Muriithi v Ogutu (Civil Appeal 93 of 2020)
[2023] KEHC 26585 (KLR) (Civ) (24 August 2023) (Judgment)

Neutral citation: [2023] KEHC 26585 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 93 OF 2020

DO CHEPKWONY, J

AUGUST 24, 2023

BETWEEN

PAUL MUHORO MURIITHI ..... APPELLANT

AND

JARED INDA OGUTU ..... RESPONDENT

(Being an Appeal from the Ruling of Hon. A. N. Makau (Ms) (PM) delivered on 30th January 2020 in Milimani Commercial CMCC No. 6232 of 2017.)

JUDGMENT

Background

1. The Appellant has filed a Notice of Motion application dated 8th November, 2019. The application is premised on the provisions of Sections 1A, 1B, and 3A all of the *Civil Procedure Act*, Orders 10 Rule 11, 22 Rule 22 and 51 rule 1 all of the *Civil Procedure Rules*, 2010 and Articles 27(1), 50(1) and 159 (2) (d) all of *the Constitution*. The application was couched in the following manner;

    a. Spent;

    b. That pending hearing and determination of this application, there be stay of execution of this Honourable Court's Judgment entered against the Defendant/applicant.

    c. That this Honourable Court's Judgment dated 14th June, 2018 and all other consequential orders emanating from the same be set aside.

    d. That an order be issued granting the Defendant/Applicant leave to file a memorandum of appearance and his defence in this matter and thereafter for this matter to be heard and determined afresh.

e. That costs for this application be provided for.

f. Any other order that this Honourable Court deems fit.

2. The application was anchored on several grounds on its face and supported by the affidavit of the applicant. In the said affidavit he has deposed that about August, 2019, he was informed by a representative of Thames Traders Auctioneers that a Judgment had been entered against him on 14th June, 2018. That prior to August, 2019 he was not aware of the Respondent's claim and upon being informed he immediately instructed his advocate to establish the status. To his knowledge, no Summons or any court documents were ever served on him and never did he ever instruct any person to receive summons or court documents on his behalf.

3. He has stated that Mr. Otongo's Affidavit of Service is unsustainable for the reasons that it does not indicate the exact location or time when the alleged service was made, the date of service mentioned was on a Saturday and he does not run his operations on weekends and has never instructed anyone to receive any court documents on his behalf.

4. Further, he has deposed that any Judgment and consequential orders issued in the matter were irregular as it is clear that he was not served with any court document relating to the claim. Thus, he has asked the court to be given opportunity to defend himself against the Respondent's claim.

5. In response to the application, the Respondent filed a Replying Affidavit dated 25th November, 2019 sworn by Salome Muhia Beacco in which she has deposed that the suit was filed on 4th September, 2017, and summons to enter appearance served upon the Respondent on 23rd November, 2017 and received by the site Manager, Mr. Paul Otieno Dola and lady in charge, Ms. Lydia Wamuyu Maina who confirmed that she was aware of the accident in question and had instructions to accept service on behalf of the Appellant.

6. The Appellant failed to enter appearance and file a defence hence interlocutory Judgment was entered. The matter proceeded for formal proof hearing and and Judgment delivered on 14th June, 2018 in favour of the Respondent. Subsequently, the Respondent sent a Notice of Judgment to the Appellant notifying him of the outcome of the Judgment.

7. According to her, the Appellant misled the court that he was not aware of any ongoing suit against him yet he was served with the Plaint and Summons to enter appearance but ignored, failed, refused to act. Having failed to annex any draft defence, the Appellabnt has not demonstrated that he has triable issues that should be heard and determined by the trial court. That Judgment was entered in June, 2018 and the appellant did not demonstrate any justifiable reasons why the same should be set aside.

8. The application proceeded by way of written submissions which both parties complied filed their respective submissions. Upon consideration of the application, the response and the written submissions by both parties, the trial court delivered its ruling on 30th January, 2020 wherein it made a finding that there was no draft defence filed by the Appellant hence the court was unable to determine if the defence had merit or not The court further stated this principle had not been met and as such, found the application lacking in merit and proceeded to disallow it with costs.

9. The Appellant was dissatisfied with the ruling and orders of the Trial court and has proffered an appeal before this court vide a Memorandum of Appeal dated 26th February, 2020.

The Appeal

10. In the Memorandum of Appeal, the Appellant has raised the following Grounds of Appeal;

a. The learned Magistrate erred in fact and in law in holding that the Respondent had effected service of its Summons to enter appearance dated 13th September, 2017 on the Appellant.

b. The learned Magistrate erred in law in misconstruing and misrepresenting the law relating to service of court process on an agent.

c. The learned Magistrate erred in fact and in law in failing to appreciate the evidence adduced by the Appellant, on the inadequate description of the location of the Appellant's location, the Respondent's process server.

d. The learned Magistrate erred in law and in fact in accepting the Respondent's description of the Appellant's location, incomplete disregard to the evidence on record.

e. The learned Magistrate erred in fact and in law in failing to hold that the Respondent had not adduced any evidence to demonstrate his attempts to personally effect service of his summons to enter appearance and notice of Judgment on the Defendant in person, contrary to well established legal principles.

f. The learned Magistrate erred in law in shifting the burden of proof on the Appellant, to prove that:

   i. He had not authorized any person to accept service on his behalf; and

   ii. The Respondent had not effected service on his agent/workers at his premises.

g. The learned Magistrate erred in law and in fact in holding that there was a regular Judgment on record, in the absence of proper service by the Respondent of its summons to enter appearance, on the Appellant.

h. The learned Magistrate misdirected herself in law in holding that the Appellant had a legal obligation to file a draft defence, alongside its application dated 8th November 2019, despite the irregular Judgment on record.

i. The learned Magistrate in all circumstances of the matter, failed to do justice as regards the matter that was before her, and accordingly erred in law by making the orders that she did.

11. The Appellant prays for the orders that: -

a. This appeal be allowed.

b. The ruling of the Honourable A. N. Makau (PM) delivered on 30th January 2020, be set aside in so far as it holds that the Appellant's application dated 8th November, 2019, is dismissed.

c. The lower court's Judgment dated 14th June, 2018 and all consequential orders emanating from the same be set aside.

d. The Appellant be granted leave to file a Memorandum of Appearance and his defence in this matter and thereafter, for this matter to be heard and determined afresh.

e. The cost of this appeal be borne by the Respondent.

12. This appeal was admitted for hearing on 25th February, 2023 and parties directed to canvass it by way of written submissions. The appellant complied and filed his submissions dated 2nd June, 2022 together with a list of authorities of even date. The Respondent on the other hand filed his submissions dated

18th July, 2022 alongside a list of authorities of even date. I will proceed to consider the submissions in the analysis and determination of the several grounds of appeal raised.

Analysis and Determination

13. I have considered the record of appeal, the grounds of appeal, the submissions filed by both parties alongside the cited authorities relied upon. I find the following issues relevant for determination;

    a. Whether there was proper service of summons on the Appellant;

    b. Whether the trial court Judgment was regular; and

    c. Whether failure by the Appellant to attach a draft defence on the application was fatal.

14. This being a first appeal from the trial court, this court is mindful of its duty of this Court as enunciated in the decision of *Selle & another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the court held that:

> " This court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence."

15. It is the responsibility of this court to reconsider and re-appraise the evidence that was adduced and evaluated by the trial court in its original jurisdiction and draw its own inferences.

16. Similarly, it is worth noting that this court will not normally interfere with a finding of the trial court unless the same is based on wrong principles of fact or law. The position was espoused in the case of *Mbogo & another v Shah* (1968) EA 93, where the court observed that:-

> " I think it is well settled that this Court as an appellate court should not interfere with the exercise of its discretion by an inferior court unless it is satisfied that decision is clearly wrong, because it has misdirected itself, or because it has acted on matters on which it should not have acted, or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

17. This court being guided by the principles enshrined above will proceed to consider the issues set out in determination of this appeal.

Whether There Was Proper Service Of Summons On The Appellant?

18. As regards the issue of it is prudent for this court to briefly outline the guiding provision on service of court processes. Order 5 Rule 8 of the *Civil Procedure Rules* provides that:-

> " Service to be on defendant in person or his agent.
>
> 1. Whenever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.

2. A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and Judgment in default of appearance may be entered after such service."

19. The Appellant submitted that all court processes must be served on all parties and cited Section 20 of the *Civil Procedure Act* which requires that, upon the institution of a suit, the Plaintiff should serve the Defendant in the manner prescribed by Order 5 of the *Civil Procedure Rules*. It was submitted for the Appellant that a Plaintiff must first seek to serve a Defendant personally. Order 5 Rule 8(1) of the *Civil Procedure Rules* recognizes instances where personal service can be effected on an agent of a Defendant. However, it must be demonstrated that there were several attempts to serve the Defendant personally and that all these attempts bore no fruits.

20. The Appellant cited case of *Filomona Afwandi Yalwala v Indumuli & another* [1989]eKLR, where Nyarangi JA, stated that the best service is personal service. For a plaintiff to engage in alternative modes of service, they must demonstrate that they made more than one attempt to effect service on a Defendant. Otherwise any non-personal service on a Defendant, as was the case in this matter, is inadequate".

21. The Appellant submitted that the learned Magistrate was alive to the fact that the appellant was not personally served. She also knew that the Respondent made no attempt to trace him so as to serve him. The affidavit of service by the process server, Mr. Moses Onyango Otongo, is clear that he did not serve summons on the Appellant himself but served a third party. The Respondent did not effect service of summons as per the applicable rules of service and thus renders the Learned Magistrate's Judgment irregular on the basis of improper service of summons.

22. On the other hand, the Respondent on the other hand has urge that the appellant was served with summons to enter appearance as evidenced by the affidavit of the Process Server. The said Affidavit of Service of Mr. Moses Onyango Otongo confirms that he received copies of summons, investigated the whereabouts of the Appellant and effected service upon the appellant's appointed representative on 23rd September, 2017. It was urged that on 23rd September, 2017, the said process server in the company of the Respondent proceeded to the Appellant's working site in Jamhuri estate, Nairobi where he was building residential houses. That upon arrival, he met the site Manager who introduced himself as Mr. Paul Otieno Dola and forelady Ms. Lydia Wamuyu Maina who confirmed that she was aware of the accident and that she had instructions to accept service on behalf of the Appellant. She therefore accepted service as per the instructions given to her by the Appellant.

23. The Appellant did not seek permission from the trial court to cross examine the process server if in deed he doubted that the said service had been effected upon him through his agent.

24. In the instant appeal, there is an Affidavit of Service on record confirming that service was effected upon the Appellant through an agent. This court therefore finds that there was proper service effected upon the Appellant on 23rd September, 2017.

25. The next issue for determination is whether the trial court Judgment was regular. Order 10 of the *Civil Procedure Rules* provides for the consequence of non-appearance, default of defence and failure to serve. It is this provision that provides for the repercussions for failure to enter appearance and file defence upon being served with summons.

Order 10 Rule 6 provides that:-

"Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any Defendant fails to appear, the court

shall, on request enter interlocutory Judgment against such Defendant, and the Plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be."

26. Order 10 Rule 11 thereof reads as follows;

> " Where 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."

27. This court is guided by the Court of Appeal decision in the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR, where it stated that:-

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgment that is regularly entered and one, which is irregularly entered. In a regular default Judgment, the Defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 Judgment 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 the default Judgment, and will take into account such factors as the reason for the 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; whether on the whole it is in the interest of justice to set aside the default Judgment, among other. See *Mbogo & another v Shah* (*supra*), *Patel v E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 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 justitiae*, 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.

28. Based on the circumstances of the instant case and having found that there was proper service of court summons upon the Appellant, it is my view that the Judgment of the lower court falls within the definition of a regular Judgment as clearly put by the Court of Appeal in the aforementioned decision.

29. With regard to Whether failure by the appellant to attach a draft defence on the application was fatal, it is evident from the record, that the Appellant did not annex a copy of draft defence in the application seeking to set aside the ex-parte Judgment. A draft defence is important as it assists the court to peruse through the pleadings to determine if indeed it has raised triable issue(s). In the absence of a draft defence, the court cannot be in a position to establish whether there is a defence warranting further interrogation by the court. On several occasions, the courts have held that failure to annex a draft defence in an application seeking to set aside an ex-parte Judgment is fatal. This was the position

enunciated in the case of *Harun Rashid Khator suing as the Representative of Rashid Khator (Deceased) v Sudi Hamisi & 11 Others* [2014] eKLR. In this case, the court held that:-

> " Failure to annex a draft defence on an application to set aside a regular *ex-parte* Judgment is fatal to such an application."

30. In view of the cited authority, it is this court's finding that the Appellant's failure to annex a draft defence is fatal as the court cannot be in a position to determine if there are any triable issues that would warrant interrogation on the necessity of setting aside the *ex-parte* Judgment.

31. In the circumstances, this appeal is found lacking in merit and the court proceeds to dismiss the Memorandum of Appeal dated 26th February, 2020 with costs to the Respondents.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 24TH DAY OF AUGUST, 2023.

D. O. CHEPKWONY

JUDGE