REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 154 OF 2018

STANLEY MANG'ELI.....APPELLANT

-VERSUS-

PHOENIX OF E.A ASSURANCE CO. LTD.....RESPONDENT

(Being an Appeal from the Ruling of Hon. C.A Mayamba (SRM) in the Senior Resident Magistrate's Court at Kilungu, Civil Case No.144 of 2014, delivered on 19th October 2018)

JUDGMENT

1. The Respondent instituted the lower court case pursuant to an accident on 30/11/2011 involving motor vehicle registration No. KBF 640D which was said to be jointly owned by the Appellant and Family Bank. The matter proceeded *ex-parte* and upon learning about the suit, the Appellant filed an application in the lower court seeking stay of execution and unconditional leave to defend but the same was dismissed.

2. Aggrieved by the dismissal, the Appellant filed this appeal through the firm of M.M Uvyu and co. advocates and listed five grounds as follows:

a) *That the learned Magistrate erred in law and fact in failing to exercise his discretion to set aside the judgment.*

b) That the learned Magistrate erred in law and fact in finding that the Appellant was served with summons when in fact that was not the case

c) That the learned Magistrate erred in law and fact in failing to find that the Appellant has a good draft defence which raises triable issues.

d) *That the learned Magistrate erred in law and fact in failing to consider the Appellant's supporting affidavit, supplementary affidavit and submissions.*

e) That the learned trial Magistrate erred in law and fact in failing to set aside the irregular ex-parte judgment.

3. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

4. In his submissions and while relying on Order 10 Rule 11 of the Civil Procedure Rules (CPR), Mr. Uvyu for the Appellant submits that the *ex-parte* judgment should be set aside as a matter of right since the Appellant was not served with the summons. He submits that in his supporting affidavit dated 11/09/2018, he averred that he had never seen the alleged process server by the name Olome John Mugondi. He contends that a reasonable man would recall if a stranger went to his home and served him with Court summons. It is also his submission that the trial Court did not take time to examine the issue of service.

5. Relying on Order 5 Rule 15 of the CPR, he submits that the serving officer did not state the name and address of the person who identified the Appellant hence the purported service is erroneous in law. He relies on the case of **Arithi Selasio Murungi –vs- Bright Wanja Julius (2020) eKLR** where it was held that;

"*The trial court should have interrogated the question of service fully by even summoning on its own motion the process server in order to satisfy itself that the Appellant was duly served before condemning him. Courts in my view should exercise some measure of reluctance at closing windows of opportunity for litigants to access justice unless there is a clear demonstration by a party to derail.*"

6. He submits that apart from the summons, the Appellant was also never served with mention and hearing notices. He argues that if any of the notices had been served, he would have been made aware of the suit and would have notified his insurers to handle the matter on his behalf. It is also his submission that the Respondent would not have been prejudiced by setting aside of the *ex-parte* judgment as costs would have been an adequate remedy.

7. Relying on the Court of Appeal decision in **Shah –vs- Mbogo (1967) EA 116**, he submits that the discretion to set aside *ex-parte* judgments is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake/error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. He has also cited the case of **Sebei District Administration –vs- Gasyali & Others (1968) E.A 300** where the Court stated that;

> *"I think it should always be remembered that to deny the subject a hearing should be the last resort of a Court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend."*

8. He faults the trial Magistrate for failing to find that the Appellant had a good draft defence with triable issues. He submits that contrary to the finding of the trial Magistrate, he actually denied the occurrence of the accident in paragraph 4 and 5 of the draft defence. He relies on **Chemwolo & Anor –vs Kabende (1986) KLR 492** where the Court of Appeal held that;

> *"The concern of the court is to do justice to the parties and the court would not impose conditions on itself to fetter the discretion. However where a regular judgment has been entered, the court will not usually set it aside unless it is satisfied that there are triable issues which raise a prima facie defence which should go for trial."*

9. He submits that a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be *bonafide.* He adds that the draft defence brings out a dispute of facts and real substantial questions to be tried and resolved after ventilation in a full hearing.

10. The Respondent through Michuki and Michuki advocates identifies the following as the contentious issues;

a) Whether the Appellant was served with summons to enter appearance.

b) Whether the judgment by the trial court was regular.

c) Whether the draft defence raises triable issues.

d) Whether the appeal is merited.

e) Who is to bear the costs of this appeal?

11. On issue (a), he submits that from the affidavit of service by Olome John Mugendi, it is clear that the Appellant was served and his only complaint is that the process server did not capture the name and address of the person who identified him *(Appellant)*. He contends that the Appellant ought to have called the process server for cross examination. He submits that the process server travelled all the way to the Appellant's residence and served him in person hence achieving compliance with Order 5 Rules 6 & 7 of the CPR. He contends that the process server could not falsify his averments as he had no personal interest in the matter.

12. On issue (b), he submits that the judgment was regular as the Appellant was duly served but failed to enter appearance. Further on issue (c), he submits that the police abstract blamed the Appellant/his driver/servant/agent for causing the accident and the Appellant admitted ownership of motor vehicle registration No. KBF 640D as well as occurrence of the accident. He contends that the only thing disputed by the Appellant was the plaintiff's ownership of motor vehicle KAY 904D.

13. On issues (d) and (e), he submits that having established that the Appellant was served with summons and that the defence has no triable issues, the appeal lacks merit and should be dismissed with costs. He submits that by electing not to defend the suit despite being served, the Appellant should not be permitted to take advantage of his own wrong.

Analysis and determination

14. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. In this case however, the benefit is not lost as there were no viva voce proceedings in respect of the application. See **Selle & Another –vs- Associated Motor Boat Company Limited and Others (1968) E.A 123**.

15. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the issues arising for determination are as captured in the summarized grounds *to wit*;

a) Whether the *ex-parte* judgment was regular.

b) Whether the draft defence raises triable issues.

Issue (a) Whether the *ex-parte* judgment was regular.

16. An *ex-parte* judgment is said to be regular when a defendant has notice of the suit but deliberately fails to defend.

17. The service of summons and plaint was said to be effected by a process server named Olome John Mugondi and in his affidavit of service dated 07/03/2015, he deposed as follows at paragraph 5;

> *"That on 18th February 2015, at about 2.00pm I travelled to Kaewa Market along the Matuu Kivaa Embu road and given that the defendant is a politician known in the area, I was directed to his home at Scout Mukaa and I was taken by a motor cycle rider and upon entering the home, I found the defendant with his wife Florence. After introduction, I gave him the summons together with the plaint which he perused accepted but declined to sign my copy."*

18. In his application to set aside the default judgment, the Appellant deposed that he had never seen the said process server in his life and applied to have him availed to court for cross examination. The Appellant further deposed that the process server had committed perjury by alleging that he had served him with the summons.

19. In dismissing the application, the trial Magistrate expressed himself as follows;

> *"The mere fact that he had not signed the summons was not indicative of lack of service since his claim of not knowing the process server was farfetched as one is not expected to know everyone he meets. It is worth noting that the service was done in 2014 and so the 1st defendant cannot claim to remember all the people he met that year. I am very much sure that service was proper. The contention that the process server ought to be summoned therefore did not arise. The affidavit of service was comprehensive on all aspects including place of service of which the application does not contest as well. I do disallow that claim."*

20. According to the process server, the Appellant is a known politician in his home area and if indeed that is the position, it is expected that details about his home and family would also be in the public domain. So, what would prevent a shrewd process server from using such information to write a very nice affidavit without effecting actual service?

21. In my view, the inclusion of details such as his home area and wife's name was not an automatic indication of service. The Appellant raised valid points about the details of the person who identified him to the process server because it is actually a requirement under **Order 5 Rule 15** of the CPR which provides that;

> *"The serving officers 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 <u>the name and address of the person</u> (if any) identifying the person served and witnessing the delivery or tender of summons." (emphasis mine).*

22. Accordingly, it cannot be said that the affidavit of service was comprehensive. Further, the fact that service was contested to the extent of alleging perjury should, in my view, have been reason enough to allow the Appellant an opportunity to cross examine the process server. Contrary to the Respondent's submissions, the Appellant actually applied to have the process server cross-examined and the said application was sanctioned by **Order 5 Rule 16** of the CPR provides;

> *"On any allegation that a summons has not been properly served, the court may examine the serving officer on oath or cause him to be so examined by another court, touching his proceedings and may make such further inquiry in the matter as it thinks fit and shall either declare that the summons has been duly served or order such service as it thinks fit."*

23. The above provision is not couched in mandatory terms but in the circumstances of this case, it would have been a prudent way of erasing any doubt that may arise. I agree with the Appellant that indeed, the question of service was not interrogated properly. As it has been held in numerous cases, Courts should always strive to afford all parties an opportunity to be heard.

24. Bearing all the above in mind, I find that the Appellant had no notice of the suit hence the *ex-parte* judgment was irregular.

25. Having opined that the *ex-parte* judgment was irregular, it automatically follows that the same should be set aside as a matter of right. There is however no harm in checking whether the draft defence raises triable issues.

26. The Respondent's cause of action was that the Appellant's motor vehicle (KBF 640D) caused extensive damage to it's motor vehicle (KAY 904D) by hitting it from the rear. In finding that there was no triable issue, the trial Magistrate stated as follows;

> *"I have managed to peruse the claim herein and whereas the 1st defendant admits ownership of motor vehicle registration number KBF 640D, he denies that the plaintiff owned motor vehicle number KAY 904D but does not deny the occurrence of the accident. It is important to note that the plaintiff had settled the issue of ownership during the hearing and there was nothing averred to buttress this contention by the applicant. The same is not a triable issue at all."*

27. On his part, the Appellant pleaded as follows in is draft defence;

> *"4. The 1st defendant further denies the contents of paragraph 5 of the plaint and shall put the plaintiff to strict proof thereof.*
>
> *6. The defendant avers that the driver of motor vehicle KAY 904D negligently drove, managed and/or controlled the said motor vehicle causing it to collide with motor vehicle KBF 640D and hence is wholly to blame for causing the accident and denies the*

contents of paragraph 5 of the plaint and the plaintiff is put to strict proof thereof."

28. In order to put things into perspective, paragraph 5 of the plaint states as follows;

> *"On or about 30th day of November 2011, the plaintiff's authorized driver was lawfully driving motor vehicle registration No. KAY 904D along Nairobi-Mombasa road at Salama when the Defendants and/or their authorized driver/agent drove, controlled and/or managed motor vehicle registration number KBF 640D along the said road thereby causing the same to hit or knock the plaintiff's said motor vehicle from the rear as a result of which extensive damage was caused to the plaintiff's motor vehicle."*

29. Whereas the Appellant admitted ownership of his motor vehicle and occurrence of the accident, and whereas the Respondent may have demonstrated its ownership of KAY 904D as indicated by the trial Magistrate, there is an obvious contest as to which party was at fault in order for the accident to occur. The Appellant attributed negligence to the Respondent and *vice versa* hence giving rise to an issue that could only be determined in a full trial.

30. The upshot is that the draft defence raises a triable issue and as correctly submitted by the Appellant, it need not be an issue that must lead to a successful defence. As long as it is *bonafide*, a party should be allowed to defend.

31. My finding is that the appeal has merit and I allow it. The dismissal of the Appellant's application vide the ruling dated 19/10/2018 is set aside. The resultant exparte judgment is also set aside. The Appellant to file his defence within 15 days of this judgment.

32. Costs of this appeal to the Appellant.

Dated and signed this 13th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge