regard, the main concern of the Court is to do justice to the parties and it will not impose conditions on itself to fetter the wide discretion which the Civil Procedure Rules gives to it. See *Patel v E A Cargo Handling Services Ltd*, [1974], EA 75 at page 76C and E.

In *Shah v Mbogo* [1967] E A 116 and 123B Judge Harris, as he then was, had this to say –

> "The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

This judgment was approved by the Court of Appeal in *Mbogo v Shah* [1968] EA 93 and in *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48 where Briggs JA as he then was said at page 51:

> "I consider that under order 9 rule 20 the discretion of the Court is perfectly free and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."

Appling the principles in these authorities, where the appellant's managing director received the

summons and forgot to take action thereon for four days is inadvertence or mistake which falls under *Shah v Mbogo* [1967] EA 116 and which would form a perfect excuse for a Court to exercise its discretion in his favour. This conduct on the part of the managing director was not designed to deliberately shy the company away from its obligation or to obstruct or delay the course of justice on the face of it. This is supported by quick action in filing the application to set aside *ex-parte* judgment on 11th March 1992 as well as an application for stay of execution filed on the same day.

I am afraid I find this was a proper case where the Court's discretion ought to have been exercised in favour of the appellant so as to afford it an opportunity to be heard in its defence.

Even then the claims made by the respondent were subject to enquire which would only be properly adjudicated upon when hearing both parties.

Ultimately I would allow this appeal, set aside the lower court's order and remit the case back to the same Court to be heard by another magistrate of competent jurisdiction with leave to appellant to file decree and defend the suit. Half costs of the lower court and full costs of this appeal should be paid to the respondent in any event.

Dated and Delivered at Eldoret this 24th day of August, 1993

D.K.S. AGANYANYA

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JUDGE