**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL CASE NO 191 OF 1985**

**HARUN MIRUKA……....…..…..…. PLAINTIFF**

**VERSUS**

**JARED OTIENO ABOK**

**TOBIAS OMONDI ABOK…….....DEFENDANTS**

## RULING

The two applicants Jared Otieno Abok (1st defendant) and Tobias Omondi Abok (2nd defendant) ask me by their Chamber Summons dated 20th June, 1989 and filed in court on 30th June, 1989 for several orders, namely, that the judgment entered against them *ex parte* on the 16th February, 1988 be set aside, that there be a stay of execution, that the defendants be granted leave to file their defence out of time, that the defence annexed to their Chamber Summons be deemed to have been duly filed and lastly that the costs of this application be provided for. The Chamber Summons is stated to be brought under order 9A rules 10 and 11, order 9B rules 1 and 8, order 21 rule 22 of the Civil Procedure Rules and under section 3A of the Civil Procedure Act.

These matters which the defendants ask me to do are all provided for in various sections of the Civil Procedure Rules and accordingly there is really no reason for my doing anything under section 3A of the Civil Procedure Act. That section provides for the exercise of the Court's inherent powers to do justice between the parties and I think it only comes into play where the rules of the Civil Procedure are silent. The application by the defendants arise in this way:

On the 9th December, 1985 the respondent Harun Miruka (the plaintiff) instituted the suit against the defendants claiming general damages arising out of a traffic accident which the plaintiff alleges took place on or about the 25th February, 1984. In his plaint the plaintiff pleaded that vehicle registration No KPG 866 was at the time of the accident owned by the 1st defendant but was being driven by the 2nd defendant and the plaintiff further averred that the accident occurred due to the negligence of the 2nd defendant. The plaintiff also averred that he suffered injuries as a result of that accident. The plaint having been filed on the 9th December, 1985, on the 19th February, 1986 summonses were issued against the two defendants asking each one of them to enter appearance within 15 days from the date of the service of the summons. On the 16th December, 1986 a court process server by the name of Justus Eliud Okwatcho filed a return of service averring that on the 24th November, 1986 at 2 pm he served the summons and the plaint upon the 2nd defendant. There is no doubt on the evidence and it is agreed that the 2nd defendant was so served and did enter an appearance on the 30th December, 1986. Again on the 2nd February, 1987 the same process server Justus Eliud Okwatcho filed another return of service and in that return he

averred that on the 16th day of December, 1986 at 10.15 am he found the 1st defendant Jared Otieno Abok at his resident in Westlands, Mutundu lane, Postal Quarters' house No 7 in Nairobi and that he served the 1st defendant with the summons and the plaint but that the 1st defendant refused to sign the summons in acknowledgement of the service, saying that he would have to see his lawyer first. The 1st defendant neither entered an appearance nor filed a defence in the action. The 2nd defendant having entered appearance did not file a defence and so on the 12th May, 1987 the plaintiff applied to the Deputy Registrar of the Court to enter interlocutory judgment for him as the 1st defendant had neither appeared nor filed a defence and the 2nd defendant had failed to file a defence.

The application by the plaintiff for an interlocutory judgment must have been made under order 9A rule 6 of the Civil Procedure Rules which allows for the entry of an interlocutory judgment with a subsequent assessment of damages. Interlocutory judgment was entered for the plaintiff on the 8th October, 1987 and the case was then fixed for assessment of damages on the 9th December, 1987. On that date the plaintiff formally proved his claim against both defendants and on the 16th February, 1988 judgment was given to the plaintiff against both defendants in the sum of shs 228,500/- with costs. It is that judgment which the defendants now ask the Court to set aside. The 1st defendant's contention is that he was never served with summons as alleged by the process server or at all while the 2nd defendant's contention appears to be that he had settled the matter with the plaintiff, giving to the plaintiff four cows as compensation for the accident.

The 2nd defendant also says that after the suit had been filed against him and he had entered appearance, the plaintiff assured him that the matter would not go on. It would appear that the 2nd defendant does not dispute that an accident did take place between him and the plaintiff and that that accident involved motor vehicle registration No KPG 866. The 1st defendant says that that vehicle was not his at the time of the accident and he has attached a letter from the Registrar of Motor Vehicles which give the ownership of the vehicle from 15th February, 1973 upto 23rd August, 1977. The Registrar of Motor Vehicles was unable to say who owned the vehicle from 1st September 1984.

I however, note from the record that both defendants have the name Abok as their last name which clearly implies some form of relationship between them. I do not think that it is a mere coincidence that both defendants happen to be called Abok. As I have said the 2nd defendant appears toadmit that there was an accident involving him and the plaintiff and the vehicle he was driving was KPG 866 – see exhibits JOA 1 and TOA 1. The plaintiff pleaded that the vehicle was owned by the 1st defendant and was being driven by the 2nd defendant at the time of the accident. As regards the 2nd defendant he was clearly served with summons and he did enter an appearance. I am aware that under order 9A rule 10 and order 9B rule 8 the Court's discretion to set aside a judgment entered *ex parte* is wide and unfettered but all the same that discretion must be exercised according to law in conformity with common sense. The principles upon which the Court exercises such discretion have been settled since the case of *Mbogo v Shah* [1968] EA 93 which was followed in the case of *Patel v East African Cargo Handling Services Ltd* [1974] EA 75 all of which were applied by the Kenya Court of Appeal in the recent case of *Philip Keipto Chemwolo and another v Augustine Kubende*, Civil Appeal No 103 of 1984 (unreported) and also in the case of *Shadrack Arap Biywo v Bodi Bach* Civil Appeal No 122 of 1986 (unreported). Dealing with the principles to be applied Platt, JA (as he then was) said in *Chemwolo's* case, supra, at page 5:

"But the Court went on to explain (in page 76) that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given it by the Rules. On the other where a regular judgment had been entered, the Court would not usually set aside the judgment unless it was satisfied that there were triable issues which raise a *prima facie* defence which should go for trial ..."

As was stated by Harris, J (as he then was) in the case of *Kimani v MC Cornnel* [1966] EA 574, the discretion of the Court is to be exercised:

"In the light of all the facts and circumstances both prior to subsequent and all the respective merits of the parties it would be just and reasonable to set aside or vary the judgment if necessary upon terms to be imposed".

So the wide discretion of the Court given by order 9A rule 10 and order 9B rule 8 is to be exercised to ensure that justice is done between the parties taking into account the merits of their respective cases. I have held that the 2nd defendant was in fact served and in fact entered appearance. He was accordingly aware of the suit and the only reason he gives as to why he did not file his defence is that he was assured by the plaintiff that the matter had been settled.

In paragraphs 5 and 6 of his supporting affidavit, the 2nd defendant swears that he was not aware that the plaintiff was proceeding with this matter and that he was also not served with the hearing notice though he had entered appearance which was contrary to procedure. The procedure referred to must be order 9B rule 1(1) which provides that at any time after the close of the pleadings the plaintiff may, upon giving reasonable notice to every defendant who has appeared, set down the suit for hearing It appears the 2nd defendant is contending that although he had appeared he was not served with the notice that the suit had been set down for hearing. Mr PL Otieno who appeared for the defendants in the application before me also submitted that no hearing notice was given to the 2nd defendants for the hearing on 9th December, 1987. I have gone through the record and that contention is clearly false. There is a return of service dated 27th November, 1987 an filed in court on the 9th December, 1987 made by a process server called Jecton Ochieng Agaya and that return shows that on the 23rd November, 1987 the 2nd defendant was served with hearing notice at Miwani Sugar Mills where he is a supervisor. He refused to sign the hearing notice and attached to the return of service is a hearing notice which clearly informed the 2nd defendant that the case had been set for hearing on the 9th December, 1987 at 8.30 am. The 2nd defendant was clearly served with hearing notice and his contention that he did not know that the plaintiff was proceeding with the suit against him is clearly false. He knew the plaintiff was proceeding with the suit and that being his only ground for alleging that the judgment should be set aside, his application must in my view fail.

He admits that he was served with the plaint and he admits that there was an accident involving him and the plaintiff. He did not attend court on the 9th December, 1987 to find out what hearing was going on if he had settled the case with the plaintiff. In my view the allegation by the 2nd defendant that he was not aware that the plaintiff was proceeding with the case in false and flimsy and must accordingly fail. Judgment was regularly obtained against him and I see no reason for setting aside that judgment. As regards the 1st defendant, his application is based simply on the fact that he was never served with summons as alleged by Mr Okwatcho or at all. If that be correct then *Ex Debito Justitiae* the *ex parte* judgment must be set aside. As Platt, JA (as he then was) said in the case of *Baiywo,* supra at page 3:

"The first ground emphasises that if there is no service then *Ex Debito Justitiae* the judgment by default must be set aside. Of course, judgment by default can only be entered if there has been an initiating process concerning which the defendants is in default. (*Kanji Naran v Ramji* (1954) 21 EACA 20 to which Mr Njuguna referred.)"

In a civil suit an initiating process is the service of summons upon a defendant and in this case the process server both in his return of service and in his oral evidence in this court stated that he served the 1st defendant with summons on the 16th December, 1986 at 10.15 am. He has stated in detail the place at which he served the 1st defendants and has even mentioned the house number which he alleges the 1st defendant occupies at that place. This he did both in the return of service and in his oral evidence before me upon which he was cross-examined by counsel of both defendants. In his supporting affidavit the 1st defendant does not anywhere deny that he lives in Postal Quarters house No 7 at Westlands, Muturolu lane. It is incredible that the process server could have possibly made up that story which he repeated before me in his oral evidence. The cross-examination of the process server by Mr Otieno for the defendants did not show anything substantial from which this Court could conclude that the process server was lying. In the case of *Baiywo*, supra, it was alleged that the defendant there had not been served despite the averment by the process server that the defendant had been served. Dealing with that point, Platt, JA said at page 6:

"There is a qualified presumption in favour of the process server recognised in *MB Automobile v Kampala Bus Service* [1966] EA 480 at p 484 as having been the view taken by the Indian courts in construing similar legislation. On Chitaley and Annaji Rao: *The Code of Civil Procedure* Vol II p 1670, the learned commentators say:

"3. Presumption as to service – There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

Mr Okwatcho has sworn that he served the 1st defendant and that the 1st defendant refused to sign saying he was to see his lawyer first. From all the circumstances of this case I can see nothing to warrant my holding that the qualified presumption in favour of the process server spoken of in *Baiywo's* case has in this case been rebutted by the 1st defendant. To the contrary the 1st defendant, in my view, has miserably failed to show that he was not served. I am satisfied on the material before me and I find andhold that the 1st defendant was personally served by Mr Okwatcho and his contention that he was not served is a lie.

Even on the merits of the case itself, I have said that the 2nd defendant admits that he was driving the vehicle KPG 866 and as I said earlier the 1st defendant does not appear to be a stranger to the 2nd defendant. Both bear the surname of Abok. Had the 1st defendant known nothing about the vehicle, it is unlikely that he would not have taken any action as he did when he was served with the summons. The document from the Registrar of Motor Vehicles which he has produced is inconclusive as to who the owner of the vehicle at the time of the accident was. The only reasonable inference to draw from the circumstances of the case must be that the 1st defendant knew something about the ownership of that vehicle which was being driven by the 2nd defendant at the time of the accident and that is why the 1st defendant took no action at all when he was served with summons.

In my view, these defendants have not advanced any good reason as to why they failed to defend the claim against them inspite of their having been properly served. The 2nd defendant was even served with the notice of hearing of the formal proof but he still failed to attend the Court. Their application accordingly fails and I order it dismissed with costs.

Dated and Delivered at Kisumu this 24th Day of July 1990

**R.S.C.OMOLO**

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**JUDGE**