Case Number:	Civil Appeal 70 of 1991
Date Delivered:	25 Jun 1991
Case Class:	Civil
Court:	High Court at Meru
Case Action:	Ruling
Judge:	Samwel Odhiambo Oguk
Citation:	MOHAMMED IQBAL KARIM v SOLOMON MAKONEN & ANOTHER [1991] eKLR
Advocates:	Mr Arithi for the applicant/appellant Mr VP Gituma for the respondent
Case Summary:	...
Court Division:	Civil
History Magistrates:	-
County:	Meru
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL 70 OF 1991

MOHAMMED IQBAL KARIM.....APPELLANT

versus

SOLOMON MAKONEN

MWIKA THURANIRA.....RESPONDENTS

25/6/1991

Coram: SO Oguk – judge

Mr Arithi for the applicant/appellant

Mr VP Gituma for the respondent

Court Interpreter – Murungi

RULING

This application by way of chamber summons is expressed to have been brought under sec 3 and 3A of the Civil Procedure Act (cap 21 Laws of Kenya

all other enabling provisions of law. The applicant, Mohamed Iqbal Karim, is praying for the following orders:

1. That this court do stay execution of the orders made by the Learned Senior Resident Magistrate, Meru on the 12th of June 1991 in her Civil Case No 14/91.

2. That this court do order Pan African Insurance Co Ltd to stop payment of the respondent's claim No CU/44/9/0 if the same is payable until appeal filed herein is heard and determined.

3. That there be orders that execution in the Principal Magistrate's Case No 14 of 1991 do proceed.

4. That costs of this application be provided for.

This application was first brought before me ex-parte on the 13th of June, 1991 under certificate of urgency duly signed by the learned counsel for the applicant, Mr Arithi. Upon perusing the documents relied upon and the orders of the learned Senior Resident Magistrate, Meru in her Civil Case No PM CC No 14 of 1991, this court made ex-parte orders, the material part of which read as follows:

"Order (Ex-parte)

…. I now make temporary orders (ex-parte) restraining M/S Truckers Auctioneers from releasing M/V.

Reg No KZB 354 to the 1st respondent (1st defendant in the lower court) or to any other person, until this application is heard and disposed of inter-partes. The said vehicle may however be released if the respondents deposited in court Shs 120,000/- together with the charges of the Court Brokers".

The above orders were sufficiently obeyed and the vehicle reg No KZB 354 is still being held by M/s Truckers Auctioneers. This then brings me to the present application, and, in order to follow up the arguments that were advanced before me, I find it necessary to peruse the record of the lower court in P.M. Civil Case No 14 of 1991. The record shows that there has been numerous applications made by either party, all heard ex-parte. At no time has there been any inter-partes hearing of any application filed before the learned Senior Resident Magistrate. All the orders made by the learned magistrate including the judgment delivered on the 29th of April, 1991 have all been made ex-parte. The race for ex-parte orders was all started by the learned counsel for the applicant/plaintiff in the lower court. At the time of filing his plaint against the respondents/defendants on the 11th of January, 1991, he made an application by way of chamber summons expressed to have been brought under certificate of urgency for the attachment of M/V Reg KAA 446T before judgment. Such orders were given. The summons and plaint were subsequently served upon the respondents/defendants. The 2nd respondent/defendant entered appearance within time but never filed any defence. The 1st respondent/defendant never entered any appearance of filed any defence with the prescribed time. The learned counsel for the plaintiff then applied for and obtained interlocutory judgment against the 1st defendant on the 1st of March, 1991. The case was then set down for formal proof of his claim against the defendants. His case was closed after his evidence was recorded and the learned magistrate reserved her judgment which was delivered on the 29th of April, 1991. It is here that the learned magistrate faultered, and she was led to do so by none other than the plaintiff's counsel. Her judgment was against the defendants jointly and severally in the sum of Shs 67,802/- as claimed together with Shs 9,477/- as general damages plus interest and costs. This was followed by a decree and thereafter attachment and sale warrants were issued against the defendants to be executed by M/s Truckers Auctioneers. These execution warrants were issued on the 14th of May, 1991 and served upon the said auctioneers on the same day. He then proceeded to close down on 2nd defendant's business premises. On the following day, the defendant's filed an application in court by way of chamber summons through M/s Mukira Mbaya & Co Advocates in which they sought among other orders, that the ex-parte judgment obtained against them and all other subsequent orders be set aside and that the execution be stayed pending the disposal of that application. This application was also expressed to be under certificate of urgency and the learned magistrate, having heard the counsel for the defendants, granted the orders sought for stay of execution pending the hearing of that application inter-partes on the 24th of May, 1991. She also observed with curiosity that there was an appearance and statement of defence date-stamped by the court to have been received on the 4th of April, 1991 filed on behalf of the 1st defendant by M/s Mukira Mbaya and Company Advocates dated 3rd of April, 1991. Similarly, there was a statement of defence filed on behalf of the 2nd defendant by the same counsel on the 28th of March, 1991. These documents, properly date-stamped by the court were never in the court file according to the learned magistrate when she delivered her ex-parte judgment on the 29th of April, 1991.

It is easy to explain how the appearance and defence filed by M/s Mukira Mbaya & Co Advocates on behalf of the defendants were never in the court file while the learned magistrate delivered her ex-parte judgment on 29th of April, 1991. It appears to me that after receiving the evidence of the plaintiff by way of formal proof on 15th of March, 1991, and reserved her judgment, the learned magistrate must have taken away the court file with her to write her judgment. If Mr Mukira Mbaya filed the said documents as shown in the date-stamp on the 28th of March, 1991 and 4th of April, 1991, then clearly the file could not have been available to the civil registry staff to put in the said documents. The earliest possible time the Civil Registry staff could have the file available was only after the learned magistrate had delivered her ex-parte judgment on the 29th of April, 1991. I do not therefore share the observation of the learned

magistrate that “somehow the documents got removed from the file”. They had simply not yet been filed after properly being received in the registry and date-stamped as the file was with the learned magistrate to write her judgment. I think that this sufficiently explains the whole puzzle and exonerates the civil registry clerk of any mischief.

The learned magistrate therefore rightly made an order for stay of execution pending the hearing of the application to set aside the ex-parte judgment. That application was to be heard on the 24th of May, 1991. On that day, the learned counsel for the plaintiff punctually and dutifully attended court, while the counsel for the defendants arrived late while the plaintiff’s counsel was already making his submissions for the dismissal of the application. When given a chance to respond to the said submissions, he said nothing.

Clearly the learned magistrate was entitled as she eventually ruled, in dismissing the defendant’s application to set aside the ex-parte judgment of the 29th of April, 1991 and all the subsequent orders. She made an order for the execution to proceed thereby reversing her interim ex-parte orders of the 15th of May, 1991. She, however, ordered that apart from the 2nd defendant’s business premises which was then already closed by the auctioneers, the 1st defendants vehicle Reg. No KZB 345, which had also been attached by the said auctioneers to be released to him on payment of the auctioneers charges. As I understand the learned magistrate, she believed that the decretal sum would be satisfied by the closure of the business premises of the 2nd defendant. That is why she ordered that:

1) KShs 67,802/- (sixty seven thousand eight hundred and two) to be deposited in this court on or before the 30th of June, 1991 for collection by the plaintiff. Sale to continue if no deposit is made.

2) Premises attached to remain closed until the 1st order above is fully satisfied.

3) 1st defendant’s vehicle Reg. No KZB 345 be released to him by Truckers Auctioneers immediately on settling auctioneers charges. Auctioneers fees to be assessed by the Court.

4) Costs of this application to be borne by the applicant (meaning defendants) – emphasis is mine.

5) These orders to be served upon Truckers Auctioneers for compliance.

After making the above orders in which the learned magistrate dismissed the defendant’s application to be set aside the ex-parte judgment, there followed another application by the defendants, who had by then changed counsels.

It then fell upon the new counsels for the defendants, M/s Murango Mwenda & Co Advocates to move the court by chamber summons dated 4th of June, 1991 also expressed to be brought under certificate of urgency to have the earlier application by M/s Mukira Mbaya & Co Advocates that had been dismissed to be reinstated. Although the learned magistrate heard that application exparte, she appears to have ignored the orders sought and was merely contended to reiterate her earlier orders for the release of M/V Reg No KZB 345 to the 1st defendant upon payment of the auctioneers charges in the sum of Shs 7,000/-. The plaintiff’s counsel, then got incesed and came to this court by way of appeal against the orders made on the 12th of June, 1991 for the release of M/V Reg No KZB 345. As if he had become accustomed to the procedure of moving the court ex-parte under certificate of urgency, he filed his appeal contemporaneously with his present application. I then granted ex-parte the orders that I have herein above referred to pending the hearing of the application inter-partes.

As I have endeavoured to show, it has all along been a race for ex-parte orders. This is a most

unhealthy procedure to encourage. The learned magistrate should have firmly resisted the request for ex-parte orders so as to streamline the proceedings. However, numerous were the ex-parte orders made by the learned magistrate, the parties should bear in mind as was stated by Chezoni, J, as he then was in Municipal Council of Eldoret v James Nyakeno (Eldoret HCC Appeal No 14 of 1980 un-reported) that "the Court goes by the principle that such an ex-parte judgment having been entered neither upon merits of the case nor by consent of the parties is subject to the Court's power of revocation at its discretion."

The application before me, in essence, asks that I do order the execution of the ex-parte judgment of the learned magistrate dated 29th of May, 1991 do proceed and that that I authorize the sale of M/V Reg No KZB 345 which the learned magistrate ordered to be released to the 1st defendant. At the same time, the applicant (appellant) asks that there be orders restraining Pan African Insurance Co Ltd from making any payments to the respondents in respect of their claim No CU/44/9/0 if the same is payable until the pending appeal is heard and disposed of.

The gist of the applicant's (plaintiff's) claim against the respondents(defendants) as shown in the affidavits filed herein and the ex-parte judgment of the learned magistrate, is that he, Iqbal, is running an insurance agency known as MIK Insurance Agencies Ltd that transact business for Pan African Insurance Co Ltd among other insurance companies. That on the 3rd of July, 1990, the defendants (respondents) approached him to comprehensively cover their M/V Reg No KAA 446T, a Mitsubishi Fuso, lorry to run from 17th of July, 1990 upto 16th of July, 1991 (see Exhibit 1). This cover attracted a premium of Shs 75,279/-. He agreed to issue a temporary cover note for the vehicle and also give them a further 10% discount in the belief that the defendants would bring him further business. The premium payable therefore came down to Shs 67,802/-. He then issued them before payment with a temporary cover note No D 886001 for the period covering 17th July, 1990 to 31st July, 1990. Everything sailed smoothly as the 1st defendant (respondent) was not only a friend to the plaintiff, but also engaged in the insurance business, he having been an agent for the American Life Insurance Co Ltd. The Kenya Finance Corporation Ltd, Meru Branch, who were then financing the said vehicle then released to the defendants, the said vehicle on the strength of the insurance cover issued by the plaintiff.

The plaintiff never saw the defendants again after the release of the vehicle until they came for the yearly insurance cover for the said vehicle on the 3rd of September, 1991. When they came, they never paid to the plaintiff the agreed premium of Shs 67,802/- saying that they had forgotten with their cheque book which had remained behind. Trusting that the defendants would later that day bring him the cheque, the plaintiff issued them with the yearly insurance certificate No CE 697694. In the meantime, the plaintiff had himself settled the premium in respect of the said vehicle with the Pan African Insurance Co Ltd, Nairobi, whom he paid full amount of Shs 67,802/-. Defendants declined to pay him back the said money and unfortunately for them, their vehicle Reg No KAA 446T which the plaintiff had covered under Policy No MCV 076436E was involved in an accident on the 10th of April, 1991. Without settling the plaintiff's money in respect of the said policy, the defendants tried to side step him and claim directly from the principals, Pan African Insurance Co Ltd. They lodged with the said insurance company claim No CU/44/9/0 in respect of the said accident to their vehicle. Before the insurance company could settle their claim one way or the other, the plaintiff demanded the payment of his money Shs 67,802/- and when this was not forthcoming, he filed the suit against the defendants in Meru P.M. Civil Case No 14/91 which has now set everything in motion.

Basically, it appears that the plaintiff Iqbal has a genuine claim against the defendants. This is well supported by documentary evidence which were annexed to his supporting affidavit dated 13th of June, 1991. The 1st defendant (1st respondent), Solomon Makonen, despite whatever he had early on stated in his statement of defence, concedes to the fact that they took the said policy through the plaintiff, Iqbal, and goes on to say as follows in his affidavit dated 17th of June, 1991:

11) THAT paragraph 8 of the applicant's affidavit is denied except to add that the applicant who was my friend then agreed on a grace period ending November, 1990 and payment to begin on instalments of Shs 10,000/- per month as from December, 1990.

12) THAT the applicant agreed to my request for the above grace period because I explained to him that I was starting anew transport business otherwise I would have taken a loan with softer terms from Alico (K) Ltd where I have worked for over 8 years.

13) THAT I and my partner met quite often with the applicant and that the applicant is desperately trying to portray me as a person not worthy of any credit or sincerity and in fact a crock.

14) THAT subsequent to my discussions with the applicant, the applicant purportedly threatened to cancel to cover note and gave us a notice of 7 days.

15) THAT thereafter the applicant moved at a terrific speed by issuing me and my partner with a demand notice to sue, filed a plaint in court on 11/1/1991 and with an application to attach our vehicle Reg No KAA 446T before judgment.

16) THAT from that time onwards the applicant moved relentlessly at a great speed and succeeded to obtain all subsequent orders ex-parte …

In essence, the affidavit of Solomon Makonen dated 17th of June, 1991, is a clear admission that they indeed took the said policy for their vehicle Reg No KAA 446T through Iqbal. It is a departure from their statement of defence where they alleged that they took their policy direct from Pan African Insurance Co Ltd. The further supporting affidavit of Iqbal dated 19th of June, 1991 does not specifically deny having accorded the defendants any grace period within which to pay him the sum of Shs 67,802/- demanded or having agreed the instalment payments of Shs 10,000/-.

The defendants having now admitted their indebtedness to the plaintiff in respect of their M/V Policy No MCV 076436E for M/V Reg KAA 446T, I am satisfied that their respective statements of defence filed before the lower court in P.M. CCC No 14/91 does not constitute any reasonable defence to the plaintiff's claim. At best, it was merely meant to gain time for the defendants and I see no reason for failing to order that the said defence be struck out as disclosing no reasonable defence. It is so ordered.

This Court having now struck out the defences filed by the defendants (respondents) in P.M. C.C. No 14/91, it follows therefore that the plaintiff's claim against them stands. I am satisfied on the documentary evidence and on the affidavit evidence adduced that the defendant are fully indebted to the plaintiff in the sum of Shs 67,802/-. The judgment of the learned Senior Resident Magistrate delivered on the 29th of April, 1991 was properly obtained against the 1st defendant, Solomon as he had not filed any appearance or defence within the prescribed period having been duly served. By the time he entered his appearance and filed defence 4th of April, 1991, interlocutory judgment had been properly obtained against him on the 1st of March, 1991. The case against him was subsequently properly proved and the ex-parte judgment dated 29th of April, 1991 as concerns the 1st defendant, Solomon was proper. That judgment to-date has not been set aside by the lower court as his application to set aside the said judgment was subsequently dismissed since his counsel did not turn up in time to prosecute it and when he did turn up in Court before the hearing of the application was concluded, he declined to proceed or say anything.

As for the 2nd defendant, Mwika, the ex-parte judgment was obtained against him by error. He had entered appearance within the prescribed time on the 16th of February, 1991. He never filed any defence

within the stipulated time and therefore the plaintiff could properly proceed against him by way of formal proof, however, since he had entered appearance, he was entitled to be served with notice of the hearing of the formal proof. This was not done. In the case of Benard Gathige Ngua v Agip Kenya Ltd (Nairobi C.A. Civil Appeal No 45 of 1980), the court stated that:

"Thus in compliance with order IX B rule 1(1) where a defendant has appeared, he must be given reasonable notice of a formal proof in order that he may have an opportunity if he so desires either to defend or seek leave to file a defence out of time. The appellant was given no notice. This entitles him to have the ex-parte judgment set aside and in consequence all subsequent orders including the order appealed against are nullified. The appeal must be allowed."

It follows therefore, that the exparte judgment of 29th of April, 1991 was entered against the 2nd defendant/respondent, Mwika in error. As far as that judgment concerns Mwika, it will be set aside together with all consequential orders and decree. This means that Mwika now escapes the said judgment that has caught his partner, Solomon. However, as I have already pointed out, he (Mwika) like, Solomon, have no reasonable defence to the claim against them filed by Iqbal. For this reason, this court ordered that the defences filed by the defendants be struck out and judgment be entered for the plaintiff (Iqbal) as prayed.

The conclusion to which I have reached is that the applicant (plaintiff) Iqbal is truly and justly entitled to judgment against the defendants upon the 1st plaintiff's own admission that they indeed took the policy in dispute through him and that they were to pay the premium due by monthly instalments of shs. 10,000/- starting from December, 1990. Since then no payments have been made. Attempts by the defendants to by-pass Iqbal and deal directly with Pan African Insurance Co Ltd without first paying his money was therefore not proper.

I will therefore enter judgment for the plaintiff (Iqbal) against the 1st and 2nd defendants jointly and severally in the sum of shs. 67,802/- as prayed. The amount of general damages in the sum of Shs 9,477/- as was done by the learned Senior Resident Magistrate being the discount they would have earned had they paid the plaintiff within time, is proper and quite reasonable in the circumstances. I confirm this amount together with costs of the suit in P.M. C.C. No 14/91 and costs of this application in the High Court. The plaintiff will also have interest on the amount awarded calculated as from the 29th of April, 1991 when the learned Senior Resident Magistrate granted the orders as prayed.

Turning now to the question of execution, I concur with the decision of the learned Resident Magistrate on different considerations, that the 1st defendant's M/V Reg. No KZB 345 now held by M/S Truckers Auctioneers be released to him upon payment of the Court Brokers charges. Instead, I authorize the attachment of M/V Reg. No KAA 446T. Mitshubishi, Fusso Lorry or its salvage, following the accident that occurred on the 10th of April, 1991 which I believe will be enough to satisfy the decretal sum in this case. In this way, it will not be the 1st defendant alone who would feel the pinch of their having not paid the plaintiff's claim as would be the case if his vehicle Reg. No KZB 345 were to be as would be the case if his vehicle Reg. No KZB 345 were to be sold in execution of the decree, but by getting hold of the vehicle KAA 446T or its salvage, both defendants now stand to share the loss and the suffer for their misdeeds. The attachment and sale of the said M/V Reg. No KAA 446T or its salvage, would in any event, be put off if the defendants could work out an acceptable arrangement with the plaintiff and Pan African Insurance Co Ltd for the payment to the plaintiff of the decretal amount on behalf of the defendants by Pan African Insurance Co Ltd out of the funds, if any, due to them from the said Insurance Company in respect of their claim No CV/44//9/0.

This ruling therefore disposes of the pending appeal No 70 of 1991 and the Lower Court P.M. Civil

Case No 14 of 1991.

As I have already stated, the applicant (appellant) is entitled to his costs of this application and costs in the lower court.

Order accordingly.

Dated and delivered at Meru this 25th day of June, 1991.

S O OGUK

JUDGE