



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. 90 OF 2019

BETWEEN

SASAH GENERAL MERCHANTS LTD.....APPELLANT

AND

MARY ATIENO OTIENO

[Suing as the legal representative of the estate of George Otieno Opudo-deceased].....RESPONDENT

(Being an Appeal from the ruling and order in Oyugis Principal Magistrate's

PMCC No. 87 of 2018 by Hon. J.P. Nandi – Principal Magistrate).

JUDGMENT

1. Sasah General Merchants Ltd and Samwel Odhiambo Akumu, the appellants herein, had filed an application dated 12th September, 2019 under Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules. They were seeking orders to vacate the ex parte judgment entered against them on grounds that they were not served with Summons to enter appearance. The application was dismissed.
2. The appellants were aggrieved by the said ruling and filed this appeal through the firm of Oguttu, Ochwangi, Ochwal & Company Advocates. Fourteen grounds of appeal were raised as follows:
 - a) The learned principal magistrate erred in fact and law in finding and holding that the appellants herein, failed and/or neglected to file written submissions, in respect of the Notice of Motion application dated 12th day of September, 2019, obvious of the written submissions which were duly filed and paid for on the 23rd day of October, 2019 and thus formed part of the record of the honorable court.
 - b) In finding and holding that the appellants herein had not filed written submissions, (which finding is erroneous.), the learned trial magistrate failed to appreciate the totality of the documents obtaining and available in the court file.
 - c) The learned trial magistrate erred in law in finding and holding that insofar as the appellants had not filed written submissions, (which finding is slanted), the failure placed the appellants herein in the position of a party who had failed to attend and/or appear before the honorable court at the time of (sic) hearing of the application.
 - d) The learned trial magistrate erred in law in finding and holding that the affidavit of service, (sic) sworn on the 29th day of October, 2018 and which was the foundation of the default judgment, was legally tenable and/or in compliance with the provisions of Order 5 Rule 15 of the Civil Rules, 2010, notwithstanding the apparent and discernable defects, evident on the face thereof.
 - e) The learned trial magistrate erred in fact and in law in not finding and holding that the affidavit of service at the foot of the purported default judgement, was omnibus insofar as the said affidavit of service, was devoid and/or bereft of salient and pertinent statutory features, inter alia the names, description of the person (sic) served with the court process.
 - f) The learned trial magistrate erred in law in failing to find and hold that the draft statement of defence, filed and/or mounted by and/or on behalf of the appellants herein, raised pertinent and bona-fide triable issues, sufficient to warrant liberty to defend the suit before the subordinate court.

- g) In dismissing the Notice of Motion application by and/or on behalf of the appellants, seeking to set aside the irregular default judgment, the learned trial magistrate denied and/or deprived the appellants of a Constitutional entitlement, donated by dint of Article 27, 48 & 50(1) of the Constitution, 2010.
- h) In any event, in failing to afford the appellants a right of audience, pertaining to and/or concerning the proceedings before the subordinate court, the learned trial magistrate proceeded to and condemned the appellants unheard and thus violating the doctrine of the rules of natural justice.
- i) The learned trial magistrate, having correctly quoted a number of binding decisions pertaining to setting aside of default/ex-parte judgments and having correctly observed the hackneyed principle that jurisdiction to set aside is unfettered, same proceeded to disregard and/or ignored the set principles and thereby fettered his discretion and/or jurisdiction and thus occasioned a miscarriage of justice.
- j) In finding and holding that the default/ex-parte judgment, which was the subject of the Notice of Motion application for setting aside, was regular, the learned trial magistrate failed to appreciate and/or apprehend the requisite provisions of Order 5 Rule 15, 16 & 17 of the Civil Procedures Rule, 2010.
- k) The learned trial magistrate erred in law in dismissing the Notice of Motion application dated the 12th day of September, 2019 and thereby grating liberty for execution proceedings, notwithstanding failure to comply with and/or adhere to the provisions of Order 22 Rule 6 of the Civil Procedure Rules, 2010, consequently, the learned trial magistrate sanctioned illegal proceedings and/or execution, to the prejudice of the appellants.
- l) The learned trial magistrate erred in fact and in law in failing to fully appreciate, analyze and or evaluate the totality of Evidence on record as well as the submissions, filed and or lodged by the parties and in particular, the written submissions filled on behalf of the appellants, which in any event, were ignored *per incuriam*.
- m) The decision and or ruling of the learned trial magistrate, amounts to and or constitutes punishment to the appellants in lieu of rendering Justice. Consequently, the appellants have been subjected to condemnation and or deprivation of the right to natural justice.
- n) The ruling of the learned trial magistrate is contrary to the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2019, consequently, the ruling and or decision is a nullity.

3. The appeal was opposed by the respondent through the firm of Nyatundo & Company Advocates. The respondent contended that:

- a) The appellants were duly served.
- b) The appeal lacks merit.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The service of summons is provided for under section 20 of the Civil Procedure Act and Order 5 Civil Procedure Rules. Section 20 of the Civil Procedure Act provides:

Where a suit has been duly instituted the defendant shall be served in manner prescribed to enter an appearance and answer the claim.

The prescribed manner is provided for under Order 5 of the Civil Procedure Rules. Order 5 Rule 7 provides:

Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

Order 5 Rule 8 on the other hand provides:

(1) Wherever 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.

6. The outstanding salient requirements of service for summons are:

- a) Where practicable, service to be on the defendant in person; or
- b) Upon an agent empowered to accept service; or
- c) Upon an advocate who has instructions to accept service and to enter an appearance to the summons.

The affidavit of service filed in court on 19th November, 2018 and sworn by Moses Omondi Ogada indicate that he served the Summons to Enter Appearance on the Secretary. He does not give the name of the secretary. The person who signed does not indicate a name but just a signature. The court could not be able to ascertain whether such a person was empowered to accept service. Secondly, the process server did not make an attempt to establish the whereabouts of the second appellant. Thirdly, there was no return of service in respect of the first appellant.

7. I therefore find that the appellants were not served with summons to enter appearance. The default judgment and the consequential orders are hereby set aside. The appellants are given 14 days within which to enter appearance. The appeal is therefore allowed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE