IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wambuzi P, Mustafa & Musoke JJ A)

CIVIL APPEAL NO 6 OF 1976

KARATINA GARMENTS LTD…… APPELLANT

VERSUS

DAVID NYANARUA…… RESPONDENT

Appeal from an order of Chesoni J

in the High Court at Nairobi

dated 13th August 1975

in

Civil Case No 667 of 1975

JUDGMENT OF THE COURT

The appellant filed a suit in the High Court claiming the sum of Shs 62,701 from the respondent under the Transfer of Businesses Act. The respondent did not enter appearance and judgment was entered against him in default on 8th May 1975. The respondent applied to the High Court to set aside the judgment on the ground that he had not been served with any summons in connection with the suit. The High Court allowed the application and set aside the judgment on 13th August 1975. It is against this decision that the appellant now appeals to this Court.

The respondent's application before the High Court was supported by an affidavit dated 22nd July 1975 in which he denied the appellant's claim and denied having been served with a summons or the plaint in the suit. He claimed that he had a good defence. On the other hand, the process server employed by the appellant's advocates deponed in his affidavit dated 29th July 1975 that he had served the respondent at his place of business at Kericho with a summons and a copy of the plaint in the suit and that the respondent had declined to sign the original copy of the summons. Due to the conflicting affidavits, it would appear, the Court decided to have the deponents examined on oath and gave a detailed ruling holding that the respondent was never served with the summons. This ruling has been attacked on a number of grounds stated in the memorandum of appeal to the effect that the judge erred in holding that there was no service of the summons.

We would like to state from the outset that rule 10 of order IX of the Civil Procedure Rules, then in force, gave power to the Court to set aside or vary a judgment given *ex parte* upon such terms as may be just. The power was discretionary and unqualified. We are of the view that in a case like this one where the respondent denied having been served with a summons, it was proper for the Court to inquire into this aspect of the matter; and in the face of the conflicting affidavits filed, it was again proper for the deponents to be examined on oath to try and ascertain the truth. It was then a matter of fact as to which party was to be believed. The judge who saw and heard the deponents believed the respondent. We are unable on the evidence as a whole to say that he came to the wrong conclusion, or that he did not exercise his discretion judicially. We have said time and again that, in normal circumstances, the Court should lean towards a policy of deciding cases on their merits rather than encourage *ex parte* judgments based on procedural technicalities.

In this case it is quite clear that the judge was satisfied that the party allegedly in default should be allowed to defend the claim against him. The basis of his decision was that the respondent was not served with a summons and a plaint and it follows that the *ex parte* judgment had to be set aside.

Mr Khanna for the appellant has submitted that this finding was unreasonable, contrary to the weight of the evidence, and in fact, perverse. With respect, we do not agree, We have deliberately omitted to mention a number of points raised by Mr Khanna in his appeal because we are of the view that, although they are interesting, they are only of peripheral significance and do not affect the basis of the judge's decision.

Appeal dismissed with costs.

Dated at Nairobi this 30th Day of April 1976

S.W.W. WAMBUZI

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PRESIDENT

A.MUSTAFA

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JUDGE OF APPEAL

J.S. MUSOKE

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JUDGE OF APPEAL