



**Wangunyu v Ndehi & another (Civil Appeal E047 of 2021)
[2022] KEHC 12007 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E047 OF 2021
MM KASANGO, J
JUNE 23, 2022**

BETWEEN

RAPHAEL NGURE WANGUNYU APPELLANT

AND

JOHN GACHERU NDEHI 1ST RESPONDENT

EDWARD NDEHI KAMAU 2ND RESPONDENT

*(Being an appeal from the Ruling and order of the the Chief Magistrate's Court at
Gatundu (H.M. Nganga, SRM) in CM Civil Case No. 1 of 2020 dated 3rd March, 2020)*

JUDGMENT

1. John Gacheru Ndehi (John) and Edward Ndehi Kamau (Edward) sued before the Chief Magistrate's court at Gatundu four defendants. On January 31, 2020 judgment was entered in favour of John and Edward against all the defendants in default an appearance. Judgment was entered jointly and severally for the liquidated amount of Kshs.2,055,000/= against the four defendants.
2. By an application of Notice of Motion dated December 21, 2002 the fourth defendant Raphael Ngure Wangunyu (Raphael) applied to set aside the ex parte judgment and decree and also applied that he be granted leave to defend the suit.
3. The trial court after hearing that application by a ruling dated March 3, 2021 dismissed the application. It is that dismissal that aggrieved Raphael and hence the present appeal.

Analysis

4. John and Edward in their claim before the trial court pleaded that they entered into sale agreement with all the four defendants for the purchase of Land Parcel No. Ng'enda/githunguchu/79. The four defendants, it was further pleaded they were paid Kshs.2,055,000. They also pleaded that the parcel of



land was registered in the name of Raphael and that he consented to the said sale. John and Edward were given possession of that land but subsequently, they were evicted from the land. That the four defendants sub-divided the subject parcel of land into different portions with different title numbers. It is on that basis John and Edward demanded refund of Kshs.2,055,000 from the four defendants.

5. Raphael, by his application to set aside ex parte judgment stated that he was not served with summons; and that he does not reside at Muhara village as stated in the process server's affidavit of service. Raphael supported his deposition by producing a letter of a chief of Ngenda location. By that letter, the chief stated that Raphael, a person well known to him, resides at Githugucu sub-location in Ngenda location Gatundu South Sub-County. In the affidavit in support of the application, Raphael deponed that the claim against him was time barred since the agreement of sale of land was entered into in the year 2012 yet the claim was filed in 2020.
6. The trial court by its Ruling, while declining the application had this to say:-

“I find that the affidavit of service was only denials and the only way to discredit the same would have been to subject the process server on the mode of service ...

I have gone through the draft defence and there is nowhere that the defendants deny that they received the sum claimed by the plaintiff.”
7. An appeal before this Court is by way of retrial. I am required to reconsider the evidence presented before the trial court and draw my own conclusion: See *Selle & Another vs. Associated Motor Boat Co. Ltd & others* (1968) EA 123.
8. The court faced with an application to set aside ex parte judgment is afforded wide discretion. This is what order 10 rule 11 of the [Civil Procedure Rules](#) provides, thus:-

“Where judgment has been entered under this order, the court may set aside or vary judgment and any consequential decree or order upon such terms as are just.”
9. The exercise of that discretion was discussed in the case *Shah vs. Mbogo* (1967) EA as follows:-

“This discretion is intended so as to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who had deliberately sought, whether by evasion or otherwise, to obstruct or delay.”
10. Raphael sought to set aside ex parte judgment on the ground that he was not served with summons. There is however an affidavit of service sworn by Felix Omondi Owino where he stated that Raphael was served. The process server stated that on January 11, 2020 he served all the defendants including Raphael at Muhara village in Mukinye sub-location.
11. Raphael by this appeal has trivialised that deposition and argued that he produced a letter of the chief which proved he did not reside where the summons were served. Raphael needed to be reminded that there is a presumption in favour of the process server. Raphael needed to shift that presumption and that would have been done if he successfully discounted the evidence of the process server by cross examining him. This is what the Court of Appeal stated in the case [Diskson Daniel Karaba vs. John Ngata Kariuki & 2 others](#) (2010) eKLR thus:-

“Indeed the Superior Court and the parties appreciated this imperative at an early stage of the proceedings and the court made orders, correctly in our view, that the process server and the 1st respondent be cross examined on their affidavits. There was a good reason for that order,



traceable to the law on such matters, that there is a presumption that the court process was properly served unless such presumption is rebutted. We allude to the case of Shadrack Arap Baiwo V. Bodi Bach, Civil Appeal No. 122/86 (UR) cited and applied in *Miruka v. Abok & another* [1990] KLR 544, where in the former case Platt JA stated:-

“There is a qualified presumption in favour of the process server recognized in *MB Automobile V Kampala Bus Service* [1966] EA 480 at p 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 Vol. II p 1670*, the learned commentators say:- ...

in *Karatina Garments Ltd. v. Nyanarua* [1976] KLR 94, the predecessor of this Court stated:-

“Where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter; if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth.”

12. I also wholly concur with the holding of the trial court that Raphael failed to raise bona fide triable issue to the claim.
13. In the draft defence annexed to the application, Raphael did not raise the issue of time bar of the claim. The only issue Raphael raised is that of misjoinder of the plaintiffs. Raphael by his draft defence stated that the claim by John and Edward (the plaintiffs) were “distinct to each plaintiff.”
14. Raphael needed to have considered the provision of order 3 rule 5(1) of the *Civil Procedure Rules*, that:-
 - “(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.
15. It must by now be clear that I am of the view that the present appeal has no merit. It is declined.

Disposition

16. The judgment of this court is that this appeal is dismissed for it lacks merit. Costs are awarded to the respondent.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 23RD DAY OF JUNE, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice

For the Appellant: Mr. Irungu

For the Respondent :- N/A

COURT



Judgment delivered virtually.

MARY KASANGO

JUDGE

