



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, TUNOI & BOSIRE, J.J.A)

CIVIL APPEAL NO. 38 OF 1998

BETWEEN

TREE SHADE MOTORS LIMITEDAPPELLANT

AND

D.T. DOBIE AND COMPANY (K) LIMITED 1ST RESPONDENT

JOSEPH RADING WASAMBO 2ND RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi of Hon. Mr. Ole Keiwua dated the 30th day of June, 1995

in

H.C.C.C. NO. 3764 OF 1994)

JUDGMENT OF THE COURT

Joseph Rading Wasambo, the second respondent in this appeal, (*hereinafter called "the plaintiff"*) sued D.T. Dobie and Company Ltd, the first respondent, (*hereinafter called "the first defendant"*) and Tree Shade Motors Ltd, the appellant (*hereinafter called "the second defendant"*) in the superior court seeking a declaration that the sale by the first defendant, to the second defendant, of a motor vehicle belonging to the plaintiff was null and void and of no legal effect; an order directing the defendants to return the vehicle to the plaintiff; damages for loss of use and detinue; a sum of Shs 1,407,202.50 car hire charges; and an additional sum of Shs 5,000 per day for car hire until the settlement of the case.

Service of summons and plaint was effected on both defendants by registered post in accordance with *Order V r2(b)* of the Civil Procedure Rules. The first defendant entered an appearance and filed a defence denying the plaintiff's claim. The gist of the defence was that the plaintiff had left his motor vehicle with the first defendant for repairs; that he failed to pay the repair charges when required to do so; and that on 10th November, 1993 it sold the motor vehicle to the second defendant by tender for Shs 102,000, out of which it recovered Shs 4,202.10 for work done on the motor vehicle, and Shs 73,599.50 for storage charges. The balance of Shs 24,198.40 was forwarded to the plaintiff who refused to accept payment.

The second defendant did not appear nor did it file a defence with the result that on 14th December, 1994, interlocutory judgment was entered against it for Shs 1,412,202.50 together with interest at court rates

from the date of filing suit. The remainder of the plaintiff's claim was ordered to be set down for formal proof.

On 27th March, 1995, the second defendant applied by Chamber Summons under *Order 1XA rr10 and 11* the Civil Procedure Rules to set aside the ex parte interlocutory judgment and consequential orders. The application was supported by an affidavit sworn by *Geoffrey Mwangi Muthuri*, a director of the second defendant. He deponed that the letter forwarding the summons and plaint did not reach the second defendant because of changes which had taken place within the company relating to shareholders and directors and blamed all this on the company auditors. A draft defence was also annexed in which the plaintiff's claim was denied in its entirety. The main plank of the second defendant's draft defence is that it was a bona fide purchaser for value without notice.

The application was opposed by the plaintiff and Ole Keiwua J who heard it, held that the judgment was regular as the second defendant had been properly served and he dismissed the application with costs. It is against that decision that the second defendant now appeals.

The changes on which *Geoffrey Muthuri* relied to assert that process did not reach the second defendant took place between 1992 and 1993, two years before the suit was filed, and we cannot therefore accept *Mr Gatonye's* submission that this could have affected internal management of the second defendant at the time process was issued. The learned Judge was quite right therefore to hold, as he did, that the second defendant had been properly served, and if the matter depended entirely on service there would have been nothing to say in favour of the second defendant in this appeal.

The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff's claim. Where a draft defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does, the defendant should be given leave to enter and defend. That is what this Court decided in the case of *Kingsway Tyres and Automart Ltd v Rafiki Enterprises Ltd* (Civil Appeal No. 220 of 1995) (Unreported). In the course of its judgment the Court said:-

"To our minds, the onus was on the respondent to fault the service. Having failed to do so, and in the absence of evidence on record to lead us to hold that the service was improper, it is our view and so hold that ex parte judgment was a regular judgment. It would only, if at all, be properly, vacated on grounds other than non-service of summons.

There are ample authorities to the effect that, notwithstanding regularity of it, a court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits. The respondent did not annex to its application in the lower court a draft defence. A director of the company did, however, swear an affidavit to state that the appellants's claim was based on certain LPOs which had been stolen from it (the respondent) by its employees. Too, that the employees had been arraigned in court on criminal charges relating thereto. In view of that, it did not think the claim, properly, lay against it. It was desirable, we think for the respondent to annex to its application a draft defence to include all that and any other defences it may have had to the appellant's claim. Be that as it may, the defences, above, were not such as would have properly, influenced the court below to exercise its discretion in favour of setting aside. That is the more so considering the manner the parties conducted business between themselves."

As we have already said, in this case the second defendant annexed a draft defence to the affidavit in support of the application to set aside, the gist of which is that it purchased the motor vehicle from the first defendant as a purchaser for value without notice. The effect of this defence, if it prevails, is that the plaintiff would have to seek redress from the person with whom he had left his motor vehicle and who sold it to the second defendant. That is a defence which the second defendant should be allowed to raise although it has been less than candid on the issue of service. The plaintiff has been inconvenienced, but he certainly has not been prejudiced, and his inconvenience can be redressed by an appropriate order for costs.

In the final analysis, we allow this appeal, set aside the ruling and order of *Ole Keiwua J* dated 30th June, 1995 and substitute therefor an order allowing the second defendant's application dated 27th March, 1995, and set aside the ex parte interlocutory judgment entered on 28th December, 1994, against the second defendant. The second defendant is hereby granted leave to enter and defend and to file its defence within 14 days from today. The second defendant will bear the plaintiff's thrown away costs and his costs of this appeal which we assess at Shs 20,000 to be paid within 14 days from today and in default execution to issue. The first defendant is not entitled to costs.

Dated and delivered at Nairobi this 10th day of July, 1998.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR