REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC. CIVIL APPLICATION NO. 2 OF 2019

GICHARU KIMANI & ASSOCIATES ADVOCATES.....APPLICANT

VERSUS

SAMWEL KAZUNGU KAMBI.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Gicharu Kimani Advocates for the Applicant

Wambua Kilonzo Advocates for the respondent

RULING

The applicant **Samwel Kazungu Kambi** through his legal counsel **Mr. Wambua Kilonzo** by way of a notice of motion expressed to be stated in terms of Section 1A, 1B, 3A of the Civil Procedure Act, Order 22 Rule 22, Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules, Article 48, 50 of the Constitution and all enabling provisions of the Law sought the following orders:

> ***(i). That this honourable court be pleased to set aside the exparte Judgment delivered herein against the respondent in default of appearance and defence and all consequential orders thereof and the taxation be also set aside.***

The grounds in support of the motion are as stated on the body of the application as herein under. In addition to the grounds an affidavit sworn by **Samwel Kazungu Kambi.**

> ***(i). That the applicant irregularly obtained judgment against the respondent on 28/3/2019 and is now executing having issued warrant of arrest against the respondent.***
>
> ***(ii). That there was not service of bill of costs and notice of taxation and other pleadings to the respondent herein as required by the law.***
>
> ***(iii). That the respondent became aware of this suit upon a search by the police with a purpose of arresting him.***
>
> ***(iv). That judgment was delivered in this matter against the respondent on 28/3/2019 and the applicant extracted certificate of taxation dated 28/3/2019 amounting of Kshs.1,732,639/= is exaggerated and this amounts to miscarriage of justice.***
>
> ***(v). That the applicant proceeded to extract warrant of arrest in execution of the decree hence if stay is not granted the respondent will be arrested and committed to civil jail and will suffer irreparable loss.***
>
> ***(vi). That in the interest of justice and fairness the orders prayed herein are deserving and the same should be granted.***

The gist of all these deposed the applicant is that he was not served with the bill of costs dated 4.2.2019, notice of the taxation dated 6.2.2019, notice of motion dated 6.6.2019, decree dated 19.9.2019 and notice to show cause dated 16.10.2019 and other pleadings required by Law and therefore exparte Judgment entered against the certificate of costs and consequential orders should be set aside for being irregular and unlawful.

Mr. Gicharu Kimani in opposition filed a replying affidavit dated 10.12.2019. According to the deponent information and belief, the impugned exparte Judgment was entered upon the court being satisfied that there was proper service of process against the respondent.

Further, **Mr. Gicharu Kimani** deposed that the bill of costs was taxed by the taxing master following proper service of it upon the

respondent who opted not to defend the proceedings.

That further, the taxing master having exercised judicial discretion to tax the bill, the respondent ought to have filed a reference in terms of Section 11(41) of the Advocates Remuneration Order. That the respondent having been notified of the entry of Judgment asked for bank details of the respondent so as to effect payment. As regards the application he prayed that it be dismissed for lack of merit.

I have considered the notice of motion, affidavit in support together with the replying affidavit all touching on the issues raised in the application. The matter before me is fairly simple, has the applicant satisfied the test to set aside the exparte Judgment?

The Law, analysis and resolution

Section 3A of the Civil Procedure Act provides that:

> ***"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or so prevent abuse of the process of the court."***

In regard to Section 1A of the Act, ***"on overriding objective the court has a duty to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes".***

What is before this court turns more under the provisions of Order 5 Rule 14 and 15(1) of the Civil Procedure Rules.

> ***"14. where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with an affidavit of service.***
>
> ***15. (1). The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No. 4 of Appendix A with such variations as circumstances may require.***
>
> ***(2). Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month's imprisonment or both."***

This order though premised on service of summons, it applies **Mutatis Mutandis** on the requirements to be met by a process server which comes to serve the other notices upon the parties to a litigation. With regard to Judgment or order from default service Order 12 Rule 7 of the Civil Procedure Rules provides as follows:

> ***"Where under this order has been entered or the suit has been dismissed, the court, on application, may set aside or vary the Judgment or order upon such terms as may be just."***

In application for setting aside exparte judgment, the court must consider not only the reasons but why the applicant failed to attend the hearing. In the case of **Esther Wamaitha Njihia & 2 Others v Safaricom** referring to the issues on matters of the court to set aside exparte Judgment stated as follows:

> ***"The discretion is free and the main concern of the courts is to do justice to the parties before it. (Patee v EA Cargo Handling Services Ltd). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice (Shah v Mbogo). The nature of the action should be considered, the defence if any should also be considered and should be the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to delay a litigant a hearing should be the last resort of a court. It also goes without saying that the reason for failure to attend should be considered."***

Considering the circumstances of this motion, the facts regarding the merits or demerits of it one must take into account in exercise of discretion that its within the ambit of the guiding principles laid down in the case of **James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another Civil Appeal No 6 of 2015 Eklr (Msa).** The Court of Appeal stated as follows:

> ***"We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest to set aside the***

default judgment, among other. (See Mbogo & Another v Shah (supra), Patel v EA Cargo Handling Services Ltd {1975} EA 75, Chemwolo & Another v Kubende {1986/KLR 492 and CMC Holdings v Nzioki {2004/1 KLR 173})'. In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgement on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango 0100 v Attorney General {1986-1989 1EA 456})"

So the answer to the concerns raised in the notice of motion and replying affidavit depends on whether either at the taxation stage of the bill of costs and subsequent entry of exparte Judgment, the applicant has brought himself within the provisions of Order 10 Rule 11 of the Civil Procedures, Section 1A, 1B and 3A of the Civil Procedure Act, Order 5 Rule 13, 14 & 15 and Order 22 Rule 22 of the Civil Procedure Rules.

Returning to the facts of this case, the starting point would be whether in the opinion of the court. There was fair and proper adjudication of the claim at initial taxation of the bill of costs.

The Learned counsel **Mr. Gicharu Kariuki** prosecuting the case explains in his affidavit and that of **Mr. Terrence Omondi,** where its deponed that on 22.3.2019 the applicant **Samwel Kazungu Kambi** was served with the notice of taxation through his personal assistant. The most cogent averment in the affidavit of service is that of **Mr. Terrence Omondi** to the effect that the said unnamed personal assistant who was introduced to him by the unnamed receptionist accepted the notice of taxation but declined to sign on any of the copies.

Notwithstanding, that it was alleged to the effect that **Samwel Kazungu Kambi** was personally never served with the suit documents, the taxing master went ahead to tax the bill of costs and a certificate of taxation dated 28.3.2019 was issued and sealed by the court. The certificate of costs simply generated the second application dated 6.6.2019 for entry of Judgment in terms of the Ruling on the bills of costs and subsequent certificate by the taxing master.

This time round **Mr. Morris Mwavuo Ngonyo** clearly depones that **Samwel Kazungu Kambi** was personally served with the court process in the form of a hearing notice but declined to sign and endorse the copy. In this context summary Judgment was entered against the applicant **Samwel Kazungu Kambi** pursuant to the certificate of costs. The applicant deny each and all the several statements and dispositions set out in the various affidavits, to discredit service of the court process.

Although I do not agree with the whole arguments and affidavit evidence by the applicant, I should however on my part not shut my eyes on the defects to the original adjudication of the bill of costs.

It seems to be clear that the applicant did not participate in the proceedings which gave rise to the decision of the taxing master. The record of proceedings in the court below and the correspondence generated by the taxing master shows that even the Ruling was read in absence of the parties.

As acknowledged by the taxing master in her letter dated 28.3.2019 the Ruling on the bill of costs was scheduled to be delivered on 8.4.2019 but ended up being pronounced on 28.3.2019 without notice of change to the parties involved in the claim.

In the instant matter I hold that therefore in this case the statutory provisions as to service of the bill of costs, the applicant has brought himself within the realm of non-service of the process which culminated certificate of costs. The process server ought to have drawn a distinction between the identity of the party being sued and the name of the party who accepted service as an authorized agent of the applicant.

In this case the identity of the person was not known to the process server. It is not even in doubt that he was not an authorized agent of necessity to receive service on behalf of the applicant.

Therefore, the appropriate questions to be asked are: What is the name of the receptionist and personal assistant who might have been served with the notice on the bill of costs on behalf of the applicant? It is clear from the affidavit of service that the identity remains unknown. The evidence by the process server demonstrates that the exparte taxing order was from a substituted service that was in total violation of the rules. Yet the most important and decisive certificate of costs which gave rise to the impugned exparte Judgment, was dependent on that irregular affidavit of service.

The test is whether the impugned Judgment can be allowed to stand if the identification of the legal entity served with the notice of taxation is distinct from the legal person sued, which is specific to this particular case. In this regard from the facts of the case its manifest that a genuine mistake was made by the taxing master for relying upon a defective affidavit of service to hear and determine the bill of costs.

In addition to the above points, this application provides an opportunity to delve into a key right under Article 47 of the constitution on fair administrative action and the process of Fair Administrative Action Act 2015. The intent of the provisions was as articulated by the Court of Appeal in **Judicial Service Commission of Kenya v Mbalu Mutava {2015} eKLR**

"lays the scope of several rights to include, the right to act expeditiously, the duty to act fairly, duty to act lawfully, duty to act reasonably and in specific cases to give written reasons for the decision."

In the case at hand a major source of the confusion that arose is on the mode of service of the initial notice of taxation. Lack of notice for delivery of the Ruling. Under Order 21 Rule 1 of the Civil Procedure Rules Judgment is the official and authentic decision of a Court of justice upon determination of the respective rights and claims of the parties to a dispute. The Law requires it should be dated, pronounced and signed in open court in the presence of the parties or the respective legal representative as provided in Order 9 of the Rules and Article 50 (2) (G) of the Constitution.

The question is whether the jurisdiction exercised by the Taxing master to adjudicate on the claim and post the final Ruling to the registry for the claimants to extract a copy of the decision, had the Force of Law. With respect to the taxing master, the Law does not provide for any such alternatives, other than open court in the presence of the parties or their legal representatives. Thus, the irregularity and illegality of the process on Judgment/Ruling was in breach Article 47 of the Constitution and the Act on right to fair administrative action. Self-evident from the notice of motion, more has happened since the certificate of costs was issued by the taxing master. It would be unjust to deny the applicant an opportunity to be heard with regard to the bill of costs.

In the context of the constitution under Article 47, this court has power to look back impliedly to ensure that fair procedures were followed in compatibility with fundamental principles of justice. This brings out neatly to the characteristics and content of inherent jurisdiction of the court.

A striking feature of this jurisdiction is produced for in Section 3A of the Civil Procedure Act. The conceptual framework which better transcends the inherent power of the court and its intrinsic application was stated as follows in **DPP v McKevin L. L. R**

> ***"First, the application must patently and substantively concern an issue of constitutional justice other than the merits of the decision as such. Secondly, the grounds of the application must objectively demonstrate that there is a substantive issue concerning a denial of justice in the proceedings in question consistent with the onus of proof on an applicant."***

In addition, borrowing the principle in the persuasive authority from Ireland in **Greendale Developments Ltd {2000} 2 L.R. 514** the court gave a decision and stated:

> ***"The Supreme Court has jurisdiction and a duty to protect constitutional rights. This jurisdiction may arise even if there has been what appears to have been a final order. However, it would only arise in exceptional circumstances. The burden on the applicants is to establish that exceptional circumstances exist. It would duly be in most exceptional circumstances, that the Supreme Court would consider whether a final Judgment or order should be rescinded or varied, such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, though no fault of the party, he or she has been subject of constitutional rights."***

Applying the above principles, the best example deduced from the record is the cumulative effect of numerous errors in the decision making process by the Taxing master. She was misled either innocently or inadvertently that there was proper personal or authorized service upon the applicant.

Therefore, the order on certificate of costs was largely flawed by reason of breach of fair procedures occasioning prejudice and a failure of justice guaranteed by the Constitution and the Civil Procedure Act. Is this court helpless to undo the mess? In the case of **Connelly v DPP {1964} AC 1245 al 1347** the court stated:

> ***"The Judges of the High Court have in their inherent jurisdiction, both in Civil and Criminal matters, power, subject of course to any statutory rules, to make and enforce rules of practice in order to ensure that the court process is used fairly and conveniently by both sides if jurisdiction is confirmed upon a court, it may and should exercise that jurisdiction, and if no procedural machinery has been provided, it is for the court to provide such machinery as best it can."***

It can be seen from a cursory review of the notice of motion and the primary record the proceedings were flawed and erroneous which exhibits confusion blurring the administration of justice in accordance to the Law in a regular and effective manner. While the two streams of exercise of jurisdiction were involved both by the taxing master and this court to hold and determine matters in issue as incontrovertible, nonetheless the application reflects the aspect of irregularity created by the process server to color the decisions.

I am satisfied that the applicant has discharged the burden of proof that exceptional circumstances exist for this court to rescind the two decisions and re-open the proceedings afresh.

Having regard to the evidence in this application and the views that I have already expressed on the matter and taking into account the Law as illustrated by the cited authorities, I exercise discretion in favour of the applicant by making the following orders:

> ***a) That the certificate of costs and the exparte Judgment were obtained by the respondent having misled, innocently or deliberately as to the service of the suit papers upon the applicant.***
>
> ***b) That there was fatal defect on the part of the Taxing master at the perceived pronouncement of the decision on the bill of costs in absence of the parties.***
>
> ***c) That the judicial proceedings in which the order on the bill of costs and the exparte Judgment was made are gravely flawed by reason of breach of the Civil Procedure Rules and justice guaranteed by the constitution greatly compromised.***
>
> ***d) Thus, the certificate of costs and subsequent Judgment having been so obtained from a flawed process be set aside as of***

right.

e) Accordingly, the bill of costs be remitted back to the Deputy Registrar to proceed expeditiously and not later than 7th February 2020 to hear and determine the claim.

f) In the alternative, the applicant fails to defend or prosecute the bill of costs, the impugned certificate of costs be reinstated and enforced as the Judgment of the court.

g) The costs of this application be awarded to the applicant save that it abides the outcome of the taxation of the bill of costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF JANUARY 2020.

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R. NYAKUNDI

JUDGE