Blessed Tansporters Limited v Kimeu & 3 others (Civil Appeal E032 of 2021) [2024] KEHC 9287 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9287 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E032 OF 2021

BM MUSYOKI, J

JULY 31, 2024

BETWEEN

BLESSED TANSPORTERS LIMITED .... APPELLANT

AND

JOSEPH MUTHAMA KIMEU .... 1ST RESPONDENT

JOHN KYALO MUTHAMA .... 2ND RESPONDENT

MUTUI K LIMITED .... 3RD RESPONDENT

PATRICK KYALO .... 4TH RESPONDENT

(An appeal from ruling and orders in the Chief Magistrates Court at Machakos (Hon. E.H. Keago CM) dated 16-12-2020 in his civil case number 594 of 2017)

JUDGMENT

1. This appeal arises from ruling of the Machakos Chief Magistrate in his civil case number 594 of 2017 which was delivered on 16-12-2020. In the said ruling, the court dismissed the appellant's application dated 7-09-2020 which was seeking that judgement entered against the appellant in the matter be set aside and that the appellant be granted leave to file defence in the suit. The application had 12 grounds which were mainly that the appellant had not been served with summons to enter appearance and that it had a good defence to the 1st and 2nd respondent's claim. The application was supported by affidavit of Perry Asuke who described herself as legal officer with Invesco Assurance Company which had insured the appellant's motor vehicle which was involved in the accident in question.

2. The 1st and 2nd respondent (hereinafter referred to as 'the respondents' for the purposes of this judgement) filed a replying affidavit sworn by the 1st respondent on 11-02-2021 in which he averred that the appellant was served and exhibited affidavit of service of one Catherine Mwikali, a process server. This is the affidavit of service which was the basis for entry of interlocutory judgment the subject

of the application. The respondents also deponed that the appellant did not have good defence to their claim as they had not attached the draft defence.

3. The court has a wide and unfettered discretion to set aside default judgment in order to do justice to the parties. However, the unfettered discretion should be exercised judiciously and not whimsically. A court of law must apply and operate within set principles of law and procedures while exercising its discretion. If we were to let loose and say everything goes in matters of discretion, in my view, that would be a recipe for disorder in the administration of justice. That said, the law and judicial precedence has established principles which should guide the court while exercising its discretion in considering an application to set aside judgment entered in default of appearance or defence.

4. Where it is established that a defendant was not served or the service was improper or the judgement was otherwise irregular, the court should set aside the default ex debito justitiae. In the instances where the defendant was properly served with summons, the court would exercise its wide discretion if it is shown that the defendant had good reasons or excusable explanation for their failure to enter appearance and/or file defence in good time or where the defendant establishes that they have a good defence to the claim.

5. The lower court in this matter found that the appellant was properly served with summons to enter appearance. The magistrate held the view that the onus of disproving the service of summons lied with the appellant which in my considered view was the correct position in law. The respondents had so far convinced the court that the summons had been served upon the appellant which led to the entry of interlocutory judgement. I have looked at the affidavit of service by Catherine Mwikali and I find that the same had established good ground for entry of judgment. It was therefore incumbent on and the duty of the appellant to disprove those averments.

6. The averments by the process server could only be countered by the person who was said to have been served. In this case, the supporting affidavit which deponed to matters denying service was sworn by the legal officer of the insurance company one Perry Asuke. The said Perry had no capacity to depone to the matters of service as she was not a party to the proceedings. She claims to be a legal officer in the insurance company which allegedly had insured the appellant’s vehicle. I have actually noted that in the entire proceedings in the lower court, the appellant said nothing about the service of summons.

7. I have encountered instances where employees of an insurance company swear affidavits in matters involving their insureds. I hold the position that whereas the insurance companies have an interest in the suit where the causes of actions have a bearing on the interest insured by them, they should be reminded of rules governing oaths in form of affidavits. Order 19 Rule 3(1) of the Civil Procedure Rules provide that;

> ‘Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the source and grounds thereof.’

8. That is the law and the employees of such insurance companies should take oath on matters which are within their knowledge or which arise from information which comes to in their knowledge in which case they must disclose the source of their information.

9. In Hassan Babakar Osman & Another vs Nuh Abdulwahab Mohamed & 3 Others (2018) eKLR, Honourable Justice W. Korir (as he then was) had the following to say on the same issue;

   QUOTE

'When it comes to the swearing of an affidavit, the person with primary knowledge of the facts should swear the affidavit otherwise the affidavit will fall prey to hearsay rule.'

10. The entire supporting affidavit of Perry Asuke does not disclose her source of information. I find and hold that Perry Asuke was not competent to swear on matters of service. In the circumstances, I find no fault in the decision of the honorable magistrate on that issue.

11. The upshot of the above is that the lower court was correct when it held that the appellant was served with summons to enter appearance. That should deal with grounds of appeal touching on service.

12. The appellant did not offer any explanation for the delay in entering appearance and failure to file defence. This perhaps was hinged on its belief that the court would agree with its position that it was not served with summons. The learned magistrate found that the appellant did not demonstrate that it had a good defence to the claim. He observed that the appellant did not attach a draft defence which would have enabled the court to consider whether the appellant had a good defence. I have always held the view and I still do, that for an applicant to demonstrate that it has a good defence, it does not have to annex a draft defence. The grounds of defence can as well appear in the supporting affidavits or any other document or pleading produced in the application. So, even if the appellant had not exhibited a draft defence, the court should have gone into the affidavit produced in court to satisfy itself whether or not the defendant had a good defence.

13. I have gone through the supporting affidavit which I have already held consisted majorly of inadmissible hearsay. Even assuming that the deponent had personal knowledge of what she deponed in the supporting affidavit, there is nothing in the contents thereof to demonstrate a good defence to the claim. The same goes for the submissions by the counsel before this court. The counsel makes submissions which to me border on evidence which has not been produced in court in form of affidavit or otherwise.

14. There is the issue of whether the appellant had exhibited the draft defence to the application. I have noted in the respondents' submissions that they a claim that the draft defence appearing in the record of appeal at pages 99 to 101 of the record of appeal has been sneaked into these proceedings as it was not availed in the lower court. Paragraph 18 of the supporting affidavit by Perry Asuke seems to exhibit a draft defence as annexure 'PA1'. Ostensibly, paragraph 5 of the same affidavit exhibited a bundle marked as 'PA1' too. The draft defence is not marked. I have looked at the original record of the lower court and the same defence appears at the last pages of the supporting affidavit still unmarked. However, although the same was not marked as an annexure, it was unfair and too technical for the magistrate to fail to consider it.

15. The other grounds of appeal attacking the awards made by the court as being excessive and other issues touching on the magistrate's final judgment are not for consideration in this appeal. They cannot be discussed or considered at this point. The issues are time barred since the judgement was rendered on 23-05-2019 and time for filing appeal against the same lapsed on 23rd June 2019. No leave to file appeal out of time against the judgment was sought or granted. The leave granted by Honourable Justice D.K. Kemei vide his ruling dated 10-03-2021 was in respect of appeal against ruling dated 16-1-2020.

16. Having said the above, I will give the appellant the benefit of doubt noting that he at some stage deponed in miscellaneous application number E11 of 2021 that he had authorized his insurer to swear affidavit and bring proceedings on his behalf. That benefit of doubt has led me to reluctantly consider the draft defence attached to his application in the lower court. The benefit will however come with conditions.

17. Noting that the appellant was properly served and gave no explanation for failing to enter appearance and file defence and the trouble taken by the respondents in prosecuting the suit and executing the decree, I must take recognisance of the fact that the respondents are entitled to a reprieve to secure any further inconveniences that may be caused by the appellant or his insurers. I therefore proceed to allow this appeal on condition that the appellant shall deposit half of the decretal sum in a joint interest earning account in the joint names of advocates for the appellants and the advocates for the 1st and 2nd respondents.

18 In conclusion and summary, I make the following orders;

a. Subject to order 'b' below, the appellant's application in Machakos Cmcc number 594 of 2017 dated 7th September 2020 is allowed in terms of prayers 3 and 4.

b. The appellants shall within sixty (60) days after delivery of this judgement deposit a sum of Kshs 1,961,842.00 (one million nine hundred and sixty one thousand eight hundred and forty two) in an interest earning account to be opened in a reputable bank in joint names of the advocates for the appellant and the advocates for the 1st and 2nd respondents.

c. For avoidance of doubt, if the appellant shall fail to comply with order 'b' above within the stipulated period, this appeal shall stand dismissed without any further reference to this court.

d. Each party shall bear their own coast of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgement delivered in absence of the appellant and presence of Mr. Kamolo for the respondent.