



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.53 OF 2014

ELCOF KENYA LTD.....APPELLANT

-VS-

PATRICK KALABAYI.....RESPONDENT

(An appeal from ruling in Original Bungoma CMCC 578/2010 delivered on 15.5.2014 by P.N Areri Acting Principal Magistrate)

JUDGEMENT

By Plaintiff dated 19.8.2010 and filed in court on 19.8.2010 Patrick Kalabayi (the Respondent) filed a suit against Fred Wandago (1st defendant) and Philip Kilonzo T/A Nasioki Auctioneers (2nd defendant) seeking the following orders.

- 1. An order declaring the attachment and sale of the five head of cattle and the Auctioneers costs as illegal.**
- 2. The release of the said five head of cattle or payment of the equivalent value of Kshs 250,000.**
- 3. General damages for trespass.**
- 4. Costs of this suit and interest at court rates.**

The defendants were served with summons and plaintiff filed on 1.9.2010, and they filed a Memorandum of appearance through M/s Bulimo & Co. Advocate.

By amended Plaintiff dated 9.12.2010 the Plaintiff amended this plaint by including :

Kenya Eclof Company Ltd (1st Defendant)

Fred Wandago 2nd defendant

Paul K. OleYiaile T/a Nasioki Auctioneers 3rd Defendant

Philip Kilonzo 4th defendant, but seeking the same orders as before. The amended plaint which now included the appellant as 1st defendant was served on the 2nd defendant Fred Wandago who was the 1st defendant branch manager Bungoma. The appellant did not file defence within the prescribed time. Interlocutory judgment was entered on against appellant.

The appellant filed application dated 20.1.2014 seeking the following orders:-

- a. That this application be certified as urgent and the same be heard ex-parte in the first instance.**
- b. That the honourable court be pleased to grant temporary stay of the court's decree issued against the defendants and all consequential orders obtained pursuant thereto pending the hearing and determination of this application inter-partes.**
- c. That the honourable court be pleased to set aside and or vary the exparte judgment obtained against the defendants and all consequential orders obtained thereto.**
- d. That the 1st defendant be granted leave to file Defence out of time and the annexed Defence be deemed as duly filed upon**

payment of the requisite court fees.

e. That this suit be set down for hearing inter-parties and on merit.

f. That the cost of this application be provided for.

The Respondent filed grounds of opposition dated 18.2.2014. After the hearing the trial magistrate by ruling dated 15.5.2014 dismissed the application stating:

I have considered the pleadings of the parties and the record and the provisions of the law cited and I find that the summons to enter appearance were properly served upon the 2nd defendant who is the Bungoma Branch Manager of the 1st defendant. The 2nd defendant then instructed the firm of Bulimo and Company Advocates who entered appearance for the defendants vide a memorandum of appearance dated 1st September, 2010. While the firm of Kassim Sifuna & Associates entered appearance for the 3rd defendant. Later when the Plaintiff amended his plaint the same was served upon the firm of Bulimo and Company Advocates. The said law firm went to slumber and did not file any defence to the amended plaint.

Although they were served with court processes they did not act and the case was heard the absence of the defendants notwithstanding and judgement made. After judgment the law firm of Makokha Watanga & Luyali associates filed the present application.

I find that the law firm of Makokha Watanga & Luyali are not properly on record. That the 1st defendant was properly served with summons to enter appearance and file defence. That the 1st and 2nd exparte and that the defendants having failed to attend court and defendant themselves cannot come now and ask that the judgment and all consequential orders be set aside and they be granted leave to file their defence for interpartes hearing. Doing so will be prejudicial to the plaintiff/respondent and counter to the provisions of S.I A IB of the Civil Procedure Act Cap 21 Laws of Kenya.

Aggrieved by the ruling, the appellant preferred this appeal on the following grounds:

- 1. That the learned magistrate erred in law and in fact when he dismissed the Appellant's Application dated 20th January 2014 where he was seeking to set aside the ex-parte judgment.**
- 2. That the learned magistrate erred in law and in fact when he failed to appreciate that the respondent had not proved his case on balance of probability.**
- 3. That the learned magistrate erred in law and in fact in failing to appreciate that the appellant has an arguable defence.**
- 4. That the Learned Magistrate erred in law and in fact failing to appreciate the issues raised by the Appellant in the submissions and in the Supporting Affidavit in respect of the Chief Magistrate's Case No. 578 of 2010 and failing to appreciate that the appellant has an arguable and merited defence.**
- 5. That the learned Magistrate erred in law and in fact in suing wrong principles in arriving at the decision of dismissing the Appellant application and failing to accord natural justice to arrive at fair trial.**
- 6. That the learned Magistrate misdirected himself in aiming at a wrong decision in entering judgment against the appellant.**

By consent the appeal was to be canvassed by way of written submissions. Mr. Makokha for the appellant submitted that in the original plaint the appellant was not a party as the defendants were Fred Wandago (1st appellant) and Philip Kilonzo (2nd appellant). In this Amended Plaint, the appellant was named 1st defendant and his address is shown to be Nairobi. He submitted that there was no proof that the appellant as served with the amended Plaint. Counsel for appellant further submitted that the appellant filed an application to file defence out of time which was dismissed which meant that the appellant as denied an opportunity to adduce his defence.

Mr. Ikapel for the Respondent submitted that an application under Order 10. Rule 11 of the Civil Procedure Code to set aside the judgment is at the discretion of the trial court. He submits that an appellate court cannot interfere with that discretion unless it is shown that the same was not exercised judiciously, on the second ground that the trial magistrate did not consider that the appellant had an arguable defence, counsel submitted that the trial magistrate considered all the issues in the application. Finally counsel submitted that there was evidence that the appellant was served, thus judgment was properly entered and that there was no denial of fair hearing by the trial court to the appellant.

Upon considering all the grounds of appeal and the submissions, this court determines that the appeal is against the ruling of the trial magistrate dated 15.3.2014 where he dismissed the appellants application dated 20.1.2014 seeking leave to file defence out of time. The main ground adduced at the application and reiterated in this appeal is that the appellant was not served with the amended plaint.

It is not in contention that the 2nd defendant in the amended plaint Fred Wandago is a Bungoma branch manager of the 1st defendant/Appellant Kenya Eclof Company Ltd. It is also not in dispute that the Appellant is a company within the meaning in the companies Act. A company acts through its officers.

The amended plaint in para 2 describes the 2nd defendant Fred Wandago as the manager/agent of the 1st defendant/appellant carrying on business in Bungoma. That being so the 2nd defendant being a manager of the 1st defendant was an agent for the purpose of service. In deed

in this application dated 20.1.2014 the supporting affidavit is sworn by one Phelomen Misoi a resident of Bungoma and a Business Unit Manager of the appellant and stated that he was competent to swear the affidavit. This confirmed the Respondent submissions that the branch manager in Bungoma would also have sufficient authority to receive summons as an agent of the appellant.

For these reasons I am satisfied that service of the amended plaint on appellant was proper, and amounted to effective service.

The appellant having been served therefore through its agent, and failed to file defence within the prescribed time, and not explaining the delay to the satisfaction of the trial court, it cannot turn and allege lack of fair hearing in the suit.

I find that the discretion of the trial court in the ruling dated 15.3.2014 was properly and judiciously exercised. I therefore find no merit in this appeal which is hereby dismissed with costs.

Dated and Delivered at BUNGOMA this 29th day of January, 2020

S.N.RIECHI

JUDGE