



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. E100 OF 2021

BETWEEN

ABDULKADIR GIRO TUTU..... APPELLANT

AND

MARTIN KIMATHI GUANTAI ..... RESPONDENT

(Being an appeal from the Ruling of Hon. S.N. Abuya- CM in CMCC NO. 322 OF 2019

delivered on 19<sup>th</sup> July 2019)

JUDGMENT

**Background**

1. By a plaint dated 25<sup>th</sup> November, 2019, Respondent sued the Appellant seeking orders that:
  - 1) **Special damages in the sum of Kshs. 443,000/-**
  - 2) **Costs and interest**
2. Respondent did not defend the suit and interlocutory judgment was entered against him on 24<sup>th</sup> February, 2020.
3. Subsequently, the suit as heard by way of formal proof on 24<sup>th</sup> June, 2020.
4. By a judgment dated 28<sup>th</sup> July, 2020, judgment was entered for the Respondent against Appellant for:
  - i. **Kshs. 433,524/-**
  - ii. **Costs of the suit and interest**
5. By a notice of motion dated and filed on 18<sup>th</sup> May, 2021, the Appellant sought an order to set aside the *ex parte* judgment and leave to defend the suit on the grounds that the Appellant was not served with the plaint and summons and further that the cause of action arose not in Meru but in Isiolo where Appellant resides.
6. The application was opposed on the basis of a replying affidavit sworn by the Respondent on 20<sup>th</sup> May, 2021.
7. By a ruling dated 19<sup>th</sup> July, 2021, the court dismissed the application and it is that dismissal that triggered this appeal mainly on the ground that the Appellant was condemned unheard.

**Analysis and determination**

8. I have considered the appeal in the light of the evidence on record and submission on behalf of both parties.

9. I have It is trite law that "whoever alleges must prove. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** states as follows:

**1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.**

**2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person**

10. The duty to prove that Appellant was served with summons and plaint lay squarely with the Respondent

11. The court of appeal in the case *Mbuthia Macharia v Annah Mutua & Another [2017] eKLR* discussed the burden of proof and stated thus:

*[16] "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.*

12. **The Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17**, at paras 13 and 14: describes it thus:

*"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case....."*

13. As rightly contended by the Appellant, the affidavit of service sworn by Kellen Kendi on 18<sup>th</sup> February, 2020 reveals that the process server does not disclose how she identified the Appellant whom she does not aver was known to him nor was she accompanied by the Respondent.

14. From the foregoing, I find that the learned trial magistrate erred in failing to consider that the burden to prove that Appellant was served shifted to the Respondent the moment the Appellant averred that he was not served.

15. In *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76*, Sir William Duffus P held:

*"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.*

16. This Court will not lightly interfere with the discretion of the trial judge unless it is satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision, or unless it is manifest on the case as a whole that the judge was clearly wrong in the exercise of his discretion, and that as a result there has been a miscarriage of justice. (See *Mbogo v Shah [1968] E A 93*.)

17. It should be the court's last resort to deny a party a chance to be heard. The overriding objective of the civil procedure rules is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Judicial authority to do justice to all, vested on this court by Article 159 of the Constitution cannot be said and be seen to be exercised if the courts were to deny a party a chance to be heard on merit especially one that has demonstrated that he was not served with summons and the plaint.

18. In conclusion, I find that a case has been made out for allowing the appeal and it is therefore hereby ordered:

**1) The order dated 19<sup>th</sup> July, 2021 dismissing the notice of motion dated and filed on 18<sup>th</sup> May, 2021 is set aside and substituted with an order allowing the application with costs to the Appellant**

**2) The Appellant is granted 30 days to file and serve its defence**

**3) Mention before the Chief Magistrate Meru on 15<sup>th</sup> March, 2022 for directions as to the hearing of the suit**

**DELIVERED IN MERU THIS 24<sup>th</sup> DAY OF FEBRUARY 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For the Appellant - Mr. Riungu for A.G.Riungu & Co Advocates**

**For the Respondent - Ms. Gitonga for M.D.Maranya Advocates**