



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 121 OF 2018

ERICK JOHNSTONE MAPWONI ESHIRERA.....APPELLANT

VERSUS

JIMMY NANDWA.....1ST RESPONDENT

VINCENT AHONO.....2ND RESPONDENT

(Being an appeal from the ruling in Eldoret CMCC No. 478 of 2017

delivered by Chief Magistrate Honorable C. Obulutsa on 14th September, 2018).

JUDGMENT

The appeal before the court arises from the ruling delivered in the Chief Magistrate's court on 14th September 2018. The appellant had filed an application dated 6th February 2018 seeking the following orders;

- a) Pending the hearing and determination of the application there be a stay of execution of the court's decree dated 12th June 2017.
- b) That the firm of Kitiwa & Company Advocates be barred from representing the plaintiff in the suit.
- c) That judgment entered against the 2nd defendant/applicant in default of appearance and defence and all consequential orders and decree be set aside ex debito justitiae.
- d) Leave be granted to the 2nd defendant applicant to enter appearance and file defence.

The trial court dismissed the application and stated that notice of entry of judgment be served upon the 2nd defendant for the execution to proceed.

APPELLANT'S CASE

There are no submissions on record for the appellant.

The grounds of the appeal on the memorandum of appeal are that the learned magistrate erred in law in failing to find that there was no proper service wherefore the court had no discretion in setting aside the default judgment. That the learned magistrate had erred in law for failing to properly evaluate the affidavit evidence which was presented before court. Further, that the learned magistrate erred in law in failing to find that there was a defence on merits and that the learned magistrate erred in law in failing to find that the appellant had done nothing to obstruct or delay the course of justice. The learned magistrate erred in law in failing to consider the fact that the respondents could, in any event, be compensated in costs.

RESPONDENT'S CASE

The respondent opposes the appeal.

They submitted that on 19th may 2017 a process server by the name George Ochieng as sworn in his affidavit of service on 5th June 2017 as annexed to the replying affidavit, travelled to Kakamega where at around 2.30 pm he met the wife of the appellant who is the 1st defendant near Safaricom house and served her with the summons to enter appearance. She accepted service on her behalf and on behalf of the

appellant herein. She appended her signature and the same is on court record.

The respondents rely on order 5 rule 12 and paragraph 41 and 43 of the supporting affidavit of the appellant to confirm that service was properly done.

The respondent cites the case of **Jaber Mohsen & Anor v Priscilla Boit & anor** as cited in the case of **Gladys Wamuyu Ngira v Mary Wamaiitha Ruiru (2016(EKLR))** on unreasonable delay.

The respondent submits that the appellant is guilty of inordinate delay as;-

- a) No explanation is given to court why since 19th May 2017 the date of service, the appellant did not enter appearance, file his defence or instruct counsel timeously.
- b) The delay herein is a scam to deny the respondents enjoyment of the fruit of their judgment.

The appellant claims that there is a conflict of interest in the firm of Kitiwa & Company Advocates acting for the respondents. He alleges that the agreement was signed in good faith and was prepared and attested to by the firm of Kitiwa & Company Advocates who acted for both parties and was given all the details surrounding the joint venture. The respondent submits that the advocate only attested to the signatures after the parties had signed the agreement. He refers the court to paragraph 8 of the supporting affidavit. The averments by the appellant do not suffice a conflict of interest. The appellant knew the advocate was acting for both parties and never raised the issue at all. He is therefore estopped from raising it at this point. Mere attestation of an agreement does not bar the attesting advocates from representing either of the parties thereto. He cites the case of **H.F Five Africa vs A.M.R Ghavieb (2005) eKLR** in support of this submission.

At paragraph 4 of the appellant's supporting affidavit is an agreement marked ERJ 1 being a copy of the agreement dated 23rd September 2016 wherein the appellant acknowledges owing the respondent kshs 2,017,227 and commits to pay the sum in full on or before 5th October 2016 at paragraph 2 of the said agreement. The agreement is duly signed and witnessed by a commissioner for oaths.

At annexure marked ERJ 15 in the applicant's supporting affidavit is a draft copy of the appellant's defence. The same is an abuse of the court process for comprising of mere denials to the plaintiff. No substantial issue is being raised in terms of averments or even a counterclaim. He alleges the agreement was between the plaintiffs and Eshirerea & Associates Limited. The agreement forming the basis of this claim is crystal clear. The appellant signed the agreement in his individual capacity. The agreement is very clear on how much is owed and how much money was to be paid. If there were other issues to be sorted out later, the agreement could have expressly stated. The defendants have admitted having received the money and that they owe the plaintiffs. The respondent's claim being that of a liquidated sum, and the appellant having annexed a defective and unmeritorious draft defence constituting of mere denials, the judgment entered against him should stand. In the event the appellant is allowed to defend the suit, no real defence is going to be tendered therein.

The lawful execution process was underway before the appellant rushed to court to hijack the process and deny the respondent's enjoyment of the fruit of their judgment. The appellant failed to provide sufficient security in the event that the judgment is eventually entered in favour of the respondents especially this being a liquidated claim.

The respondent submits that the appeal be dismissed with costs.

ISSUES FOR DETERMINATION

From the memorandum of appeal, the issues for determination are;

1. Whether there was proper service.
2. Whether the application was made without unreasonable delay.
3. Whether the judgment entered against the 2nd defendant/applicant in default of appearance should be set aside.
4. Whether leave should be granted to the 2nd defendant to enter appearance and file a defence.

WHETHER THERE WAS PROPER SERVICE

The appellant contends that the summons to enter appearance was not properly served upon him.

Order 5 rule 12 of the *Civil Procedure Rules* provides;

Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.

As per the affidavit of service filed on 5th June 2017, it is evident that the summons and plaint were served on the 1st defendant on 19th May 2017.

WHETHER THE APPLICATION WAS MADE WITHOUT UNREASONABLE DELAY

The appellant seeks to overturn the ruling on the application delivered on 14th September 2018 where he had sought stay of execution of the court's decree dated 12th June 2017.

It has already been proven that the appellant was served with the summons to enter appearance on 19th May 2017. The applicant has not offered any explanation as to why there was no appearance entered until the notice to show cause was issued or why no defence was filed. This is coupled with the fact that the appellant has failed to defend the appeal thus showing that indeed the applicant filed the application after inordinate and unexplained delay.

WHETHER THE JUDGMENT ENTERED IN DEFAULT OF APPEARANCE SHOULD BE SET ASIDE

Order 10 Rule 4(1) of the Civil Procedure Rules, 2010 provides that: -

“where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”

A perusal of the agreement annexed as EJE1 to the application dated 6th February 2018, the appellant acknowledges owing the respondent KShs. 2,017,227 and committed to paying the sum in full on or before 5th October 2016. The agreement was signed in the individual capacities of the defendants.

In the case of; ***Shah vs Mbogo (1967) EA 166***, the court held that: -

“this discretion to set aside an ex-parte judgment 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

In the case of; ***Tree Shade Motors Ltd vs D.T. Dobie & Another (1995-1998) IEA 324***, it was held that: -

“Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”

The draft defence constitutes of mere denials. Further, the claim is for a liquidated sum and therefore the defence is unmeritorious. In the premises, it won't be in the interest of justice to grant leave to the appellant to file the defence. The appeal lacks merit and is hereby dismissed with costs to the respondents.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of November, 2020.

In the absence of:-

CBJ Ouma for the appellant

Mr. Babu for 1st and 2nd respondents

Ms Gladys - Court assistant