



**Momanyi v Misoga (Environment and Land Appeal E073 of 2022)
[2023] KEELC 16125 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E073 OF 2022**

**AA OMOLLO, J
MARCH 16, 2023**

BETWEEN

EVANS MOMANYI APPLICANT

AND

JAMES MISOGA RESPONDENT

JUDGMENT

1. The Appellant filed a memorandum of appeal dated August 24, 2022 which listed the following nine (9) grounds of appeal
 - i. That the Hon. Magistrate erred in fact and law by failing to take cognizance of the fact that court orders given on the November 3, 2010 in favour of the Respondent were irregularly obtained.
 - ii. The learned Magistrate erred in fact and law in the exercise of judicial discretion as to whether or not to grant a stay of proceedings in Milimani MCRTC No. 53 of 2010.
 - iii. The trial court erred by failing to take notice that the eviction orders and warrant of attachment had been obtained in 2011 and 2012 hence failed to apply the same measure of restraint to the Respondent on the basis of the time taken between the years 2010 and 2020 when he served the Notice to show cause thus occasioning to a miscarriage of justice
 - iv. That the trial Court erred in fact and law by acting upon a wrong principle while discharging its discretion in her finding that the Appellant's application dated May 25, 2022 was unmerited
 - v. The learned Magistrate erred in law and fact when she failed to hold that the respondent obtained the orders fraudulently on the basis of misrepresentation of facts
 - vi. That the Hon. Magistrate misdirected herself in totality by disregarding the Appellant's strong evidence and thereby giving the Respondent undue advantage.



2. The Appellant sought to be granted the following orders;
 - a. That pending the hearing and determination of the Appellant’s Appeal, the Honourable Court be pleased to grant an order of stay of proceedings of the Milimani MCRTC No.53 of 2010 (James Misosa vs Evans Momanyi)
 - b. That the Honourable Court be pleased to grant Leave to the Appellant herein to file and/or mount his responses; to the Milimani MCRTC No.53 of 2010(James Misosa vs Evans Momanyi)
 - c. That the ruling delivered on the July 22, 2022 and orders issued therefrom by the Honourable Court in the Milimani MCRTC No.53 of 2010(James Misoga vs Evans Momanyi) be and are hereby reviewed, suspended, varied and/or set aside.
 - d. That the Appellant herein be granted an opportunity through its advocate on record, to file and/or mount his responses and be heard and submit before the Honourable Court.
3. The brief background to this appeal is as follows; on April 30, 2010 the Respondent sued the Applicant in Tribunal Case No.53 of 2010 for payment and recovery of rent arrears. The Appellant did not enter appearance and on November 3, 2010, an order was given directing the Appellant pay Kshs. 64,020/- rent arrears owing to the Respondent. In the year 2020, the Respondent moved to execute the said orders by serving the Appellant with a Notice to show cause on July 2, 2021. The Appellant filed an application dated May 25, 2022 in the lower court seeking for stay and/or setting aside orders of the above said court order on the grounds that the same was obtained after the proceedings were conducted ex parte without being served.
4. After consideration of the application dated May 25, 2022, the trial court vide her ruling delivered on July 22, 2022 found that the Appellant had not satisfied the conditions to merit the orders sought therein. Consequently, the Appellant’s application was dismissed. He was dissatisfied with that ruling and thus filed this appeal.
5. Directions were given on October 25, 2022 for prosecuting the appeal by filing of written submissions. The Appellant filed his submissions dated November 7, 2022. He submitted that premised on the evidence placed before the learned magistrate, service of summons to enter appearance was an issue disputed yet she did not make a finding on the issue. The Appellant submitted that he was never served with court process save for service of the notice to show.
6. The Appellant stated that his application dated May 25, 2022 was simply seeking to temporarily halt further court process and later for the trial court to lift the stay by resuming proceedings. That the dismissal denied the Appellant an opportunity to file and or mount his responses, be heard and submit before the Court strange issues raised by the Respondent. That the denial amounted to a grave violation of his fundamental rights to a fair hearing as provided under article 25 and 50 of *the Constitution*. The Appellant cited Nairobi HCFAMCA No E021 of 2021 which quoted *Ridge vs Baldwin* (1963) 2 ALL ER 66 which observed thus;

“The principle of fairness has an important place in the administration of justice and is also a good ground upon which courts ordinarily exercise discretion to intervene and quash the decisions of a tribunal or a subordinate court made in violations of right to a fair hearing and due process”
7. It is submitted by the Appellant that the dismissal of his application was not founded on the sound principles of law and justice. That the court ought to be guided by the provisions of Order 10 rule



11 of the Civil Procedure Rules which allows courts to set aside a default judgement if there is a demonstration of reasonable circumstances that may have occasioned the non-appearance. In his case, he averred that he was unaware of the existence of the case MCRTC 53 of 2010. The Appellant referred to the case of John Akasirwa vs Alfred Mai Kimuso Civ Appeal No 16 of 1999 where the Court of Appeal held: -

“Proper service of summons to enter appearance in litigation is crucial matter in the process whereby the Court satisfies itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not. Hence the need for strict compliance with Order 5 rule 9(1) of the Civil Procedure Rules. The ideal form of service is personal. It is only when the defendant cannot be found that service on his agent empowered to accept service is acceptable”

8. The Respondent filed undated submissions in which he outlined the background of the case and framed the issue for determination to be; whether the summons to appearance were served upon the Appellant and subsequent notices. He submitted that the Appellant had been served by affixing a copy of the summons on the outer part of the door of his house and service of all documents as proved by affidavits of service filed and therefore the Appellant knew of the existence of the case and chose not to defend.
9. The Respondent submitted that setting aside an ex parte judgement is a matter at the discretion of the court and in support cited the case of Esther Wamaita Njibia & two others vs Safaricom Ltd which quoted with approval the decision of the case of Shah vs Mbogo which held that it must be satisfied that either the defendant was not properly served with summons or that the defendant failed to appear in court at the hearing due to sufficient cause.

Analysis

10. The substantive issue in this appeal is whether the orders of dismissal made on July 22, 2022 by the learned magistrate hon. Ogonda esq should be set aside and or varied with the result that the Appellant be granted opportunity to defend the original claim filed before the Rent Restriction Tribunal. The Appellant’s main argument in his application to set aside the decree obtained was on the grounds that he had not been served with the summons to enter appearance.
11. The Respondent while opposing the impugned application filed a response which annexed copies of the affidavit of service to prove that indeed the Appellant had been served. For instance, Mr H.Wamutege the process server swore that pursuant to directions given by the court, he affixed a copy of summons to enter appearance on the outer part of the door of the suit premises. That on June 15, 2010, the chairman directed that the hearing notice be served by affixing a copy of the outer door of the Appellant’s premises but he was still not present during the hearing. It is only after a notice to show cause was served to the Appellant via What’s app on July 2, 2021 that he responded by to filing the application dated July 12, 2021 seeking for the proceedings commenced ex parte against him be struck out.
12. The Appellant herein challenged the contents of the affidavit of service filed although did not apply to cross examine the process server on the contents of his affidavit before prosecuting his application. It is a principle of law that if it will be the position that service was not properly effected, then the judgment will have to be set aside as a matter of right, ex debito justitiae. In this instance, the Respondent explained the manner service of summons to enter appearance by affixing the same on the door of the suit premises which in my view was sufficient service.



13. An affidavit of service is presumed to outline the factual position of what transpired as was established in the case of *Shadrack Arap Baiywo vs Bodi Back* (1987) eKLR, where the Court of Appeal stated as follows: -

“There is a qualified presumption in favour of the process server recognized in *M B Automobile v Kampala Bus Service*, [1966] EA 480 at page 484 as having been the view taken by the Indian Courts in construing similar legislation. On Chitale and Annaji Rao; *The Code of Civil Procedure Volume II* page 1670, the learned commentators say:

“3. Presumption as to service – There is a presumption of services as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service.”

14. The Appellant has not denied that he lived in the house the subject of dispute, and the same is confirmed by virtue of contesting the notice to show cause served requiring him to surrender vacant possession. It is therefore my opinion that the Appellant has not provided sufficient evidence to cast doubt that service upon was not proper. Therefore, I hold that there was no error in the Magistrate’s finding that the Appellant had been properly served.
15. This court is alive to the provisions of law that the court can still exercise discretion to set aside *ex parte* judgement even where it is held that service was proper. Among the matters that the court ordinarily considers in its unfettered discretion, is whether the applicant has presented a defence that raises triable issues to justify the applicant being accorded a hearing on the merits of the case. The Court of Appeal in *Stephen Wanyee Roki v K-Rep Bank Limited & 2 others* [2018] eKLR cited its decision in the case of *Patel v East Africa Cargo Handling Services Ltd* [1974] E.A. 75, where Duffus J, points out as follows at page 76: -

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan, J. put it “a triable issue” that is an issue which raises a *prima facie* defence and which should go to trial for adjudication”

16. I have not seen any draft defence annexed in the Appellant’s application or a statement to his defence in the supporting affidavit to enable the court make a discernment as to whether there is a triable issue. Consequently, it is my view that the Appellant has failed to satisfy this court as to why the court proceedings and the orders thereof should be set aside.
17. There was no mention of a draft defence being attached to the affidavit sworn in support of the motion dated May 25, 2022 that sought to set aside the decree. The Appellant does not mention having a good defence in his memo of appeal. It is discernable from the memo of appeal that paragraphs 1-6 refers to the learned magistrate not taking into consideration that should have made her allow the application



including stating that the Respondent also delayed by about 9.10 years before taking out the Notice to show Cause. Paragraph 7 of the memo refers to the prayer on stay of proceedings. It is only in paragraph 8 where the Appellant refers to the learned magistrate “misdirecting herself in totality by disregarding the Appellant’s strong evidence thereby giving the Respondent undue advantage” In his submissions, the Appellant stated that the strong evidence was that the only notice touching on the determined matter was given in the course of the conduct of the execution proceedings. Thus the Appellant was still discussing the issue of service.

18. The only issue raised and submitted on challenging the ex parte proceedings is the Appellant’s right to be heard as provided for under article 50(1) of *the Constitution* which states thus; “every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or another independent and impartial tribunal”
19. Similarly, in the grounds in support of the impugned motion of May 25, 2022, the Appellant did not mention any issue that he would raise as a defence to the Respondent’s claim apart from sling of not being given an opportunity to be heard. Neither did the Appellant annex any draft statement of defence for the learned magistrate to consider and so the magistrate cannot be faulted in reaching the decision that he did.
20. Despite the observations pointed out in the body of this judgement, this court takes cognizant of the weight of the decree sought to be executed. On the basis that the decree seeks to have the Appellant evicted and on the basis that the Appellant has now submitted to the court’s authority, I would exercise my discretion of giving him opportunity to present his case. I have also taken note that the Respondent expended money in effecting service of process upon the Appellant as well as several court appearances. Consequently, I do allow the appeal on the following terms;
 - i. The learned trial Magistrate’s ruling of July 29, 2022 dismissing the application dated May 25, 2022 be and is hereby set aside and instead, the said application is allowed in terms of prayer 3 that the judgement entered on November 3, 2010 be and is hereby set aside.
 - ii. The Appellant shall file and serve his defence to the claim within 21 days from the date of this ruling
 - iii. The Appellant shall pay to the Respondent thrown away costs of Kshs 20000 within 30 days hereof in default, the Respondent is at liberty to execute.
 - iv. The Appellant shall also deposit in court within 30 days hereof the sum of Kshs 30000 as security for rents claimed by the Respondent. In default, the Respondent be at liberty to execute and cause the monies realized from the execution process to be deposited in court
 - v. Each party to bear their respective costs of this appeal

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH, 2023

A. OMOLLO

JUDGE

Ruling delivered in presence of:

Mr. Misoga in persons – present

Nyakanga for Appellant

Catherine – Court Assistant

