REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 13 OF 2020

JIMNAH MWANGI IRUNGU.....APPELLANT

VERSUS

EMILY WAMBUI WAIRIMU.....RESPONDENT

(Being an appeal arising from the ruling and order of Hon. A. N. Makau Principal Magistrate delivered in Milimani CMCC No. 4728 of 2017 on 11th December 2019)

JUDGMENT

1. Jimnah Mwangi Irungu "the appellant was the defendant while Emily **Wambui Wairimu** "the respondent" was the plaintiff in the trial court. An interlocutory Judgement was entered against the appellant on 9th July, 2018 for failure to enter appearance and file defence. The matter proceeded to formal proof on 14th March 2019 and Judgement was delivered on 15th April 2019 in favour of the respondent.

2. The respondent filed a notice of motion dated 12th November 2019 through the firm of Muma, Nyagaka and Company Advocates before the trial court seeking the following orders

i) Temporary stay of execution

ii) Setting aside of the exparte Judgement.

iii) Leave to file and serve a statement of defence out of time.

3. The application was canvassed by way of written submissions. A ruling to the said application was delivered on 11th December 2019 whereby the trial court dismissed it with costs to the respondent. It is the said ruling that is the subject of this appeal.

4. The said appeal dated 13th January 2020 raises the following grounds:

1. The learned trial Magistrate erred in law and in fact by holding that the summons to enter appearance were served upon the defendant by means of registered post when there was no iota of evidence put forth by the respondent showing the postal address to which the summons were allegedly dispatched to.

2. The learned trial Magistrate erred in law and in fact by holding that the draft defence attached to the notice of motion application to set aside the exparte Judgement did not raise triable issues contrary to the principles of law and precedents which have crystalized into law.

3. The learned trial Magistrate's decision was against the weight of evidence, speculative, biased and against the rules of natural justice and has caused hardship to the appellant.

5. The appeal was canvassed by way of written submissions.

6. Muma, Nyagaka and Company Advocates appearing for the appellant submitted that the appellant had denied having been served with the summons to enter appearance. Counsel referred to the process server's affidavit of service and submitted that the alleged mail was not

addressed to the applicant's known address, there was no postal address indicated to which the mail went.

7. Counsel has submitted further that in the impugned notice of motion the appellant explained how she learnt of the existence of the suit. He has referred to the respondent's replying affidavit to the notice of motion and submits that the demand notice purportedly sent to the appellant has no postal particulars. The insurance company which is said to have been served is not a party to these proceedings. It is his argument that the appellant's postal address was unknown until the impugned notice of motion was filed. He therefore submits that the trial magistrate erred in her finding on the postal address as stated at page 34 of her ruling.

8. Citing Order 5 Rule 17 (2) of the Civil Procedure Rules counsel contends that in the absence of the process server disclosing the particulars of the postal address to which the summons were sent and in the absence of evidence being led to show that the alleged mail was duly collected by the appellant, there can't be proof of compliance with the said Order. He adds that if there was any doubt on the service the court should have resolved it in the appellant's favour. He referred to the following cases:

i) Mathews Mugo t/a Super Gibs Tours and Travel Vs Samuel Kamau Njogu {2005} eKLR

ii) Remco Limited Vs Mistry Parbari and Company Limited and 2 others, HCC No.17 of 2001.

iii) Yusuf Gitau Abdallah Vs Building Centre (K) Ltd and 4 others {2013} eKLR

iv) Guadian Brothers Vs H.K Nyaga t/a H.K Enterprises HCC No. 1330 of 2001.

9. He also requests the court to exercise its discretion under Order 10 Rule 11 of the Civil Procedure Rules and consider the application bearing in mind the case of **Sammy Maina Vs Stephen Muiruri {1984} eKLR** where Justice E.O O'Kubasu (as he then was) quoted the guiding principle set in the case of **Patel Vs E.A Cargo Handling Services Limited {1973} E.A 75** where the Court of Appeal of East Africa stated thus at page 76:

"I do agree with this broad statement of principles to be followed. 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. I agree that where it is a regular Judgement as is the case here, the Court will not usually set aside the Judgement unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, a defence that must succeed. It means as Sheridan J. puts, "if a triable issue". That is an issue which raises prima facie defence and which should go to trial for adjudication."

10. It is counsel's submission that the learned trial magistrate did not analyze the draft defence well before finding that it raises no triable issues. This was an error he said. To support this, he cited the cases of:

i) Tree Shade Motors Limited Vs D.T Dobie and company (K) Limited and another Court of Appeal Civil Appeal No 38 of 1998

ii) Atlas Copco Customer Finance Limited Vs Polarize Enterprise Limited {2014} eKLR.

11. Citing Articles 50 (1) and 159 (2) (d) of the Constitution Counsel urges the court to give the appellant an opportunity to be heard by setting aside the order dismissing the notice of motion dated 21st November 2019 plus costs.

12. Waiganjo, Wachira and Company advocates for the respondents filed submissions dated 1st November 2020. Counsel has submitted that the trial court on 30th April 2018 allowed the respondent to effect service on the appellant through registered post. The postal address relied on was 623 – 00518. The summons were then mailed to the appellant on 2nd May 2018. He admits that the affidavit of service by Christopher Muthigani Githeu does not disclose the appellant's postal address, but the postal payment receipt bears the appellant's names.

13. It is his contention that the appellant was served but he willingfully opted not to participate in the suit. He refers to the case of **John Engineering and Design Limited {2016} eKLR** where it was held.

"Courts of law are enjoined by the principles of natural justice to ensure that unless it cannot be avoided, all its judgments and decisions are made after hearing all the parties concerned in the matter before it. A decision reached after hearing of parties on merit is more suitable than one made exparte, However, the court where it is reasonably persuaded that a party having been served with summons fails or ignores to enter appearance to those summons will proceed to hear and dispose of such matter in the absence of a party served."

14. Counsel while relying on the case of **James Kanyiita Nderitu and another Versus Marios Philotas Ghikas and another {2016} Eklr,** submits that the default judgement herein was regularly entered as summons were served on the appellant. Again relying on the case of **James Wanyoike and 2 others Vs CMC Motors Group Ltd and 4 others {2015} eKLR** he submits that the trial magistrate applied the right principles of law in finding that the draft defence raised no triable issues as it consisted of counter accusations and blame games against the respondent.

15. Secondly, that the respondent went through a regular process of hearing and it would be unfair to have her repeat the same process. That the respondent's declaratory suit **Milimani CMCC No. 5314 of 2019** has been delayed by this appeal.

16. Thirdly that the appellant's reasons for delay are based on the allegations of not having been served with the summons which is not true. He accuses the appellant and his advocate of negligence and lack of interest in this matter hence delaying the same. He has referred to the case of **Richard Ncharpi Leiyagu Vs IEBC and 2 others {2013} eKLR** to support this submission.

17. He dismissed the appellant's reliance on Articles 50 (1) and 159 (2) (d) of the Constitution by citing the case of **The Law Society of Kenya Vs Centre for Human Rights and Democracy and others, Supreme Court Petition No. 14 of 2013,** where the court stated:

> **"Indeed, this court has had occasion to remind litigants that Article 159 (2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obligated to do is to be guided by the principle that Justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case – by – case basis Raila Odinga and 5 others Vs IEBC and 3 others; Petition No. 5 of 2013, {2013} eKLR."**

18. It is counsel's argument that the appellant was not condemned unheard. That he deliberately neglected and/or refused to participate in the lower court proceedings as a result of which the matter was heard and determined on merit in his absence.

Analysis and determination

19. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence and arrive at its own conclusion. It also has to bear in mind that it never heard or saw the witnesses and has to make an allowance for that. See ***i)*** *Selle and another Vs Associated Motor Boat Company Limited and others {1968} E.A 123;*

ii) Kamau vs Mungai and another {2006} l KLR 150.

20. I have accordingly considered the record, the grounds of appeal, submissions and authorities cited. The main issue for determination is whether the learned trial Magistrate erred in dismissing the appellant's application dated 12th November 2019 which sought to set aside the exparte Judgement entered against him on 15th April 2019.

21. There is no dispute that the appellant did not enter appearance nor file defence in this matter. The issue is whether he was served or not. The respondent insists that he was served while the appellant disputes that. The respondent vide a notice of motion dated 9th March 2018 obtained leave on 30th April 2018 to serve the appellant by registered post.

22. The issue is whether service was effected. In the notice of motion dated 9th March 2018 the appellant's address is given as P.O Box 623 – 00518 Nairobi. This address was retrieved from the records at the National Transport and safety Authority as at 9th June 2017. A receipt of payment annexed to the affidavit of service, reads:

> "Letter – Domestic
>
> Destination: Kayole {00518} Addressee: Jimnah Irungu.
>
> It was posted on 2nd April 2018, as per the stamp but the receipt reads 2nd May 2018 @ 14.01.

23. In his reply to the notice of motion the appellant denies having been served with the summons. He explains how he learnt of the matter through his insurers. The big issue hangs around the postal address. Does it or did it belong to the appellant? The appellant in his reply does not say anything about Box, no 623 – 00518 Nairobi yet he used it during the registration of the subject vehicle with the National Transport and Safety Authority. The box number could have been his or another person's, but this needed to come out of him. His silence is interpreted to mean it was his or he could access it. In the absence of any rebuttal evidence I am satisfied that it was his postal address and he received the summons and plaint.

24. That being the case then the court was right in entering an interlocutory Judgement for failure to enter appearance and/or file defence by the appellant. The Judgement that followed after the formal proof was therefore a regular one.

25. The next issue is whether the learned trial Magistrate erred in rejecting the draft defence by the appellant. I have considered the authorities cited by both counsel over this issue. It is always in the worst of cases that a party who has brought himself to court under whatever circumstances is denied an opportunity to present his/her case. In the case of **National Bank (K) Limited Vs Mary S. Ndeto and another H.C.C.C No 518 /2000 {2002) eKLR** Justice J.W Onyango Otieno (as he then was) stated thus:

> "This is the correct legal approach as can be seen in the case of **Tee Shade Motors Limited Vs D.T Dobie and Company (K) Limited and Joseph Rading Wasambo Court of Appeal C.A No. 38 of 1998** where the Court of Appeal states as follows:
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> > **"Where a draft defence is tendered with the application to set aside the default Judgement the court is obligated to considers it to see if it raises a reasonable defence to the plaintiffs' claim. If it does, the defendant should be given leave to enter and defend."**

26. On what a reasonable defence or defence on the merits or bonafide defence is I rely on the case of **Patel Vs E. A Cargo Handling Services Ltd {1973} E.A 75 (Supra)**.

27. In his application seeking to set aside the exparte Judgement, the appellant annexed his proposed statement of defence (JMI) which I have also considered. The learned trial magistrate stated in her ruling dated 11th December 2019 that the defence consists of counter accusations and blame games against the plaintiff and she found no triable issues. With all due respect, I do not find that to be the case. Anybody reading the statement of defence with an open mind would not come to the trial magistrate's conclusion.

28. I am of the view that this finding was based on the fact that the trial court had listened to the respondent's evidence which had not been challenged by cross examination and so wholly relied on it. The best way to test the respondent's evidence would have been to allow the appellant to cross examine her and also present his case as stated in the statement of defence.

29. The interlocutory Judgement had been entered on 9th July 2018 while the exparte Judgement was entered on 15th April 2019. The appellant's application is dated 12th November 2019 and was filed on the same day. The appellant has explained that he learnt of this matter from his Insurer's Claims Manager on 29th August 2019. He went to their offices on 30th August 2019 and was shown photocopies of the plaint and summons to enter appearance. It is thereafter that he instructed counsel to file the application dated 11th November 2019.

30. Having considered all the above it is my finding that the appellant should have been given an opportunity to defend the claims against him, as it was not too late to do so. Condemning a party unheard should always be done as a last resort. Infact if the trial court had done as expected this matter would have been finalized by now.

31. The upshot is that there is merit in the appeal which I hereby allow and make the following orders:

i) The decision by the trial court dated 11th December 2019 is hereby set aside and substituted by an order allowing the notice of motion dated 11th November 2019 in terms of prayers 3 and 4 of the said application.

ii) Milimani CMCC No. 4728 of 2017 is hereby remitted back to the said court for hearing and determination by a Magistrate with competent jurisdiction other than Hon. A.N Makau (M/s) Principal Magistrate.

iii) Costs of this appeal shall be in the cause.

DELIVERED ONLINE, SIGNED AND DATED THIS 28TH DAY OF JULY, 2021 AT NAIROBI

H. I. ONG'UDI

JUDGE