Njuki v Mwangi & another (Civil Appeal 73 of 2020)
[2023] KEHC 2916 (KLR) (Civ) (28 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2916 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 73 OF 2020

JK SERGON, J

MARCH 28, 2023

BETWEEN

JULIUS MUCHOKI NJUKI ..... APPELLANT

AND

JOSHUA THIGIRU MWANGI ..... 1ST RESPONDENT

ISAAC WAWERU ..... 2ND RESPONDENT

(Being an appeal from the ruling and order of Honourable G. A. Mmasi (Mrs.) (Senior Principal Magistrate) delivered on 12{{^th}} February, 2020 in Milimani CMCC no. 5311 of 2017)

JUDGMENT

1. At the onset, the 1st respondent lodged a suit against the appellant and the 2nd respondent through the plaint dated July 25, 2017 and sought for special damages in the sum of Kshs 1,350,000/= being the refund of the purchase price paid by the 1st respondent to the appellant and the 2nd respondent in respect to two (2) motor vehicles; general damages plus costs of the suit and interest on the same, arising out of a claim for breach of contract.

2. Upon the request of the 1st respondent, an interlocutory judgment was entered against the appellant on February 11, 2018 and the matter proceeded for formal proof. Upon close thereof, final judgment was delivered in favour of the 1st respondent and against the appellant and the 2nd respondent on July 3, 2018.

3. Consequently, the appellant filed the Notice of Motion dated December 3, 2019 and sought to set aside the interlocutory/ default judgment and further sought for leave to file his statement of defence out of time. The Motion was opposed by the 1st respondent.

4. Upon hearing the parties on the aforesaid Motion, the trial court by way of the ruling delivered on February 12, 2020 allowed the Motion on the condition that the appellant deposits half the decretal amount in court within 14 days therefrom, failing which the 1st respondent would be at liberty to proceed with execution.

5. Being aggrieved by the aforementioned ruling, the appellant sought to challenge the same by way of an appeal. Through his memorandum of appeal dated February 20, 2020 the appellant put in the following grounds:

    i. The learned trial magistrate erred in law by allowing the appellant's Notice of Motion Application dated December 3, 2019 and imposing a condition that the appellant deposits half the decretal amount in court.

    ii. The learned trial magistrate erred in law and in fact by making a finding that the service to enter appearance against the appellant was proper.

    iii. The learned trial magistrate erred in law and in fact by making a finding that the appellant's Notice of Motion Application dated December 3, 2019 was filed after an unreasonable delay.

6. This court gave directions for the parties to file written submissions on the appeal. The 2nd respondent did not participate in the appeal.

7. On the part of the appellant, it is submitted that the trial court erred in placing a condition to the setting of the interlocutory judgment by requiring the appellant to deposit half the decretal sum and yet leave had been granted for the appellant to put in his statement of defence.

8. To buttress his argument above, the appellant has drawn the attention of this court to the case of *Peter Kariuki Karuguchu v Stephen Waithaka Mwangi* [2017] eKLR in which the court determined that upon the granting of leave for a defendant to defend a suit, there is no basis for a trial court to revive the decree by placing conditions for its satisfaction.

9. It is also submitted on behalf of the appellant that the trial court erred in concluding that service of the summons to enter appearance had been properly effected in the absence of credible evidence on record to support that finding and cited the case of *Titus Musembi v Rureri Wahome & 3 others* [2016] eKLR where the court held thus:

> "Service of summon or indeed any process is the foundation of the right to a fair hearing which must be enforced at all times and is incapable of being limited.
>
> It has bothered this court what to make of the plaintiff's action of taking out summons and serving same in a manner unsupported by court records and on the basis of such affidavit obtaining a judgment which it now insists on. It has equally bothered the court whether the plaintiff can insist on the rights that accrue out of such an erroneous affidavit.
>
> The court of appeal in a Yalwala -vs- Indimuli [1989] eKLR when faced with such a scenario held that failure to effect proper service invalidated all the subsequent proceedings which then become null and void and of no effect. That decision has been followed severally with the understanding that if it is public duty for citizens to obey the law, then it is a bigger obligation on the courts of law, if not for anything else, but for purposes of enforcing the law to avoid perpetuating acts of illegality. To allow an act performed contrary to the law to

stand is in effect a perpetuation of the illegality see Wilson Ndolo Ayaa -vs- National Bank of Kenya Ltd [2009] eKLR."

10. The appellant further faults the trial court for finding that there had been a delay in bringing the application seeking to set aside the interlocutory judgment and yet the appellant only came to learn of the existence of the suit on November 22, 2019 on being served with execution documents.

11. For all the foregoing reasons, the appellant urges this court to vary the impugned ruling and to grant him the opportunity to defend the suit unconditionally.

12. The 1st respondent through the submissions dated February 21, 2023 contends that the trial court exercised its discretion judiciously and considered all the relevant factors and therefore acted correctly in its decision.

13. The 1st respondent further contends that service of the summons was duly effected by way of substituted service and hence the interlocutory judgment is proper, citing inter alia, the case of *Hamisi Omar Juma & 152 others v Amralai J Rajshi Shah & 2 others*[2015] eKLR where the court held that:

> "It is not in dispute that the plaintiffs served the defendants via two newspapers. Mr. Birir submitted this advertisement was in reus not in persona. Mr. Saende submitted the same was too small not easily visible. Did the Plaintiffs therefore serve the STEA property as envisaged in the rules? The advert was placed in the Standard and Daily Nation newspapers of June 22, 2012. Both cuttings were annexed in the affidavit of service of Leonard Shimaka sworn on September 26, 2012 and annexed to the request for Judgment. Under Order 5 rule 17(4) which provides for service by advertisement, the size is not provided for. Therefore whether the advert was too small or in the classified section does not invalidate it. The defendants served were the ones whose name appeared in the certificate of official search conducted at the time of filing suit. The service was thus proper and this Judgment can only be set aside on the basis of the Court's discretion."

14. It is the submission by the 1st respondent that in any event, there was an inordinate delay in filing the application. Consequently, the 1st respondent supports the decision by the trial court and urges this court not to disturb it.

15. I have considered the submissions on record and the authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. It is clear that the appeal fundamentally lies against the trial court's decision to place a condition for allowing the appellant's application seeking to set aside the interlocutory judgment and for leave to file his statement of defence out of time. I will therefore deal with the three (3) grounds of appeal below.

16. The first subject for consideration on appeal has to do with whether service of summons to enter appearance was properly effected.

17. In his supporting affidavit to the Motion dated December 3, 2019 the appellant stated that he was never personally served with summons to enter appearance and/or the pleadings in the suit despite the fact that he and the 1st respondent were known to one another.

18. The appellant also stated that the reason behind the 1st respondent opting for service by way of advertisement was to ensure that the appellant did not become aware of the existence of the suit until it was too late.

19. In reply, the 1st respondent stated that all attempts at effecting personal service upon the appellant proved to be futile since it was difficult to trace the whereabouts of the appellant and the 2nd respondent, thereby leaving him with no other alternative but to serve them by way of substituted service.

20. The 1st respondent stated that consequently, both the appellant and the 2nd respondent were duly served by way of advertisement in the Daily Nation newspaper dated December 21, 2017 pursuant to leave of the court being granted on November 29, 2017.

21. In her ruling, the learned trial magistrate concluded that service of the summons to enter appearance together with the pleadings, had been properly effected.

22. Upon my re-examination of the evidence, I observed that the same supports the averments made by the 1st respondent on the effecting of service.

23. There is credible evidence on record to show the attempts made at tracing the whereabouts of the appellant and the 2nd respondent, and that leave of the court was sought and granted to effect substituted service by way of a newspaper advertisement in the Nation Newspaper.

24. In the absence of any credible evidence to the contrary, I am satisfied that the learned trial magistrate arrived at a correct finding when she held that service was properly done. However, though service was proper, there is doubt whether the appellant applicant actually saw the newspaper advert. The trial magistrate should have given the appellant the benefit of doubt by setting the exparte judgment.

25. The second ground is on whether the learned trial magistrate correctly found that there had been a delay in bringing the Motion seeking to set aside the interlocutory judgment.

26. Upon my study of the record, I note that the learned trial magistrate reasoned in her ruling that the application had been brought close to 1 ½ years since delivery of judgment in the suit on July 3, 2018.

27. In my view, upon taking into account the fact that the suit was filed in the year 2017 coupled with the service of summons, I concur with the finding of the learned trial magistrate as to the delay. However the trial magistrate erred when she failed to take into account the fact that the appellant came to learn of the existence of the judgment when he was served with execution documents.

28. That notwithstanding, I note from her ruling that the learned trial magistrate reasoned that despite the delay, she would exercise substantive justice upon the appellant. I find this reasoning to be fair and see no reason to alter it.

29. This brings me to the third and final ground on appeal touching on whether the learned trial magistrate acted correctly by conditionally allowing the appellant's Motion seeking to set aside the interlocutory judgment and for leave to defend the suit.

30. In her ruling, the learned trial magistrate granted the appellant's application but placed a condition that the appellant deposits in court half the decretal amount within 14 days, failing which execution would proceed.

31. Upon my re-examination of the record, I find that upon setting aside the interlocutory judgment, the learned trial magistrate ought to have granted the appellant unconditional leave to put in his statement of defence, which it appears he has already done.

32. In my view, there was no basis for the learned trial magistrate to place conditions to the setting aside of the judgment and consequent decree. In reasoning so, I am supported by the finding of the court in the case of *Peter Kariuki Karuguchu v Stephen Waithaka Mwangi* [2017] eKLR thus:

> "Deposit of decretal amounts will normally be required where the decree remains in place until otherwise set aside – usually as a condition for stay of execution of the decree. Where the court has just set aside the decree in question and granted leave to the applicant to defend the suit, why should it, as it were, revive the decree by demanding that the decretal amount be deposited?
>
> This was a claim in negligence and it would appear that there was a third party involved in the accident. The outcome of a full trial of the action could not have been certain at all. Why then require one party to go through the hustle of looking for and depositing a decretal sum when there was no decree in place?"

33. In view of the foregoing circumstances, I am convinced that it would be a proper exercise of my discretion to interfere with that aspect of the decision by the learned trial magistrate.

34. In the end, the appeal succeeds. Consequently, the order requiring the appellant to deposit half the decretal sum in court is hereby set aside and is substituted with an order granting the appellant leave to defend the suit unconditionally.

35. In the circumstances, a fair order on costs is to order, which I hereby do, that each party meets its own costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28TH DAY OF MARCH, 2023.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent