



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NYARANGI, GICHERU & KWACH JJ A)

CIVIL APPEAL NO 163 OF 1989

ABDALLA MOHAMED

SWALEH A HASSAN..... APPELLANTS

VERSUS

MBARAKA SHOKA..... RESPONDENT

(Appeal from a Ruling and Order of the High Court at Mombasa, (Bosire J) dated the 20th day of July 1988 in Civil Case No 1118 of 1982)

JUDGMENT

On July 7, 1982 at about 12 00 noon, motor vehicle registration No KRQ 086 was involved in a road traffic accident with Mbaraka Shoka, the respondent, at Vipingo on Mombasa/Malindi road. This motor vehicle was then being driven by Abdalla Mohamed, the first appellant, and was owned by Swaleh A Hassan, the second appellant. The respondent was at the time of this accident, a standard two pupil at Vipingo Primary School in Kilifi District and was aged about 13 years.

In this accident, the respondent sustained the following injuries:

1. Head injury with loss of consciousness.
2. Crash injury to the left leg with compound fracture of both left tibia and fibula.
3. Fracture of the left clavicle.
4. Fracture of the pelvis – left superior and inferior rami.
5. Spinal injury with damage to the spinal cord at lumbar vertebra one (paraplegia).

He was treated for these injuries initially at Kilifi District Hospital and subsequently at the Coast General Hospital to which latter Hospital he was transferred on July 8, 1982. X-rays of the left leg revealed comminuted fractures of the left tibia and fibula. This led to the amputation of this leg through the left knee.

On November 12, 1982 the respondent filed an action in the superior court against the appellants and

claimed special and general damages from them jointly and severally for the injuries set out above. By an outmoded return of service submitted to that court by a process server of the said court, summons to enter appearance was purportedly served personally on the second appellant on December 7 1982 at 4.30 pm. On the same date and time, the second appellant also purportedly accepted service of similar summons on behalf of the first appellant who was described in the relevant return of service as his (second appellant's) brother. The second appellant did not endorse on the original summons purportedly served personally on him nor on the original summons served on him on behalf of the first appellant. Neither of the appellants entered appearance within the 15 days period prescribed in the said summonses.

On February 24, 1983 the respondent in writing requested the superior court for interlocutory judgment as prayed in his plaint to the said court. This was on account of the appellants' failure to enter appearance within the prescribed time. Such judgment was entered against the appellants on March 19, 1983.

On May 6, 1983 the respondent was medically examined by Mr E E Ambeva, F R C S, a consultant orthopaedic surgeon. According to this doctor, resulting from the injuries set out above, the respondent lost his left leg; he suffered loss of motor power and sensation below the level of lumbar vertebra one with the consequent inability to lead a normal sexual life; he suffered post-concussional syndrome – persistent headaches – which is a complication of cerebral concussion; and he suffered complete paraplegia below lumbar vertebra one owing to the irreversible damage to the spinal cord. These were permanent disabilities and at his age, the respondent was to find it difficult to cope with life on his own. No doubt considering these disabilities together with other factors, the superior court on October 6, 1983, assessed the respondent's claim for special damages at Kshs 16,000, general damages at Kshs 900,000 and entered a final judgment against the appellants jointly and severally in the sum of Kshs 916,000 with costs and interest at the rate of 12% per annum.

Pursuant to this judgment, it would appear from the record of the superior court that by or before May 7, 1984 the decretal sum of Kshs 916,000 was paid to the respondent by the Kenya National Assurance Company Limited, the insurer of the second appellant's motor vehicle registration No KRQ 086.

In a letter dated March 27, 1985 and received by the superior court on March 28, 1985 the second appellant asked that court to furnish him with the details concerning the suit out of which this appeal arises. On January 18, 1988 the appellants filed an application in that court for orders *inter alia* that the interlocutory and final judgments entered against them as are set out above be set aside. In one of the supporting affidavits to their application, their counsel, Ushwin Khanna, *inter alia* deponed as follows:

“2. That I have been entrusted with the conduct of this suit on behalf of the first and second defendants and am duly authorized by them to make this affidavit.

3. That on perusal of the said court file I am informed by the first defendant and verily believe the same to be true that the summons in this suit were irregularly served by the plaintiff on the said defendants.

4. That I am informed by the defendants and verily believe the same to be true that the summons in the above suit were never served upon them.

5. That the interlocutory judgment and final judgment entered herein were therefore irregular.”

At the hearing of their application in the court below, the appellants' complaint, besides their claim that they had a good defence to the respondent's suit against them, was that there was no service of the summons to enter appearance and that the returns of service in respect thereof were defective. Service of the said summons was therefore irregular.

In his ruling, Bosire J observed that the process server used returns of service which were not then legally recognized as the same had been amended by legal notice No 119 of September 19, 1975. This amendment enjoined the process server to require the person served to sign on the original summons or indicate that such person had refused to sign the same. According to him therefore, these returns of service were drawn in a manner that was irregular. Nevertheless, he held that that alone could not have

them ruled inoperative nor could it impel him to exercise his discretion in favour of the appellants who were guilty of laches and set aside a judgment that had been satisfied and part of the decretal sum of money applied for purposes which may have been difficult to reverse.

Accordingly, he dismissed the appellants' application with costs to the respondent.

Against this decision, the appellants have appealed to this court and have put forward and argued before us four grounds of appeal. These are that:

"1. The learned judge erred in law and on facts in dismissing the appellants' chamber summons dated December 30, 1987.

2. The learned judge having correctly decided that the manner of service purportedly effected upon the second appellant was irregular erred in law in refusing to exercise his discretion to set aside the judgments obtained by the respondent.

3. The learned judge misdirected himself in concluding that although the process server had used an obsolete procedure of service this ground alone was insufficient to enable him to set aside the judgment entered against the appellants.

4. The learned judge erred in fact and law in failing to find that the service of the court summons allegedly effected by the process server on the appellants was improper and/or invalid and therefore the interlocutory and final judgments entered against the appellants on March 19, and October 6, 1983, respectively, were irregularly entered."

Starting with ground two of the appellants' appeal, as we have pointed out above, the learned judge found that the manner the returns of service were drawn was irregular. He did not, however, decide that the manner of service purportedly effected upon the second appellant was irregular. Indeed, his holding in this respect was that the second appellant by his conduct demonstrated that he received the summons to enter appearance but did nothing about it.

As regards ground three of the appellants' appeal, the learned judge did observe that the process server used a procedure of making a return of service which had been abandoned in favour of a new one. He did not, however, conclude that the process server had used an obsolete procedure of service. In fact, if the outmoded return of service in respect of the second appellant was anything to go by, the learned judge did observe that service of the summons to this appellant was personal. This would be in accordance with order V rule 9(1) of the Civil Procedure Rules. Such procedure of service would not be obsolete.

Concerning ground four of the appellants' appeal, paragraph three of Mr Khanna's affidavit as is set out above indicates that the summonses to enter appearance were served upon the appellants but that that service was irregular. Paragraph four of the said affidavit, however, indicates that the appellants were never served with the said summonses. On this basis, Mr Khanna deponed that interlocutory and final judgments entered against the appellants were irregular.

The indication contained in paragraph three of the affidavit mentioned above is contradictory to that contained in paragraph four of the same affidavit. The appellants were either irregularly served with summons to enter appearance by the respondent which means that they were actually served with the said summons although the proper formalities in respect thereof were not followed or they were never at all served with the same.

It could not be both. Pitted against the returns of service referred to above, this contradiction is a pointer that the appellants were aware of the action filed against them by the respondent long before the interlocutory and final judgments were entered against them. This was notwithstanding that the aforesaid returns of service were drawn in a manner that was irregular. It was for the appellants to establish on a balance of probabilities that even with the irregular returns of service, they were never served with the summons. This they did not do as they rested their application on these returns of service. That *per se*, as

the learned judge rightly observed, would not have been a sufficient ground upon which the interlocutory and final judgments could be set aside considering that the said judgments were not clearly shown to have been entered irregularly. More so when the circumstances of the case in the lower court are taken into account and the fact that the final judgment had been satisfied with part of the decretal sum of money applied for purposes which would not be easy to reverse. Reverting now to the appellants' first ground of appeal, the tests for the correct approach in an application to set aside a default judgment are; firstly whether there was a defence on merits; secondly, whether there would be any prejudice; and thirdly, what is the explanation for any delay – see the judgment of Kneller, JA (as he then was) in the case of *Merama Nyangombe v Chacha Mwita*, Court of Appeal, Civil Appeal No 79 of 1983.

From the copy of the appellants' intended defence annexed to Mr Khanna's affidavit referred to above, it is arguable whether or not the appellants had a defence on merit to the respondent's suit against them. Despite this, however, considering the lapse of more than four years since interlocutory and final judgments were entered against the appellants and January 18, 1988 when the application to set aside these judgments was filed; and taking into account that by this date the final judgment had been satisfied with part of the decretal sum of money applied for purposes which would not be easy to reverse without occasioning considerable hardship to the respondent; and in view of the absence of a plausible explanation for this inordinate delay; the trial judge could not have exercised his discretion in favour of the appellants without prejudice to the respondent. Indeed considering that justice looks at both ways, he would not have done so without the resultant misjustice.

Accordingly, the dismissal of the appellants' application by the learned trial judge as is referred to above cannot be faulted. We are therefore unable to find any merit in the appellants' appeal. The same is dismissed with costs to the respondent. That is the order of the court.

Dated and Delivered at Mombasa this 15th Day of June, 1990

J.O. NYARANGI

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JUDGE OF APPEAL

J.E.GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL