Marekio v Muratha (Civil Appeal 690 of 2019)
[2022] KEHC 13004 (KLR) (Civ) (22 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13004 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 690 OF 2019

JK SERGON, J

SEPTEMBER 22, 2022

BETWEEN

VIRGINIA MUMBI MAREKIO ..... APPELLANT

AND

JOHN KINUTHIA MURATHA ..... RESPONDENT

(Being an appeal from the ruling and order of the Honourable A. M. Obura (Mrs) (SPM) made on the 8th November,2019 in Milimani Commercial Courts, Civil Suit No.2240 of 2010)

JUDGMENT

1. John Kinuthia Muratha, the respondent herein, filed an action before the Chief Magistrate's Court seeking to recover a sum of ksh 191,860/= from Virginia Mumbi Marekio, the appellant herein, being the amount due and owing for material damage as a result of a road accident that occurred on November 28, 2008 along the Muranga road. As a result of the accident the respondent's motor vehicle was damaged.

2. The appellant instructed the firm of Gachienga and Gitau who came on record on December 16, 2010 and filed a defence however, the appellant received a call from the auctioneers with instructions to execute a judgment as she came to learn that her advocates had been granted leave to cease acting for her.

3. That on June 16, 2018 judgment was entered in favour of the respondent and against the appellant in the sum of ksh 191,860/= plus costs and interest. The appellant later instructed the firm of Gichina, Macharia, Matsotse & Co Advocates to come on record on her behalf and file an application dated 12th day of July ,2019 seeking to set aside the *ex parte* judgment.

4. The respondent opposed the application. HonEK Usui, learned resident magistrate heard and dismissed the application on November 8, 2019.Being dissatisfied with the dismissal order, the appellant preferred this appeal and put forward the following grounds:

    a) That the learned magistrate erred in law and in fact by finding that the defendant had been properly served with hearing notices during the hearing of the case.

    b) That the learned magistrate erred in law and in fact by declining to allow the defendant to defend her case on merit.

    c) That the learned magistrate erred in law and in fact by declining to allow the defendant to defend her case on merit.

    d) That the learned magistrate erred in law and in fact by not taking into account the grounds raised in the defendant's supporting affidavit dated July 12, 2019and especially paragraph 7 of the said affidavit.

    e) That the learned magistrate erred in law and in fact by failing to allow the appellant to cross examine the process server notices upon the appellant.

    f) That the learned magistrate erred in law and in fact by failing to take into account that the advocate for the appellant had ceased acting without any communication to the appellant.

    g) That the learned magistrate erred in law and in fact to consider the weight of the defendant's defence that she was not the owner of the subject motor vehicle and therefore allow her to adduce this strong evidence.

5. When the appeal came up for hearing learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions.

6. The appellant *vide* its submissions dated March 1, 2022 gave brief facts of the matter and identified three issues for determination to be as follows:

    i. Whether the appellant was properly served with a hearing notice.

    ii. Whether the appellant was served with a judgment notice.

    iii. Whether the judgment ought to be set aside.

7. On the first issue, the appellant submitted that the respondent had alleged that she had been served by way of registered post to PO box 1395 -20300 Nyahururu and that as per court record was PO box 1238 Nakuru and that the same had been provided by some alleged investigator hired by the respondent.

8. On this the appellant relied on the case *William O Donnell v Roxanne Kaye* where it was stated as follows:

> " Service by publication and mailing cannot establish personal jurisdiction where one of the key steps mailing to the defendant's known address was not carried out. It might be a different case if the mail were sent to the correct address, but somewhere along the line, an error by the postal service, shenanigans by the defendant or some other third party interfered with delivery to the defendant. Here, however, the error was the sole fault of the plaintiff. Where the plaintiff failed to successfully complete one of the strict statutory requirements No 2013AP26158 for alternative service, the defect is fundamental, and the action was properly dismissed for lack of personal jurisdiction"

9. On the second issue,the appellant contends that she was never served with the notice of judgment since the process server allegedly served the appellant at Moi Forces Academy May 10, 2019 but the letter from the Teacher's Service Commission dated September 22, 2014 indicated the appellant had been transferred from the said school onOctober 1, 2014 to Githura School then to Bahati PCEA school in February 2019 therefore there was no way the process server served the alleged judgment notice upon the appellant.

10. The appellant on this argument relied on the case *Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another* (2014) EKLR stated 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."

See also this court's decision in *Kingsway Tyres & Automart Ltd vs Rafiki Enterprises Ltd*., – Civil Appeal No 220 of 1995. Going by the material that is before us regarding the service of the order and the dicta enunciated the aforesaid authorities we agree with counsel for the 1st respondent that the burden lay with the appellants to demonstrate that the affidavit of service was incompetent."

11. On the third issue, the appellant submitted that she has a meritious defence on record raising triable issues and denying him the chance to defend herself shall defeat her right to be heard, issues of third party proceedings which were clearly overlooked by the trial court and that the respondent did not indicate any prejudice he would suffer if the judgment was set aside.

12. In reply,the respondent submitted that appellant's advocates ceased acting after failing to seek the cooperation of the appellant to attend court and that the matter proceeded without her participation despite being served.

13. The respondent contends that the appellant was served through her last known address 1395-20300 Nyahururu, the contact was obtained from her sale agreement documents and no particular hearing notice that was returned undelivered.

14. It is the respondent's submission that the appellant was duly served and was fully aware of the existence of her case but failed to exercise her due diligence to ensure she has defended the same.

15. On the issue of notice of judgment ,the respondent submitted that a notice of judgment of not less than 10 days is to be issued to a defendant who fails to file a defence after entering appearance or did not do both.

16. The respondent pointed out that the rule is applicable where the suit proceeds *ex parte* or by way of formal proof in absence of such a party and in this case the party enters appearance and files defence and then participates through counsel the provision do not apply in this case.

17. On this the respondent relied on the case of *Shah v Mbogo & another* (1967)6 A U7 the Court of Appeal for Eastern Africa held that:

> " Applying the principle that the court's discretion to set aside an *ex-parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether

by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused".

18. The respondent pointed out that setting aside the lower court judgment will greatly prejudice the respondent as he incurred expenses by calling all the witnesses to prove their cases against the appellant and taking into account the age of the matter it would be extremely difficult to get hold of the witness.

19. I have re-evaluated the arguments which were made before the trial court in support and against the appellant's motion dated December 17, 2019. I have also considered the rival written submissions plus the authorities.

20. The question is whether in the circumstances of this case the court ought to set aside the *ex parte* judgment. As was held by the Court of Appeal in *CMC Holdings Ltd vs Nzioki* [2004] KLR 173

> "In an application for setting aside *ex parte* judgement, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside *ex parte* judgement, the court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input...What the trial court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a *prima facie* triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put

forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned trial court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed."

21. In *Remco Limited vs Mistry Jadva Parbat & Co Ltd & 2 Others* Nairobi (Milimani) HCCC No 171 of 2001 [2002] 1 EA 233 the Court set out the principles guiding setting aside ex parte judgments as follows:

    (i). if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside ex debito justitiae (as a matter of right) on the application by the defendant and such a Judgement is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.

    (ii). if the default judgment is a regular one, thecourt has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by order 9A rule 10 [now order 10 rule 11] of the *Civil Procedure Rules*.

22. The appellant pointed out that the trial court erred in law by finding that she had been properly served when the address indicated in the postage receipt was not her last provided address and that if the hearing notice been served to her last provided address then she would have been aware of the matter and participated.

23. On the hand the respondent stated that the appellant had been served through her last known address 1395-20300 Nyahururu that it was obtained from her sale agreement documents and no particular hearing notice was returned.

24. The appellant stated that in all her court documents she has been using PO box 1238 Nakuru as her address. In my view the respondent should have relied on the court documents which have been consistent instead of relying on the one in the sale agreement which is not an official court document. At the same time the appellant indicated that she had already been transferred from the last address that the respondent had sent the court documents.

25. In this case, regrettably, the learned trial magistrate did not make an express finding that the appellant was served. She seemed to have been persuaded by the fact that the trial court was satisfied that service was duly effected. However, in an application seeking to set aside the judgment, the judge hearing the application must make a determination as to whether service was actually effected. In those circumstances, it is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts *ex parte*. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error.

26. In this case the appellant's failure to appear in court is attributed to the failure by the respondent to serve the hearing notice.

27. It would therefore have been prudent if the process server had been availed for cross-examination. The appellant prayed for leave to cross examine the process server which leave was not granted by the trial

court. Had the learned trial magistrate made an express finding regarding the service of the hearing notice on the appellant, it would have been an uphill task persuading this court to allow the appeal. However, in light of that omission, this court cannot foretell what would have been the outcome of the application had the trial court addressed its mind to the need to make a specific finding on the service of the hearing notice.

28. The Court of Appeal in *Baiywo vs Bach* [1987] KLR 89; [1986-1989] EA 27 expressed itself on the matter as hereunder:

> " There is a presumption of service as stated in the process server's report, and the burden 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."

29. In the premises, I allow this appeal, the ruling delivered by the learned magistrate on November 8, 2019 and the judgment delivered on June 16, 2018 and the resultant decree issued on the July 11, 2018 in CMCC No 2240 of 2010 are hereby set aside. The suit to be set down for hearing afresh by another magistrate other than hon AM Obura.

30. Each party to bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2022.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent