IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GICHERU, TUNOI & SHAH, JJ.A.)

CIVIL APPEAL NO. 35 OF 1995

BETWEEN

NIMROD N. NCHOGU……..1ST APPELLANT

JOSEPH MUMANYI GUTWA……2ND APPELLANT

AND

M. S. CHODHA & SONS LIMITED……RESPONDENT

(Appeal against a ruling of the High Court of Kenya at Kisumu (Justice J.A. Mango) dated 24th march, 1994

IN

H.C.C.C. NO. 5 OF 1985)

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JUDGMENT OF THE COURT

When Kisumu High Court Civil Case No.5 of 1985, now that subject-matter of the present appeal, was called for hearing on 15th July, 1992 the plaintiff, now the respondent in this appeal, was present but there was no appearance for the defendants, now the appellants herein, although the hearing notice for that day had been served on their Counsel, Mr. Moses Omwega Omanwa, on 4th June, 1992. Satisfied that the defendants were properly served with the requisite hearing notice but had not appeared to defend the suit against them, the learned trial judge, Shield, J. proceeded to hear the suit in their absence.

That suit concerned a claim of K.Shs.85,000/= by the plaintiff against the first and second defendants jointly and severally as special damages being the value of the plaintiff's motor vehicle registration number KSL 843 which was a total loss consequent to a fatal accident in which it was involved with the first defendant's motor vehicle registration No. KTU 955 then being driven by the second defendant as an agent or servant of the first defendant. The plaintiff also claimed general damages for the loss of user of its vehicle. This accident in which the driver of motor vehicle KSL 843 died occurred on 7th August, 1983 at about 3.30 P.M. along Moi Highway/Abosi Road junction in Kericho Township. The second defendant was subsequently convicted of dangerous driving as a result of the said accident.

Expressing himself to be satisfied that under section 47A of the Evidence Act, Chapter 80 of the Laws of

Kenya the second defendant's conviction as is mentioned above was conclusive evidence of his negligence and that the first defendant's vicarious liability was not displaced, the learned judge entered judgment for the plaintiff against the defendants jointly and severally in the sum of K.Shs.85,000/= with interest at court rates from 7th August, 1983 until payment in full together with costs of the suit.

In a Chamber Summons taken out under Order IXB rule 8 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and dated 8th August, 1992 the defendants inter alia sought to have the judgment referred to above set a side. When the application came up for hearing on 9th December, 1992 there was no appearance for the defendants with the result that the said application was dismissed with costs to the plaintiff. On 11th February,1993 this application was reinstated with the orders of 9th December, 1992 being set aside. When it eventually came up for hearing on 22nd March, 1994 before Mango, J. counsel for the defendant relied on the supporting affidavit of Mr. Moses Omwega Omanwa sworn on 8th August, 1992 and in which he deponed that on the date set for the hearing of the suit against the defendants- 15th July, 1992- he had started his journey from Nakuru to Kisumu using his motor vehicle registration number KYZ 433. At the outskirts of Kericho (presumably Kericho Township) his motor vehicle broke down and could not be repaired in time to enable him to get to Kisumu to defend the suit against the defendants. No receipts for towing charges or mechanical repairs to his vehicle were annexed to his affidavit in support of these allegations nor was there any indication as to what time he had left Nakuru for Kisumu on the material date. Because of these omissions, counsel for the plaintiff thought that the explanation by counsel for the defendants as is set out above was unconvincing.

On 25th march, 1994 the judge hearing the defendants' application said this of that application:

> "A total scrutiny of all the evidence on record considered along with the arguments of counsel persuade me that justice requires that the application be dismissed and accordingly it is dismissed as prayed with costs."

Against the dismissal of their application, the defendants have come to this Court with complaints that the learned judge was in error in declining to exercise his discretion to set aside the ex-parte judgment; in his failure to give reasons for his dismissal of their application; and in his non-consideration of the reasons that led to their counsel's non-attendance at the hearing of the suit against them on 15th July, 1992.

At the hearing of this appeal yesterday, counsel for the defendants, the appellants herein, submitted that besides the explanation set out in the supporting affidavit to the application to set aside the ex-parte judgment entered against the defendants on 15th July, 1992, the first defendant's defence was that motor vehicle registration KTU 955 did not belong to him and that therefore when the accident occurred the second defendant who had never been his employee could not at that time have been his agent. Vicarious liability was therefore disputed and if he was not given an opportunity to disprove it, a serious miscarriage of justice may be occasioned against him.

Counsel for the plaintiff, the respondent herein, complained that there was no affidavit from the court clerk to whom Mr. Moses Omwega Omanwa allegedly spoke to over the telephone on the material day concerning his predicament.

Arising from what we have attempted to outline above, it appears to us that it was possible that Mr. Moses Omwega Omanwa's explanation of what led to his inability to attend and defend the suit against the defendants on 15th July, 1992 was unsatisfactory. However, the first defendant having denied in his written statement of defence that he was vicariously liable as the motor vehicle alleged to have collided with the plaintiff's motor vehicle registration number KSL 843 did not belong to him, a factor which appears to have eluded the learned trial judge who entered judgment for the plaintiff against the defendants on15th July, 1992, a refusal to give him a chance to press his defence in his regard even on terms may have led to a failure of justice which no court of justice in this land should countenance. In the result, we think that had the learned judge carefully scrutinized the entire record before him, he would have come to the inevitable conclusion that the dictates of justice required that at least the first

defendants be given an opportunity to ventilate his defence on liability.

It is for this reason that we allow this appeal and order that the ex-parte judgment entered against the defendants, the appellants herein, on 15th July, 1992 be set aside upon the terms that they, the appellants herein, will deposit within the next 60 days from todays date the total sum of K.Shs.85,000/= in an interest bearing account with a reputable Commercial Bank or Financial Institution in the joint names of the Advocates and the Advocates for the plaintiff, the respondents herein. As the defendants, the appellants herein, were partly the authors of their misfortune, they will not have the costs of this appeal.

Dated and delivered at Kisumu this 24th day of March, 1995.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL