



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. E007 OF 2020

ALEX CHEPKOIT KIPROTICH.....PLAINTIFF/APPELLANT

VERSUS

VINCENT MABATUK.....DEFENDANT/RESPONDENT

(BEING AN APPEAL FROM THE RULING OF HON. J.B KALO (CM)

IN NAKURU CMCC NO. 309 OF 2018 DATED 13TH OCTOBER 2020).

JUDGEMENT

1. This appeal arises from the ruling delivered by the learned trial magistrate in Nakuru CMCC No. 309 of 2018. The genesis of the dispute between the parties herein is that on the 13th March, 2018 the defendant/respondent maliciously and wrongfully composed or caused to be composed and wrote or caused to be written, published or caused to be published the following posts on his Facebook account and directed to a group account by the name ***“For real I am from Baringo County”***;

“finally.... the office you see belong to the Standard Group (SG), situated at the 2nd floor of Merica Hotel building. The guy being boarded is the notorious Kanu Slay queen, Lex k Ander Aka Alex Kiprotich Chepkait. Kindly assist me to identify the passenger on board. From the look of things, the photo was taken at night when the SG staff had left the office. The chairs and desks were empty and it is possible soldiers were instructed not to allow anybody until the ‘eating’ was over. This is the time Cherukunye communication strategist opted to convert the heavily guarded office into a private lodging. Bro it is evil to eat your ‘meals’ in the office. The standard pays and its advice you to take your ‘supper’ kwako”.

2. The plaintiff/appellant vide a plaint dated 23rd March 2018 filed suit at the lower court claiming inter-alia damages for defamation from the defendant/respondent. The defendant/respondent failed to enter appearance hence the matter proceeded by way of formal proof and on 25th February 2020, judgment was entered in favour of the plaintiff/appellant as against the defendant/respondent at a cumulative sum of Kshs. 8,000,000/= plus the costs of the suit.

3. Being dissatisfied, the defendant/applicant filed a Notice of Motion dated 28th May 2020 seeking to set the said judgment and all the consequential orders. In a ruling dated 13th October 2020 which is the subject of this appeal, the trial magistrate found that there was no proper service of summons to enter appearance upon the defendant/respondent.

4. In the said ruling the trial magistrate highlighted that he had examined the two affidavits of service relied on by the plaintiff/appellant sworn by Hebron Omolo, a licensed process server. He found that the said affidavits related to service of summons to enter appearance and that in the first one sworn on 3rd April 2018 and filed in court the same day the process server, Mr. Omolo deponed that he did not effect service on the defendant/respondent due to time constraints. While on the second one sworn on 10th April 2018 and file in court on 17th April 2018, the process server deponed under paragraphs 2 that he contacted the defendant through cell phone number 0724xxxx. That it was not clear how he got the said number and therefore that created doubt as to whether it is the defendant/respondent who was called and service effected upon him. He added that that was especially because the process server admitted the defendant/respondent became personally known to him at the time of effecting service upon him.

5. The trial magistrate went on to state that the court dealt with the request for judgement by the plaintiff/appellant and made remarks on the face of it that the matter had a hearing date on 30th July 2018 with instructions to serve and the affidavit of service attached to the request showed no proof of service of summons to enter appearance. He added that there was no evidence of a further attempt to serve the defendant/respondent with summons to enter appearance after that rejection by the court. The trial magistrate concluded that service of Summons to Enter Appearance was not effected upon the defendant/respondent on the reason that there was rejection by the court of the affidavit of service and failure by the process server to explain how he came to possess the cell phone number of the defendant.

6. Aggrieved by that ruling, the plaintiff/appellant filed this appeal vide memorandum of Appeal dated 4th November, 2020, setting out the following grounds of appeal:

a) THAT the learned Magistrate erred in law and in fact in holding that the Defendant/ Respondent was not properly served with the Summons to enter appearance, Plaintiff and court processes in this matter, despite overwhelming evidence on record indicating that proper service was effected.

b) THAT the learned Trial Magistrate erred in allowing the Defendant/Respondent's Application while basing his reasons on assumptions and not having the benefit of keenly perusing through Affidavits of the process server which are on record.

c) THAT the learned Trial Magistrate erred in allowing the Defendant/Respondent's Application while basing his reasons on assumptions and not having the benefit of keenly perusing through Affidavits of the process server which are on record.

d) THAT the learned Trial Magistrate erred in law in failing to address and analyze the issues of law touching on an application seeking to set aside judgment such as the application that was before him, and in the circumstances made decisions that are unfounded in law.

e) THAT in all the circumstances of the case, the finding of the learned trial magistrate is insupportable in Law.

f) THAT the learned Magistrate misdirected himself in law and fact in arriving at the decisions which could not be made by a reasonable court.

g) The Learned magistrate erred in law and fact when he based his decision on the source of the mobile phone number of the respondent which was a non-issue.

h) The Learned magistrate fell unto a deep error of law and fact when he filled in gaps for the respondent including the issue of representation.

i) That the learned magistrate fell unto a deep error of law and fact when he allowed interference of the court record by the Respondent.

j) That the learned magistrate fell into abyss of lawlessness when he ignored all the affidavits on record and the evidence of the Appellant.

7. The appellant prayed that the decisions made on 13th October, 2020 be set aside and costs of this appeal be awarded in his favour.

8. Parties were directed to canvass the appeal by way of written submissions.

Appellant's Written Submissions

9. The appellant submitted that the respondent's application dated 28th May, 2020 was filed by a stranger who had neither filed nor served a Notice of Appointment of Advocates. That therefore the said application was bad in law and offended the mandatory provisions of **Order 9** of the **Civil Procedure Rules 2010**. The appellant added that in the absence of the notice of appointment of the firm of Nyagaka S.M and Company Advocates, the said firm was misrepresenting itself as the advocates on record for the respondent pursuant to the lodged application seeking to have the judgment set aside.

10. The appellant submitted further that **Article 50 (2) (b)** of the **Constitution of Kenya, 2010** protects the rights of an accused person to choose and be represented by an advocate. That **order 9** does not impede the right of a party to be represented by an advocates of his choice. He stated that the said issue was not a mere technically and **Article 22** and **159** of the **Constitution** were not an invitation for chaos, nor are they intended to make courts abandon procedures and rules. The court's attention is drawn to the case **Musee Rap Barchok v County Surveyor, Baringo County & 4 Others [2021] eKLR**.

11. The appellant went on to state that in the respondent's application dated 28th May 2020, the main and only ground was purported lack of service of court documents and dates by him. That in response to the said application he had adduced evidence in form of copies of affidavits of service to the effect that the plaint, summons to enter appearance and hearing Notice were properly served upon the respondent. He added that despite the respondent accepting service of the pleadings and summons by signing on the face of each, he failed to enter appearance and/or file defence within the allowed time or at all.

12. That the aforementioned application was an afterthought as no evidence was produced by the respondent in support of the same. That further, the trial court was doubtful but not sure in allowing the said application as to the issue of service of summons to enter appearance. The appellant while relying on the case of **Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another [2014] eKLR**, submitted that the lower court never sought to cross-examine the process server one Hebron Odhiambo who served the respondent and therefore the affidavits of service sworn by the process server and filed in court should be considered as sufficient proof of service.

13. In conclusion, it was submitted for the appellant that the respondent did not have any triable issues vide his annexed draft statement of defence. The court's attention is drawn to **Order 10 rule 11** of the **Civil Procedure Rules** and the case of **Trust Bank v Portway Stores**

(1993) & 4 others as was referred to in the case of **James Wanyoike & 2 others v CMC Motors Group Limited & 4 Others [2015] eKLR**. He urged the court to uphold his appeal and set aside the lower court decision of 13th October 2020 with costs in its favour.

Respondent's Submissions

13. The respondent raised four issues for determination by the court. The first issue is whether the defendant's application dated 28th May 2020 is merited. He submitted that his failure to enter appearance was as a result of the dilatoriness on the part of the plaintiff to serve him summons to enter appearance hence being condemned unheard. He draws the court's attention to the cases of **Shadrack Arap Baiywo vs Bodi Bach KSM CA Civil Appeal No. 122 of 1986 [1987] eKLR**, **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR**, **Esther Wamaitha Njihia & 2 others v Safaricom Ltd [2014] eKLR** and **Wachira Karani v Bildad Wachira [2016] eKLR**.

14. On the second issue, whether there is defence on the merits the respondent placed reliance in the case of **Patel v Cargo Handling Services Ltd [1974] EA 75** where the Court of Appeal held that the main concern of the court is to do justice to the parties and not to impose conditions in itself to fetter the wide discretion given to it by the rule. That the same position was held in the case of **Chemwolo & Another v Kubende (1986)** and **CMC Holding [2004]1 KLR**.

15. On the third issue, whether there would be prejudice to the plaintiff he submitted that the appellant had not demonstrated that he will suffer any prejudice should he be allowed to put in his defence. That instead he would be the one to suffer terribly if the application is disallowed. The court's attention is drawn to the case of **Jim Rodgers Njeru v Al-Husain Motors Limited & 2 others [2018] eKLR**.

16. Lastly, on the issue whether the firm of S.M Nyagaka & Company Advocates have locus to file the application dated 28th May 2020 the respondent submitted that the said firm of advocates in line with **Order 9 rule 7** of the **Civil Procedure Rules** filed the aforementioned notice to act for him in this matter hence the locus in filing the same should not be disputed by a vigilant litigant of the appellant's status. He submitted that his advocates were conversant with court's decision in the case of **Kenya Building, Construction, Timber & Furniture Industries vs Ms. Newline Furniture Ltd [2017] eKLR** where it was held that filing of application by an advocate who had not yet lodged a notice of Appointment of Advocates were irregular and invalid as they had been taken by a stranger to the proceedings.

17. The respondent concluded by urging the court to dismiss the appellant's appeal with costs in its favour and that he is given an opportunity to put in its defence as the same raised triable issues that should be determined on merit basis and adjudicated upon.

Analysis and Determination

18. Having considered the trial court record, the grounds of appeal and submissions for and against this appeal and cited cases, the main issue for determination is whether the trial magistrate erred in law and fact when, by his ruling dated 13th October 2020 he allowed the respondent's application for setting aside exparte judgment for lack of proper service of summons to Enter Appearance upon the defendant/respondent.

19. **Order 10 Rule (2) of the Civil Procedure Rules** provide for Affidavit of Service upon non-appearance as follows: -

"Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service of summons unless the summons has been served by the process server appointed by the Court."

20. Further, in **Shah v Mbogo & another [1967] E.A. 116** It was held that:

"The court's discretion to set aside an exparte 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 therefore be refused."

21. In the instant suit, I have looked at the two affidavits of service dated 3rd April 2018 and 10th April 2018 that was relied upon by the trial magistrate in setting aside the judgment delivered on 25th February 2020. From the same I note that the two affidavits were the only ones that were related to the service of summons together with the plaint and other annexures on hearing notices for inter parties hearing on the applications that had been filed by the appellant.

22. In the affidavit dated 3rd April 2018 I am in agreement with the trial magistrate's holding that the process server deponed under paragraph 5 that he needed time to enable him effect personal service on the respondent. On the second affidavit of service dated 10th April 2018, the process server deponed that he served the respondent after contacting through cell phone number 072482xxxx. The appellant went on to attach summons to enter appearance and the same had a signature appended against the respondent's name.

23. The respondent in his submissions denies having been served with the said summons and denies having appended his signature on the same. He further contends that the cell phone number indicated on both affidavits do not belong to him. Upon my perusal of the court records, I note that there is no evidence adduced showing that the said cell phone number 0725xxxx that was allegedly used by the process server to serve the respondent was registered in his name. Further, this court is in agreement with the trial magistrates' sentiments that the process server in the said affidavit did not indicate where he got the number from and the fact that he had not met the respondent before thus casting doubt on how he was able to identify him at the time of service.

24. There is no certainty as to whether the person the process server claimed to have served was the actually the respondent. I am therefore inclined to agree with the trial magistrate that the second affidavit also does not show proof of service. I take note that the process server was not called to be cross examined as to veracity or otherwise of his affidavits of service. This in my view would have granted the chance to the

appellant and by extension the respondent to lay bare the truth.

25. This position was well obtained in the case of **MB AUTOMOBILE v KAMPALLA BUS SERVICE [1966] EA 480 at page 484**, as having been the view taken by the Indian Courts in construing similar legislations to ours. On **Chitale and Annaji Rao the Court of Civil Procedure Vol. 11 at 1670**, the learned commentators are quoted as saying –

“Presumption as to service – 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.”

23. In view of the above cited case law **Shaw v Mbogo (supra)**, I find that there is nothing on record to indicate that the respondent herein deliberately sought by way of evasion or otherwise to delay or obstruct the course of justice, as there was no evidence of service of the summons to enter appearance. Further, in my view justice is better served when both parties to a dispute are accorded an opportunity to be heard on merits to enable each of the parties ventilate their issues, unless it is demonstrably shown that the party in question has sought to merely delay or obstruct the cause of justice and in this case none has been established.

25. In view of the foregoing this court finds that this appeal lacks merit and the same is hereby dismissed with no order as to costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 16TH DAY OF DECEMBER 2021.

H K CHEMITEI.

JUDGE