UAP Insurance Company Limited v Owiti, Otieno & Ragot & Company Advocates (Miscellaneous Civil Case E112 of 2022) [2023] KEHC 20407 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEHC 20407 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

MISCELLANEOUS CIVIL CASE E112 OF 2022

WA OKWANY, J

JUNE 29, 2023

BETWEEN

UAP INSURANCE COMPANY LIMITED ..... APPLICANT

AND

OWITI, OTIENO & RAGOT & COMPANY ADVOCATES ..... RESPONDENT

RULING

1. The Respondents/Advocates filed and served their Bill of Costs dated 15th February 2021 claiming the sum of Kshs. 223,652.20/= together with a Taxation Notice dated 22nd August 2022. The matter was thereafter listed for taxation on 9th June 2022 but due to the non-attendance by the Applicant/Client (then Respondent), the taxation was rescheduled for 8th September 2022. The Respondent/Advocate served the Client with the Taxation Notice dated 5th September 2022 via E-mail on the same date. The Applicants did not file a Response or attend court on 8th September 2022 and a ruling on taxation was delivered on 22nd September 2022 in which the Bill of Costs was assessed at Kshs. 176,247.50/=.
2. Dissatisfied with the said Ruling, the Applicant/Client filed the present Application dated 30th September 2022 seeking to set aside the order on taxation of the Advocate-Client Bill of Costs dated 15th February 2021. In particular, the Applicant seeks the following Orders: -
    1. Spent
    2. That this honourable Court be pleased to issue an Order of stay of execution on the Applicant's costs as per the Ruling delivered on 22nd September 2022. Spent
    3. That this honourable Court be pleased to set aside the ex parte Ruling delivered on the 22nd September 2022, subsequent to the ex parte taxation of the Bill of Costs dated 15th September 2022.

4. That the Respondent/Client be granted leave to file its grounds of opposition to the Advocate's Bill of Costs.

5. That the costs of this Application be provided for.

3. The application is brought under Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Article 159 (2) (a), (b) and (d), and Articles 25 (c), 50 (1) of *the Constitution* and is supported by the Affidavit of Mr. Eric Onderi, the Applicant's Legal Officer.

4. The Respondent/Advocate opposed the application through the Replying Affidavit of Linda Agatha Advocate who avers that the Applicant was duly served with the Notices but failed and/or neglected to make appropriate responses or appear in court. It is the Respondent's case that any Orders to set aside or stay the decision of the Tax Master would be against the interests of justice.

5. The Application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the Client has made out a case for the granting of the orders sought in the Application.

6. The Applicant's case was that they were not served with the subject Bill of Costs or the Taxation Notice. The Client however conceded that it was served with the Ruling Notice dated 12th September 2022 thus necessitating the filing of the Application dated 20th September 2022 seeking to arrest the scheduled ruling and for leave to file grounds of opposition to the Bill of Costs. It was the Applicant's position that they were condemned unheard.

7. While relying on the decision in the case of Patel vs. E.A. Cargo Handling Services Ltd (1974) EA 75, alongside other cases, the Applicant urged this court to exercise its unfettered discretion to set aside the ex-parte orders.

8. The Respondent, on the other hand, argued that the court's discretion should not be exercised in favour of someone who deliberately evades or seeks to block the course of justice. Reference was made to the decisions in Shah VS. Mbogo (1968) EA 93, Pithon Maina vs. Mugiria (1982-1988) 1 KAR 177, John Kabira Kioni vs. George Namasaka Sichangi t/a Sichangi & Co. Advocates (2019) eKLR and Frankline J.B. Chabari vs. Tharaka Nithi County Government & Another (2019) eKLR

9. In the oft cited case of Mbogo & Another vs. Shah (1968) E.A.it was held thus: -

> " An appellate court will not interfere with the exercise of the trial court's discretion unless sit is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result, there has been misjustice."

10. The Applicant's main contention is that it was is not served with the Bill of Costs or the notice of taxation. The Respondent, on its part, maintained that service was duly effected upon the Applicant through its known email address.

11. Order 10 (11) of the Civil Procedure Rules stipulates as follows: -

> (11) Where the Judgment has been entered under this order, the Court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just.

12. It is trite that the High Court has unfettered discretion to set aside an ex parte decision where the same will serve the interests of justice. In Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs. Augustine Kubede (1982-1988) KAR, it was held: -

> " The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties."

13. The Court must at the same time consider if the impugned decision is regular or irregular. The Court of Appeal explained this distinction in James Kanyiita Nderitu & Another (2016) eKLR thus: -

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another -vs- Shah (1968) EA 98, Patel -vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another -vs- Kubende (1986) KLR 492 and CMC Holdings -vs- Nzioka [2004] I KLR 173.
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> In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."
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> (Emphasis added)

14. The Applicant contended that the Respondents did not comply with the requirements of Order 5 Rule 3 of the Civil Procedure (Amendment) Rules 2020 thus making the Taxing Master's Ruling irregular.

15. This Court appreciates that service is an integral feature in a fair trial as envisioned by Article 50 of *the Constitution* which, if overlooked, renders any subsequent determination irregular and incompetent

at law. Indeed, the Supreme Court in Moses Mwicigi & 14 Others vs. Independent Electoral and Boundaries Commission and 5 Others [2016] eKLR held that:

> "This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent."

16. Order 5 Rule 3 of the Civil Procedure Rules sets out the manner in which service to a corporation is to be effected as follows: -

> 3. Subject to any other written law, where the suit is against a corporation the summons may be served –
>
> a. on the secretary, director or other principal officer of the corporation; or
>
> b. if the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a) –
>
> i. by leaving it at the registered office of the corporation;
>
> ii. by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
>
> iii. if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or
>
> iv. by sending it by registered post to the last known postal address of the corporation.

17. As I have already stated in this ruling, the mode of service employed in this case was the use of e-mail. The guiding principles of effective service vis e-mails are outlined in the Civil Procedure (Amendment) Rules, 2020 Legal Notice No.22, Kenya Gazette Supplement No. 11 dated 26th February 2020 as follows: -

> [Order 5, rule 22B]
>
> Electronic Mail Services (E-mail)
>
> 1. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
>
> 2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
>
> 3. Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
>
> 4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.

18. In the instant case, I note that the emails were sent to the Respondent through the following addresses; legalteamclaimskenya@uap-group.com;jmuthoka@uap-group.com; iwaithera@uapoldmutual.com and eonderi@oldmutual.co.ke. I note that these are the same addresses to which the Ruling Notice of 12th September 2022 was sent. The Applicant contended that the failure, by the Respondent, to attach a delivery report rendered the service in this case improper.

19. I am alive to the fact that the Respondent knew the Applicant's correct email addresses having acted the Respondent in the matters that gave rise to the filing of the Bill of Costs. It is for this reason that the Applicant was able to receive the Ruling Notice of 12th September 2022 sent that was sent through the same email thus prompting them to instruct the firm of M/S. Murimi, Ndumia, Mbago & Muchela Advocates to enter appearance on their behalf. It is my humble view that the Applicant cannot now turn around and claim that they did not receive the earlier emails. I note that the Supporting Affidavits were sworn by the Applicant's Legal Officer, Mr. Erick Onderi is the same person to whom the emails were copied. I also note that the Applicant did not attend court when the matter came up for Ruling on 22nd September despite the fact that it acknowledged service with the Ruling Notice. My finding is that the Applicant's conduct portray it as a party who was not keen on challenging the Respondent's Bill of Costs.

20. I have perused the Affidavits of Service filed by Sharon Omollo and Baron Ndolo and find that they are proper and admissible evidence of service. In any event, it was incumbent upon the Applicant to move this Court to cross-examine the process servers in order to satisfy the Court that service was not properly effected on them. I am guided by the Court of Appeal's decision in Shadrack arap Baiywo vs. Bodi Bach KSM C.A. Civil Appeal No. 122 of 1986 [1987] eKLR where the Judges quoted Chitaley and Annaji Rao; The Code of Civil Procedure, Volume II page 1670 and held that:-

> " There is a presumption of service 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."

21. I am also guided by the persuasive decision by Nyakundi J. in the case of Doa Tented Camps and Lodges Limited vs. Jubilee Insurance Company of Kenya Limited [2021] eKLR where it was held: -

> " With respect, this criticism levelled against the process server is unjustified and should be rejected. The fact of matter being agitated by the defendants on the absence of the generated delivery report by itself does not render service through email defective. I see no cogent argument or evidence advanced by the defendant to impugn the mode of service of summons to enter appearance and other supporting suit papers as maintained by the defendant representative."

22. My finding is that failure to attach a delivery report was not fatal to the mode of service employed in this case because the Applicant received the Notice of Ruling through the same means. I further find that the service was proper. I am further guided by the decision in Prabhadas vs. Standard Bank [1968] EA 679 where the Court of Appeal held thus: -

    (i) even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity.

(ii) any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing." (Emphasis added)

23. Having found that service was proper and that not sufficient grounds have been set out to warrant the setting aside the ruling on taxation, I find that this Court cannot exercise its discretion in favour of the Applicant who was clearly indolent in pursuing his cause. In Patriotic Guards Ltd vs. James Kipchirchir Sambu {2018} eKLR, the Court stated:-

> " It is settled Law that whenever a Court is called upon to exercise its discretion, it must do so judiciously, - judicious because the discretion to be exercised is judicial power derived from the Law and as opposed to Judges private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by the Court to do real and substantive justice to the parties to the suit."

24. In a nutshell, I find that the instant application is not merited and I therefore dismiss it with not orders as to costs.

25. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 29TH DAY OF JUNE 2023.

W. A. OKWANY

JUDGE