REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA
Civil Appeal 244 of 2004

HAROLD KIDEM MGANGA …… 1ST APPELLANT

DONALD HERMAN MNGAU
(correct name**: DONALD MNGAU MWANGI) ……. 2ND APPELLANT**

AND

CONSTANCE MWAI MTOTO ……. RESPONDENT

(*An appeal from the judgment of the High Court of Kenya at Mombasa (Etyang', J) dated 29th July, 2003*

In

H.C.C.A. No. 95 of 2001)
****

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Etyang', J) delivered at Mombasa on 29th July, 2003.

This appeal has its origin in a plaint filed by the respondent herein CONSTANCE MWAI MTOTO in the Chief Magistrate's Court at Mombasa in Civil Suit No. 5020 of 1999. In the plaint dated 25th August, 1999 and filed in the Chief Magistrate's Court at Mombasa on 11th November, 1999 the respondent, through her advocates, M/s Kanyi, Juma & Company Advocates sued Harold Kidema Mganga (1st appellant herein), Donald Harman Mugau (2nd appellant) and the Attorney General for general and special damages. In her plaint the respondent averred that on or about 31st August, 1998 she was lawfully travelling as a fee paying passenger in the 1st appellant's motor vehicle registration number KAG 231K along Mwatate Road when the 2nd appellant so negligently and carelessly drove, managed and/or controlled it that it rammed into the 3rd defendant's vehicle registration number GK X848-AK-V420 which was also negligently parked on the said road by the third defendant's authorized driver or agent, as a direct result whereof she sustained serious injuries, loss and damages.

Summons to enter appearance were issued on 12th November, 1999 and were sent to one George Mgalla a court

process server who received them on 15th November, 1999. From an affidavit of service, Mr. Mgalla deponed that the 1st appellant accepted service on behalf of the 2nd appellant. The 1st and 2nd appellants did not file any appearance and hence the respondent through her advocate filed a request for judgment pursuant to provisions of **Order IXA rule 3** of the Civil Procedure Rules. Pursuant to that request an interlocutory judgment was entered on 25th January, 2000 in the following terms:-

> ***"The defendants having been duly served and having failed to enter appearance and file defence on the application by the plaintiff's advocates I enter judgment as prayed.***
>
> ***J.S. Mushelle,***
> ***Principal Magistrate,***
> ***Mombasa."***

Thereafter the case proceeded to formal proof on 28th March, 2000 before F.M. Muchemi (Senior Principal Magistrate). The respondent gave evidence and judgment delivered on 8th May, 2000 in which the respondent was awarded Kshs.140,000/- general damages and special damages Shs.1,600/- against the first and second appellants only. With regard to the third defendant the learned trial Magistrate had the following to say in the judgment:-

> ***"This is a case where there is interlocutory judgment in favour of the plaintiff against all defendants. However, the plaintiff's evidence does not put any blame on the third defendant whose vehicle was stationary on the side of the road. I therefore absolve the third defendant from liability.."***

The appellants herein made an application to set aside that judgment but their application was dismissed . Having failed to set aside the judgment the appellants took a different route this time by way of an application for review under **Order XLIV rule 1** of the Civil Procedure Rules. That application was, however, dismissed by the magistrate's court ruling delivered on 15th August, 2001.

Still dissatisfied by that dismissal of the application for review the applicants moved to the High Court to challenge the learned Magistrate's decision. That is the appeal that was placed before Etyang, J. for determination.

The appellants took the point of service of summons as their first ground. The learned Judge considered this ground and came to the conclusion that both appellants had been properly served. In the cause of his judgment the learned Judge said:-

> ***"I hold that service of court process on the first appellant for and on behalf of his employee (second appellant) in the circumstances of this case where the cause of action arose in the said employee's course of employment was sufficient and effective service."***

The second ground taken up by the appellants in the superior court was that the trial Magistrate erred in law in holding that the default judgment entered against them and the 3rd defendant without leave of the court. On that ground

the learned Judge rejected the appellants' submissions and in his judgment expressed himself thus:-

> ***"There is no proof that the Attorney General had been served before the interlocutory judgment was recorded. It can only mean that an interlocutory judgment was entered only against the first and second appellants. For this reason I do hereby hold that there is no merit in the second ground of appeal as well."***

The third ground of appeal in the superior court was that the trial Magistrate acted without jurisdiction when she moved "*suo moto*" and set aside an irregular default judgment to the great prejudice of the appellants. This matter was seriously argued by counsel appearing for the appellants but the same ground was rejected. In concluding his judgment the learned Judge said:-

> **"The issue is whether, by absolving the third defendant from blame, the appellants have suffered injustice. The answer is simple and it is contained in the first appellant's supporting affidavit on page 12 of the record of appeal i.e. that this claim has been settled by the insurance company through payment of a cheque in the sum of Sh.191,995/-. It would seem to me therefore that no prejudice or injustice has been occasioned to the appellants. There is no merit in the third ground of appeal as well.**
>
> **I have given due consideration to the remaining grounds, 4, 5, and 6 and I find also no merit in them.**
>
> **The appeal is dismissed, with costs to the Respondent."**

The appellants were still dissatisfied by the decision of the learned Judge and hence filed this appeal on the following eight grounds:-

> ***"1. The learned judge erred in law by holding that there was service or satisfactory service of summons to enter appearance on the appellants while indeed not an iota of evidence is available to support that finding.***
>
> ***2. The learned judge erred in law when he held that the judgment entered in the first trial court was only effective as against these appellants and not the Hon. Attorney General (who was named as the third defendant). This finding occasioned a grave miscarriage of justice and is not supported by any evidence.***
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> ***3. The learned judge misunderstood and misapplied the principle that "****a legal nullity is a nullity and ought tobe set aside ex-debito-justitiae****" as emaciated (sic) in the case of Craig vs. Kanseen (1943) 1 All E.R 108 thereby erroneously holding that the Appellants had not suffered any prejudice or injustice as a result of the self evident trial court's erroneous orders, yet the appellants have suffered clear prejudice and financial mischief.***
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> ***4. The learned appellate (sic) judge erred in law by failing to give reason(s) to support his decision or holding that grounds 4, 5 and 6 set out in a Memorandum of Appeal were without merit, contrary to the requirements of order XX Rule 4 of The Civil Procedure Rules.***
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> ***5. The learned judge's judgment offends the principle "****audi alteram partem****" in that it completely shut out the appellants' from presenting their case.***
>
> ***6. The learned judge erred in law by upholding an order of the court of first instance in the face of defective court process and gravely irregular proceedings with regard to service of court process and passing and vacation of orders.***
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> ***7. The learned judge relied on extraneous material when he held that the first appellant was the owner of motor vehicle registration mark KAG 230K, and while in fact the said vehicle was owned and controlled by a third party namely Gladinga (K) Limited.***

8. The learned judge erred in law by holding that service of court process on the second appellant was regular without an iota of evidence to demonstrate that the first appellant had the authority of the second appellant to accept summons to enter appearance on his behalf."

This is the appeal that came up for hearing before us on 28th January, 2010 when Mr. S.M. Kimani appeared for the appellants while Mr. Kioko Maundu appeared for the respondent . In his submissions Mr. Kimani argued grounds 1, 2, 3, 4 and 6 together which were mainly on the issue of summons. It was his contention that there was no effective service of the summons. Mr. Kimani further submitted that the superior court did not give reasons for its decision and that dismissal of the application for review was an error on the part of the superior court. Mr. Kimani appeared to have abandoned grounds 5, 7 & 8.

In answer to the foregoing, Mr. Maundu submitted that the 1st appellant accepted service on behalf of the 2nd appellant and that the 1st appellant had admitted that he was the owner of the vehicle. Finally, Mr. Maundu agreed with the conclusions of the learned Judge submitting that the learned Judge had given due consideration to all the relevant issues.

In this appeal we have given a brief background to the dispute which started in the Chief Magistrate's court at Mombasa. This was a claim by the respondent as per the plaint in which the respondent sued the two appellants and the Attorney-General. Summons to enter appearance were issued and served upon the first appellant who accepted service on behalf of the second appellant. These two did not enter appearance or file defence to the respondent's claim. Interlocutory judgment was accordingly entered and a final judgment entered after formal proof. The appellants' attempt to set aside that judgment was dismissed. They then decided to pursue the matter by way of application for review pursuant to **Order XLIV rule 1** of the Civil Procedure Rules which provides:-

1. (1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

"(2) A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

That application for review was dismissed prompting an appeal to the superior court. We have deliberately set out the provisions of **Order XLIV rule 1** of the Civil Procedure Rules in a bid to clearly show what the appellants were

supposed to demonstrate before both the trial court and the superior court.

When the appeal was argued before us the issues raised related to summons to enter appearance and the fact that the Attorney General had been absolved from any liability. This matter came from the Chief Magistrate's court and the parties had opportunity to present their respective submissions. Since the application was for review it was upon the appellants to show that there had been the discovery of new and important matter or evidence which was not within their knowledge or could not be produced by them at the time the decision was made. The appellants could succeed if they were able to show that there had been some mistake or error apparent on the record. They could also succeed if they could show any sufficient reason why the previous decision should be reviewed. We have carefully considered the history of this matter but on our part we are satisfied that the appellants' application for review was properly rejected and that the learned Judge cannot be faulted in any way for rejecting the appellants' appeal to that court.

As this was a matter arising from an application for review, we think that the issues relating to service of the summons to enter appearance and the fact that the Attorney General had been absolved from liability were beyond an application for review under **Order XLIV** of the Civil Procedure Rules. But even if we are to deal with these issues we are of the view that there was clear evidence that summons to enter appearance had been effected upon both appellants and that after hearing the evidence of the respondent at the formal proof stage the learned trial Magistrate was entitled to absolve the Attorney General from any liability.

Having carefully considered all the submissions and taking into account the background to this appeal, we are of the view that this appeal has been brought without merit . Accordingly we order that the appeal be and is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 12th day of March, 2010.

P.K. TUNOI
…….
JUDGE OF APPEAL

E. O. O'KUBASU
…….
JUDGE OF APPEAL

ALNASHIR VISRAM

…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.