IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: PLATT, APALOO JJA & MASIME AG JA)

CIVIL APPEAL NO. 37 OF 1985

BOUCHARD INTERNATIONAL (SERVICES) LTD .....PLAINTIFF

VERSUS

PHILIP NZIOKI M'MWERERIA.....DEFENDANT

(Appeal from the High Court at Nairobi, Porter J)

JUDGMENT

Platt JA On December 3, 1984, Aganyanya J gave an *ex parte* judgment after proof of the claim because the defendant had failed to appear at the trial. On January 16, 1985 the defendant applied by chamber summons to set aside the *ex parte* judgment. Porter J did so and he has been criticised for his opinion in this appeal. It is said that he was wrong to base the exercise of his discretion on the test as to whether or not there was a danger that justice may not have been done. It is objected that Porter, J constituted himself as an appellate court and was wrong to overrule Aganyanya J's finding that the plaintiff had established the claim on a balance of probabilities. Porter J was at fault, it is argued, by failing to give due weight to the presumption that once the defendant was shown to be the owner of the vehicle the onus of proof was on him to show that he was not the driver, and by speculating that all sorts of possibilities existed.

The thoughtful and anxious judgment of Porter J is as follows:-

> "On looking at the record of the proceedings *ex parte* I see that no evidence was given as to the identity of the driver of the other car involved: an issue raised by the defence; exhibits were produced to show that the defendant was the owner of the vehicle, but that was no identification of the driver and the issue was not dealt with. All sorts of possibilities exist: and the pleadings are not very helpful in the matter: the defendant has only denied that he was the driver, and has not said what happened and who was driving his vehicle: or whether such a person was authorised to do so. The plaintiff has not asked for such particulars. In all the circumstances I am of the view that there is a danger that justice has not been done in this matter, although I would criticise counsel for the defence for assuming that his instructions were withdrawn, when if that were the case, application should have been made under order III. It was his duty to attend court and he should have done so.
>
> In all the circumstances judgment will be set aside upon terms that the defendant pay the thrown away costs of the plaintiff to be agreed or taxed within 14 days of agreement or of taxation whichever is the latest."

In order to appreciate the judgment clearly, it is necessary to review the pleadings and evidence.

The plaintiff is a limited liability company employing the husband of Mrs Natalina Gonsalves. Mr Gonsalves is provided with a car which Mrs Gonsalves is authorized to drive. It was registered as KQN 813. On June 13, 1980 at about 4.00pm Mrs Gonsalves was driving along Limuru Road from Gigiri towards Nairobi city centre, when she became involved in an accident with the vehicle KRH 159 which was being driven in the opposite direction. The plaintiff claimed that Mrs Gonsalves was not guilty of any negligence, but asserted that the accident was entirely due to the negligence of the defendant. Fortunately it seems that

Mrs Gonsalves was unhurt and the only claim is for Kshs 21,460 repair charges and assessor's fees. The defence was that the defendant was not driving the vehicle as alleged, and was, therefore not liable. He would contend, he said, that the suit was misconceived and should be struck out. The damages were too high in any event. Mrs Gonsalves testified that the driver of KRH 159 overtook a bus which was coming towards her. KRH 159 a Canter (as I shall describe it in future) came out at top speed from behind the bus, overtook it still at high speed, and drove straight towards the vehicle of Mrs Gonsalves. The latter swerved to the left to avoid the Canter, but even so her vehicle was hit by the Canter, the point of impact being on the right side of Mrs Gonsalves' car, and behind her seat.

Then Mr Opiyo gave evidence for the Insurance company, and produced the report of the accident; the repair charges; the assessor's fee note: and the reply of the Registrar of motor vehicles. The Registrar replied that KRH 159 was registered as being owned by Philip Nzioki M'Mwereria and NIC (EA) Ltd of P O Box 132, Limuru. He had been requested to state the ownership of KRH 159 on June 13, 1980. It was presumed that the reply referred to that date. This evidence of ownership lay outside the pleadings and was wrongly admitted.

That ended hearing and Aganyanya J decided that on the evidence adduced on behalf of the plaintiff by Mrs Gonsalves and Mr Opiyo "unchallenged" as this was, the plaintiff had established its claim. That was not quite an accurate statement. It is true that the facts of the accident were unchallenged, but the defence was on the record, and that challenged the allegation that the defendant M'Mwereria was personally driving the vehicle. It is true that no defence evidence was given, but there was the *prima facie* defence. It is this defence that the defendant referred to in his affidavit seeking to set aside *ex parte* judgment. There was no evidence given by Mrs Gonsalves and Mr Opiyo concerning the driver of the Canter. The defence was not disposed of. That is exactly what worried Porter J.

When a court proceeds under order IXB Rule 3 of the Civil Procedure Rules, the situation will be that the plaintiff only appeared. It is for the court then to be satisfied that the notice of hearing was duly served, and if so it may proceed *ex parte.* It may also postpone the hearing or cause a second hearing notice to be served. Here the notice for hearing had been served on the defendant's advocate by October 25, 1983, because on that date the advocates notified the defendant that the hearing dates would be December 3 and 4, 1984. The defendant was asked to call at the office of the advocate two weeks before the hearing date. Service upon the advocates on the record was good service, though the defendant in a somewhat contradictory passage seems to have said he had been notified in accordance with the advocate's letter of October 25, 1983, but that the letter had never reached him in time due to police operations. Be that as it may, as the learned judge only knew of the service more than a year before the hearing dates, and neither the advocates nor their client had attended the court, it was reasonable to continue the case *ex parte*. On that basis, the plaintiff had to prove its case on balance of probabilities, and while no doubt what the plaintiff adduced in evidence would *prima facie* be accepted, because of the defendant's non appearance, yet the claim had to be proved on all essential matters. After details as to how the accident occurred, came the next important step as to who caused the accident. Having proved that, the damages would have to be proved. Who drove the Canter? Who caused the accident? As the learned judge observed, there was no evidence on that point. The ownership of the vehicle was not pleaded by the plaintiff and not tacitly admitted.

It appears to have been Mr Hawke's view that he did not need to adduce any evidence as to who the driver was, because of the judgment in the English case in *Barnard vs Sully* [1931] 47 Times LR 557. That decision was reviewed in *Hewitt vs Bonvin*, [1940] 1 KB 188 by English Court of Appeal.

Du Parq LJ remarked (at p 194) –

> "It is true that if a plaintiff proves that a vehicle was negligently driven and that the defendant was the owner, and the court is left without further information, it is legitimate to draw the inference that the negligent driver was either the owner himself or some servant or agent of his; (*Barnard vs Sully*)."

On the other hand Du Parq LJ stated:

> "It has long been settled law that when the owner of a carriage or other chattel confides it to another person who is not his servant or agent, he is not responsible merely by reason of his ownership'.

On these authorities, Mr Hawkes contended that all he had done was to call no evidence as to who the driver of the Canter was, but simply rely upon the presumption established by *Barnard vs Sully*.

In my opinion the state of the pleadings did not allow Mr Hawkes to adduce evidence of ownership and so lay the foundation of the presumption. The effect of paragraph 3 of the plaint, to say nothing of paragraph 2 of the defence, was to raise one issue only, whether the defendant had driven the car at the time of accident. Suppose the defendant had driven the car, there was then no need to prove his ownership. His own negligent act sufficed to render him liable. But suppose the defendant did not drive the car at that time, or that it was not known who had driven it, then the pleadings must raise the issue of ownership. If it is pleaded that the defendant was the owner, that would be a basis for evidence to be led, and on proof of ownership, the presumption would arise. Now that is an entirely different case to the one pleaded. If Mr Hawkes wanted to rely on the presumption, he had to amend his plaint. Had he done so, he would have had to re-serve it, and *ex parte* judgment could not have been given. Indeed it is the great error of these proceedings that evidence of ownership was wrongly let in which has now confused the situation. Even Porter J described the vehicle as the defendant's vehicle, and asked whether the driver was authorized to drive. It was not for the defendant to anticipate further pleadings by the plaintiff. He had a complete defence in saying that he did not drive the vehicle alleged to be carelessly driven. It was for the plaintiff to widen his net to catch the defendant by way of vicarious liability, if he could, even if the defendant was not the driver. Indeed it is usual to plead some such facts as that the defendant was the owner and either he, his servant or agent drove the vehicle negligently. As the evidence stood, the plaintiff did not prove the allegation in paragraph 3 of the plaint even if the defence was ignored, and consequently judgment ought not to have been given. A defence may be ignored at this stage, but is wiser to meet it by rebutting evidence.

The presumption itself is not strong. It may be appropriate here to recall that Lord Denning MR's attempt to treat the permission of the owner for a person to drive his car as being in most cases sufficient to impose on the owner where the liability for that person's negligent driving of the car, except where the owner has no interest or concern, or refused permission, was rejected by the House of Lords in *Morgans vs Launchbury*, [1972] 2 All ER 606, and very recently by this court in *Nakuru Automobile House Ltd. Vs Nasiruddin Ziaudin*, (C A Mombasa) Civil Appeal No 638 of 1986. These cases follow on from *Rambarran vs Gurrucharran*, [1970] 1 All ER (P C) 749 which was cited to us.

Porter J set about his task under Order IXB Rule 8 which provides:-

> "8. Where under this Order judgment has been entered or the suit dismissed, the court on application by summons may set aside or vary the judgment or Order upon such terms as are just."

The same principles under Order IXB Rule 8 apply as under Order IXA Rule 10. The basis of the approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgment by default) is that if service of summons to enter appearance, has not been effected, the lack of an initiating process will cause the steps taken to set aside *ex debito justitiae*. If service of notice of hearing or summons to enter appearance have been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion

is a statutory duty; and the exercise must be judicial.

The appellant contended that in the exercise of this descretion, Porter J should not seek justice, nor sit in appeal on Aganyanya J's judgment. However one puts it, Porter J was duty bound to review the whole situation, and see that justice was done; and there is the highest authority for saying so.

In *Shah vs Mbogo,* [1967] EA 116 at p 123 Harris J declared –

> "I have carefully considered, in relation to the present application, the principles governing the exercise of the Court's discretion to set aside a judgment obtained *ex parte*. This 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 a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice."

This opinion was upheld by the Court of Appeal for Eastern Africa in *Mbogo vs Shah* [1968] EA 93. It was also held that Harris J had correctly stated the principles as to the actual exercise of the discretion in *Kimani vs McConnell* [1966] EA 547. A judge had to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for Porter J. These pronouncements were carried forward in *Patel vs EA Cargo Handling Services Ltd*, [1974] EA 75 which compared them with the origin of this approach, the speeches in the House of Lords by Lords Russell, Atkin and Wright in *Evans vs Bartlam* [1937], 2 All ER 647. For some reason, practitioners often tend to over-analyse the process of exercising a discretion, perhaps in their anxiety to achieve certainty and uniformity. In *Patel's* case as in *Evans'* case, counsel had attempted to tie down the exercise of the discretion on two aspects of the problem, a) that there was some serious defence to the action, and b) that there was some satisfactory explanation for the failure to comply with the rules. The House of Lords and the Court of Appeal refused to tie down the discretion. It was an unconditional unfettered discretion, although it was to be used with reason, and so a regular judgment would not usually be set aside unless the court was satisfied that there was a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. The most memorable words employed on this topic were those of Lord Atkin in *Evans*' case at p 650.

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

It is then not a case of Porter J arrogating to himself a superior position over a fellow judge, but of Porter J being required to survey the whole situation to make sure that justice and common sense prevail (see Lord Wright in *Evans'* case p 654 approving of Bowen LJ in *Gardner vs Jay* [1885] Ch D 50). Indeed there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an *inter partes* hearing, than the judge who acts *ex parte*. Moreover Porter J was not interfering with the findings of Aganyanya J. What Porter J was doing was making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of Porter J's judgment is that in view of the defence, that the defendant was not driving the vehicle which strayed into the path of Mrs Gonsalves's car, there was a *prima facie* defence. He was not satisfied with the non-attendance of the defendant or his advocate, but nevertheless held that it would be just to set aside the *ex parte* judgment. He was not avoiding the presumption as Mr Hawkes declared; he was making certain that it applied properly to the facts of this case.

Having ascertained how Porter J acted in the circumstances and on the issues before him, what then is the position of this court? That is set out by Lord Wright in *Evans'*case on p 654 –

> "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not

> entitled simply to say that if the judge had jurisdiction and had all the facts before him the Court of Appeal cannot review his order, unless he has shown to have applied a wrong principle. The court must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion which may reverse or vary the order. Otherwise, in interlocutory matters, the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and may be one which requires a careful examination by the Court of Appeal."

The appeal presented by Mr Hawkes has afforded this court the opportunity to review the whole matter. It is clear that in essence Porter J considered it just that the issue of the defendant's participation as the driver of the vehicle which caused the accident ought to go for trial. I entirely agree. The reasons for non-appearance, which called in aid police operations, appear poor in the light of the length of time available to arrange to be absent in order to attend court. Nevertheless as Goudic J held in *Girado vs Alam Sons (U) Ltd*, [1971] EA 448, although sufficient cause for nonappearance had not been shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction. The terms of the present Order IXB Rule 8 avoids the necessity of resorting to the inherent jurisdiction.

In my opinion Porter J acted perfectly properly and I would dismiss the appeal with costs and direct that the suit proceed to trial. I would order Porter J's order to stand: except that the defendant/respondent will pay the costs of the application before Porter J. As Masime Ag JA agrees it is so ordered.

Apaloo JA (Dissenting). I have had the benefit of reading in draft the full and carefully set out judgment of Platt JA. I regret, however, that I am unable to share his conclusion that on the facts and in the events which have happened, Porter J exercised his discretion correctly in setting aside the *ex parte* judgment of Aganyanya J. In my opinion the contrary is the case.What then are the facts? The appellant is a limited liability company which employed a Mr Gonsalves. The company owns a motor car a Renault 16 T S Registration No KQN 813, which it made available to Mr Gonsalves apparently for business and private purposes, Mrs Gonsalves was also authorised by the Company to drive that car.

At about 4.00 pm on June 23, 1980, Mrs Gonsalves was driving that car along the Limuru Road from Gigiri towards Nairobi when she met an accident. According to her uncontested evidence, a vehicle from the opposite direction driven at great speed, overtook a bus on its side of the road and ran into her on her proper side of the road.

That vehicle was described as a "Canter", Registration KRH 159. It would seem Mrs Gonsalves suffered no personal injury by the collision but her car was gravely damaged. The evidence suggests that Mrs Gonsalves could not attest to the identity of the driver of the offending vehicle. Enquiries were however set on foot to determine its owner. The evidence produced from the official records of the registrar of motor vehicles shows that the respondent, a police officer, was the owner of the Canter at the material time. The company accordingly brought an action against him to recover the sum of Kshs 21,460 which it had spent on the repair and other charges connected therewith.

On being sued, the respondent briefed a firm of advocates, Macharia and Njore who entered an appearance and proceeded to file a defence on his behalf. The company's statement of claim follows more or less the facts I have recited and they claim that the accident was occasioned by the respondent's negligent driving which they proceeded to particularize. The defence was the stereotyped one. It denies that any damage was caused to the company's vehicle or if such damage was caused, it amounted to the sum claimed. It also claimed, without giving any legal reason, that the "suit is misconceived and the same should be struck out". When it came to the matter which was crucial to this case, namely, the identity of offending driver, the respondent pleaded that:

> "…….. he was never driving the said vehicle either as alleged and or at all. Consequently, the defendant denies each and every singular acts of negligence as alleged in the plaint."

One striking feature of the defence, is that there was no denial that it was the respondent's vehicle – the

Canter that was involved in the accident. There was thus an implied admission that the offending vehicle was the respondent's. The only matter denied was the identity of the person who drove it at the time of the accident.

So it seems to me that on the pleadings, the matters on which the company assumed the onus of proof were three, 1. whether the respondent's vehicle was driven negligently; 2. whether the company suffered any legal injury by the accident and 3. whether the respondent himself drove the vehicle at the material time or if he did not do so himself, whether it was driven by his servant or agent to make him vicariously responsible for the damage suffered by the company.

When trial opened before Aganyanya J, on December 3, 1984, the company was represented but the respondent neither appeared in person nor was he represented by an advocate. Having felt satisfied that the respondent's advocates were duly served, the learned judge ordered hearing to proceed. Mrs Gonsalves entered the witness box and related how the accident occurred in terms which more or less tallied with the facts narrated above. She was followed by a Mr Opiyo who produced records from the registrar of motor vehicle and this shows, *prima facie*, that the respondent was the owner of the offending vehicles. No evidence was proferred on behalf of the respondent. The court clearly accepted the evidence and proceeded to hold that as the evidence of these two witnesses stood unchallenged, it considered that the company had established its case on the balance of probabilities. The court therefore entered judgment for the company for the amount claimed on the plaint.

I think, in a very real sense, the inherently credible evidence led by these two witnesses was unchallenged. That evidence was not cross-examined upon and no contrary evidence was offered. True, the respondent averred in his pleadings that he never drove the vehicle. Had he appeared in court and related this, even if he was disbelieved, it could not be accurately said that the company's evidence was unchallenged. One knows from experience that there are, at times, considerable divergence between a sworn testimony and what is merely alleged in pleadings. I do not consider that a bare denial in pleadings which was not supported by any evidence oral, or documentary, can properly be regarded as challenging a witness's forensic testimony.

So on the three issues on which the company assumed the burden of proof, the first two were met by the oral evidence of the two witnesses, the third, namely, that the vehicle was driven either by the respondent or his servant or agent, the proof of ownership *per se*, raised a presumption of that fact in the company's favour. It was decided as clearly as anything can be decided in 1931 by the Divisional Court of three judges in *Barnard vs Sully* [1931] (47) T L R 557 that:

> "Where a plaintiff in an action for negligence proves that damage has been caused by the defendant's motorcar, the fact of ownership of the motor-car is *prima facie* evidence that the motor car, at the material time, was being driven by the owner, or by his servant or agent."

In the comparatively recent case of *Rambarran v Gurrucharran* decided [1970] 1 All ER 750 the Privy Council gave its blessings to that holding but said that *prima facie* inference can be rebutted by facts. I do not know that these inherently sensible holdings have ever been questioned.

The upshot of this analysis shows that the company discharged the two issues by *viva voce* evidence and met the third by a rebuttable presumption which was not rebutted by any facts produced by the respondent. It follows therefore that Anganyanya J was well warranted in his holding that the Company established its case on the balance of probabilities. And this clearly includes the unrebutted presumption that at the time of the accident, the offending vehicle was driven either by the respondent himself or by his servant or agent. This aspect of the case should be borne in mind when one comes to consider the reason given by Porter J for setting aside Aganyanya's judgment.

As the judgment was delivered in the respondent's absence, he was entitled to seek its vacation under Rule 8 of Order 9B of the Civil Procedure Rules, if he thought he had good grounds. And the rule empowers the court to set aside the judgment upon such terms as are just. It has been held often that this rule confers a wide discretion in the court and the only limiting factor is the requirement of justice. The

respondent felt that he had good grounds to have the judgment set aside under this rule. Accordingly, on January 16, 1985, he applied to the court for vacation of the judgment. He supported his application with an affidavit and in it, stated his grounds for seeking to have the judgment set aside. It is not necessary to read that affidavit in full but he gave two reasons for his non-attendance at the trial and also what he thought prevented his advocate from appearing in court on his behalf. He said his lawyers duly notified him by letter of October, 1983 of the impending hearing date. Although he received that letter, he said he did not receive it in time but he did not say when he received it. It is to be noted that the *ex parte* hearing did not take place till December 3, 1984 – a period of 15 months or so afterwards.

The respondent took it upon himself to provide the reason why his advocates on the record also failed to turn up. He swore that "my lawyers could not attend the case, as they assumed that I had withdrawn from them." That is hardly a satisfactory reason. The record shows that the respondent's lawyers had been less than diligent. On July 20, 1982, Mr Hawkes, advocate for the company appeared in court for the hearing of the plaint but the respondent's advocates though served, did not appear. So the case was put off. It was again listed for October 24, 1983. On that day, the advocates for both sides were in court. They then agreed that the hearing take place on December 3, 4, 1984. It is unclear how the respondent came to believe that his advocates failed to turn up in court on the date they took by consent because they assumed he had withdrawn their instructions. This was not the first time that they failed to turn up without reason.

The only other ground the respondent set up in his affidavit for seeking a setting aside of the judgment, was that "I have a good defence."

The respondent was not forthcoming what the defence was. It seems from the pleadings that the only serious issue that would be contested was; who drove the respondent's vehicle and met the accident on the day in question? The respondent pleaded that he was not that person, so he could not deny the company's evidence as to how that accident occurred. But the offending vehicle was the respondent's own. If he did not drive it, he was peculiarly well placed to say whether it was driven by his servant or agent or by a complete stranger. He did not breath a word about it and it is difficult not to be struck by this want of candour on the part of the respondent who was invoking the court's equitable jurisdiction to set aside a judgment regularly obtained by the company.

The application to set the *ex parte* judgment aside fell for consideration before Porter J on February 8, 1985. Mr Hawkes for the company was present as he ever was and Mr Njore appeared for the respondent. Counsel for the respondent then moved for setting aside the *ex parte* judgment and relied on the affidavit whose contents I have summarised. Mr Hawkes opposed it and pointed out the considerable delay this matter had suffered and the long hearing notice the respondent had of the hearing date and the respondent's apparent lack of interest in his own case. Counsel also referred to the less than candid defence put up by the respondent and said the respondent was lacking in merit and invited the court not to disturb the judgment.

On the supposition that the court was holding the scales evenly between the parties, it seems to me that on the facts which I have related, I hope, without colour, the scales tilted in the company's favour and I think they are entitled to retain the judgment they regularly and properly obtained. But the discretion to set aside or refuse to disturb the judgment was the learned judge's. He exercised it for setting aside and in the process, gave his reason for so doing. It is said of this discretion that:

> "Is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay justice, (per Harris J in *Shah v Mbogo*).

Of judicial discretion in general, the age-old principle is that;

> "A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision…"

One must now consider the reason given by the judge for setting aside the judgment. It is contained in the following passage;

> "I see that no evidence was given as to the identity of the driver of the other car involved, an issue raised by the defence. Exhibits were produced to show that the defendant was the owner of the vehicle, but that was no identification of the driver and the issue was not dealt with. All sorts of possibilities exist and the pleadings are not very helpful in the matter; the defendant has only denied that he was the driver and has not said what happened and who was driving his vehicle or whether such a person was authorised to do so …… In all the circumstances, I am of the view that there is danger that justice has not been done in this matter and I would criticize counsel for the defence for assuming that his instructions were withdrawn."

It is clear the learned judge did not consider that the injustice which he considered likely, would result from "accident, excusable mistake or error" but from the fact that an important element of the Company's case was not established, namely, the identity of the driver of the offending vehicle. In view of the way in which the learned judge expressed himself, he would not have disturbed the judgment if he had been mindful of the principle that proof of ownership of the offending car in the respondent attracted the rebuttable presumption that the respondent either drove the vehicle at the material time or that it was driven by his servant or agent.

That being so, Porter J slipped when he set aside the judgment on the ground that "there was no identification of the driver" of the offending vehicle. A presumption of law "identified" that driver as the respondent himself or his servant or agent. The burden of displacing that presumption lay on the respondent and it is plain he did not even begin to discharge it. With respect, it does not matter whether that presumption was strong or light, assuming that there is such a distinction apart from those between rebuttable and irrebuttable presumptions however light, is to place the burden on the respondent to show that at the material time, neither himself, his servant or agent drove the Canter. And I do not, for myself, subscribe to any theory that where an evidential burden is cast on a party, he discharges it by a mere averment in a pleading. If that is right, I cannot avoid the conclusion that in setting the *ex parte* judgment aside, Porter J took a wrong view of the law and his exercise of discretion is vitiated thereby. That holding is sufficient to conclude this appeal in the appellant's favour.

There is, in my opinion, another ground on which the order of Porter J can be impeached. It is plain from what fell from the judge in the passage I have quoted, that in exercising his discretion under Order 9B rule 8 he was not concerned to find whether in giving the *ex parte* judgment in the appellant's favour, the respondent suffered injustice or hardship resulting from

> "accident, inadvertence, excusable mistake or error". He said: "I see that no evidence was given as to the identity of the driver of the other car involved; an issue raised by the defence."

That seems to me to be another way of saying that the *ex parte* judgment was faulty because an important issue in the case on which the evidential burden lay on the appellant was not discharged inasmuch as no evidence was led on it. In looking at the matter that way, the learned judge seems to me to be taking, no doubt, unwittingly, the function of an appellate court. True, the judge has an ufettered jurisdiction under Order 9B rule 8 to set aside a judgment obtained *ex parte* and his discretion is limited only by the consideration of justice. But I cannot accept that that discretion entitles him to sit in judgment on the decision of a court of co-ordinate jurisdiction. After all an appellate court when setting aside a judgment of a court whose jurisdiction is inferior to itself on the ground that the *onus probandi* on a party was not discharged, is also informed by the consideration of justice.

The appellant complained that the judge was in error in construing his role as that of an appellate court. In my judgment, that is a perfectly valid complaint. The judge's basic approach and his reasoning are more appropriate to a court sitting on appeal or a judge reviewing his own judgment than one which has the limited role of setting aside a judgment obtained in a party's absence.

I do not doubt that Porter J showed anxiety to do what was just to the parties but I am, for my part, far from satisfied that he took into consideration, in exercising his discretion, all the matters which he ought properly to take into consideration. If he did not, the exercise of his discretion can be faulted. In *Shah v Mbogo* [1967] EA 116, the court warned against what should not be done under the jurisdiction to set aside. It said:

> "The rule is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."

The question is; on the evidence has not the respondent sought to do just this? On the subject of evasion, it seems clear that it was the respondent's vehicle that damaged the appellant's car. The respondent himself by necessary implication admits this. Who drove that car on that day, was a matter peculiarly within his knowledge. He caused a defence to be filed in which he avoided saying this. When *ex parte* judgment was given against him and he sought the court's aid in setting it aside, he again refrained from telling the court who drove that vehicle but merely said "he had a good defence." Is this not the conduct of a man who was seeking to evade the truth, or at least obstruct its disclosure? On the question of delay, it ought to be remembered that the accident took place as long ago as 1980. When trial was set down for hearing on July 20, 1982, it had to be put off on account of the respondent's unexplained absence. Again when with the respondent's advocate's participation, the hearing was definitely fixed for December 3 and 4, 1984 both the respondent and his advocate failed to turn up, they did not give anything like a satisfactory reason for their absence. Clearly, the learned judge did not think they provided good reason for their absence. Indeed, he expressly criticised the respondent's counsel for wrongly assuming that the firm's instructions were withdrawn. He also thought that the pleadings were unhelpful. The only pleading against which this stricture can be directed was the respondent's, because he "denied that he was the driver and has not said what happened or who was driving his vehicle", to use the words of the judge. The one person who, on the facts of this case, showed or had an interest in obstructing or delaying the course of justice, was the respondent.

Had the learned judge borne in mind the admonition given in the *Mbogo* case against the use of this discretion either to delay or obstruct the course of justice, he would, in all probability have decided against setting the judgment aside. I think therefore, that in exercising his discretion to set aside the *ex parte* judgment, the judge failed to take into account not only all the circumstances, but also the respondent's proven proclivity to evade, obstruct or delay the course of justice. Indeed, the judge's order of 1985 which obliged the appellant's company to start all over again a suit it had commenced in 1982, after obtaining a perfectly valid judgment when no fault of any sort can be attributed to it, seems to me to injure the innocent and to benefit the guilty. That seems wrong.

In the result, I think the learned judge in setting the judgment aside slipped in three respects namely, firstly, he took a wrong view of the law and founded his conclusion on it, secondly, he without apparently appreciating this, sought to sit in judgment on the decision of a court of co-ordinate jurisdiction and; thirdly, he failed to take into account all the circumstances of this case and in particular, the facts and matters which show that the respondent was engaged in a course of conduct in relation to the case which was calculated to evade, obstruct or delay the course of justice.

I think therefore, we should deny that judgment our support. I have since committing my views into writing seen and read the judgment of my brother Masime. In view of what he says, I have no doubt what the result of this appeal will be. It will be of course, as my brothers say. But I would for my own part allow the appeal, set aside the order of Porter J and restore the judgment of Aganyanya J with costs here and below.

Masime Ag JA. This appeal concerns the important matter of the exercise of judicial discretion under orders 9A Rules 10 and 11 and 9B Rule 8 of the Civil Procedure Rules to set aside an *ex parte* judgment obtained in the absence of an appearance or defence by the defendant or on failure of either party to attend the hearing. On the facts of the case from which the appeal arises another important matter arises

namely when the *prima facie* inference of liability for accident by virtue of ownership of a vehicle may be rebutted.

The plaint in the case alleged that the defendant drove, managed and controlled a vehicle registration number KRH 159 negligently and caused it or permitted it to collide violently with the plaintiff's vehicle. It was not pleaded that the defendant was the owner of the vehicle nor was the capacity in which he drove the offending vehicle particularised; no claim of vicarious liability was made. In reply to these claims in the plaint the defence was that the defendant was never driving the said vehicle either as alleged or at all and consequently he denied all the acts of negligence. To pin liability on the defendant for the damages resulting from the collision the sole issue to prove was thus who was driving the vehicle and his relationship with the owner of the vehicle – see: *Bernard v Sully* (1931) 47 Times LR 557. *Hewitt vs Bonvin* [1940] I KB 188; *Rambaran vs Gurruchanan* [1970] 1 All ER (P.C) 749 and *Nakuru Automobile Hse Ltd v Nasiruddin Ziaudin* (C.A – Mombasa) C.A 638/86.

During the formal proof although the plaintiff had not pleaded that the defendant was the owner of the offending vehicle he led evidence that the defendant was the owner. Against this was the defence on record that the defendant even if he was the owner was never driving the vehicle. This at once raised the issue of the capacity and relationship to the defendant of whoever was driving the vehicle at the time of the accident. Without disposing of this issue it is clear that the plaintiff would not be said to have discharged his onus of proof of his case against the defendant. Liability could in the circumstances not be based on the alleged driving by the defendant and there was no claim on which vicarious liability could be based. It is in the face of these shortcomings in the pleadings that Porter J saw "all sorts of possibilities (to) exist," and sensed a "danger that justice may not have been done in the matter" particularly as the matter had been heard *ex parte.*

In the circumstances, and in the exercise of his statutory discretion he reconsidered the position after hearing both parties. I have examined his exercise of discretion in the matter in the light of the series of recent cases on the exercise of discretion – see–*Shah vs Mbogo* [1967] EA 116; *Mbogo vs Shah* [1968] EA 93; *Patel vs EA Cargo Handling Services Ltd* [1974] EA 75 and I can find no quarrel with him.

I have had the advantage of reading in draft the judgments of Platt JA and Apaloo JA. They each reach a different conclusion. For my part I agree with Platt JA that Porter J was right in exercising his discretion to set aside the *ex parte* judgement of Anganyanya J. I would dismiss this appeal and order that the case proceed to trial with costs.

Further order of the majority:

Platt JA & Masime Ag JA: The appeal to this court is dismissed with costs, and the suit will proceed to trial. Porter, J's order stands except that the defendant/respondent will pay the costs of the application before Porter, J.

Dated and Delivered at Nairobi this 14th Day of October, 1987

H.G. PLATT

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL

J.R.O. MASIME

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Ag. JUDGE OF APPEAL