



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**HCCA NO. 205 OF 2012**

**THE SECRETARY**

**THE CHAIRMAN BOARD OF**

**GOVERNORS KABAA HIGH SCHOOL.....APPELLANTS**

**VERSUS**

**LUCIA NDINDA MUSYOKA T/A JOCIA STORES.....RESPONDENT**

*(Being an appeal from an Order/Ruling of the Chief Magistrate's Court at Machakos in Civil Suit No. 10 of 2012 delivered on 27<sup>th</sup> November 2012 by Hon. Gesora, SPM)*

**JUDGMENT**

**Introduction**

1. Before the Court for determination is an appeal from the Ruling by Senior Principal Magistrate delivered on 27/11/2012, in which the learned magistrate declined to set aside a default judgment entered on 14/2/2012 and to grant leave to the defendant's to defend the plaintiff's case, on the ground that the defendant's were properly served and the judgment was regularly entered.
2. The application before the trial court was brought by way of Notice of Motion dated 5<sup>th</sup> April 2012 which sought:
  1. That this Honourable Court be pleased to certify this application as urgent and the application be heard ex-parte.
  2. That this Honourable court be pleased to set aside the default judgment issued in favour of the Plaintiff/Respondent against the Defendant/Applicants on 14<sup>th</sup> February 2012 and the subsequent decree issued by this Honourable Court on 14<sup>th</sup> March 2012 and the Defendants be granted unconditional leave to defend the case
  3. That this Honourable Court be pleased to stay the execution of the decree issued by this Honourable court on 14<sup>th</sup> March 2012 pending the hearing and determination of this Application.
  4. That the costs of this Application be borne by the Plaintiff/Respondent.
3. The application was supported by the affidavit of Gregory Muia dated 5<sup>th</sup> April 2012.

**REPLYING AFFIDAVIT**

4. The Plaintiff/Respondent filed affidavit on 14/5/2012 and sworn on the 12<sup>th</sup> May 2012 ascertaining the Deputy Principal of the School was served with Summons and Plaint on 19<sup>th</sup> January 2012, and were received under the instructions of the 1<sup>st</sup> Defendant.
5. The Respondent also avers that the Applicant did not produce records of visitors for 19<sup>th</sup> January 2012 that would have been evidence of service and that the Defence raised no triable issues.

**SUBMISSIONS OF THE PARTIES IN THE TRIAL COURT**

**Defendant/Appellant's Submissions**

6. The Applicant submitted that they were not aware of the filing of the main suit until auctioneers visited the school on 3<sup>rd</sup> April 2012 and proclaimed for attachment of the school property on the basis of warrants issued by this Honourable Court.

7. They also submitted that the 2<sup>nd</sup> Defendant indicated on the Proclamation for attachment when served that:

*“Received under protest, school not aware of any claim, judgment or decree”.*

8. The Applicant cited the decision in **Jackson Biego v. Charles Too and others** [2005] e KLR which Kimaru, J. cited the decision in **Mwalia v. Kenya Bureau of standards** [2001] EA in which case the Ringera, J. (as he then was) set out the principles to be considered in deciding whether or not to set aside the interlocutory judgment at page 155;

*“I think it is now convenient to state the law applicable to applications to set aside judgment in default of appearance or defence. It is undisputed that the discretion of the court is unfettered except that if the judgment is set aside, it must be done on terms that are just. That is what Order ... 1XA Rule 10 itself ordains (this provision is the equivalent of Order 10 Rule 11 in the Civil Procedure Rules, 2010)*

9. In the case of **Ceneast Airlines Ltd Kenya Shell Ltd** [2000] EA, the Court of Appeal quoted with approval the following remarks of Duffus, P. in **Patel v. EA Cargo Handling Services** [1974] EA 75:

*“the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J. put it “a triable issue” that is an issue that raises a prima facie defence and which should go to trial for adjudication.”*

10. The Defendant/Appellant submitted to have a good Defence that should be heard and determined on merit and the court should do substantive justice to all the parties. They thus prayed for their application to be allowed and the Defendant/Appellant be allowed to defend the suit unconditionally.

#### **PLAINTIFF/RESPONDENT SUBMISSIONS**

11. The plaintiff/Respondent submitted that the Applicant/Appellant did not produce the register of visitors for the 19<sup>th</sup> January 2012 when they allege service took place and referred to annexures LMN 1(a) - LMN 1 (c) which are copies of the Summons duly served, signed and stamped.

12. The Plaintiff/Respondents claim their submissions that the Applicant/Appellant has not met the conditions necessary to set aside a judgment, which include;

- 1. The Defendants must demonstrate that the Summons to enter appearance were not served upon them.*
- 2. That the Defendants have a Defence that raises triable issues which they submit the defence is a mere denial.*
- 3. The discretionary power of the court to be used judicially without rendering hardship on any party.*

13. They therefore submitted that the application to be dismissed.

#### **RULING OF TRIAL COURT**

14. In the trial court's Ruling, the Magistrate was of the opinion that on the issue of service, there was a copy of Summons duly signed and stamped and no argument has been made as to whether the signature therein was that of the Deputy Principal of the School. He also took note of the Affidavit of Service by one John Muasya, a process server.

15. The trial Magistrate took note that what he was being asked exercise was discretionary and held as follows:

*“In the instant case, I find and hold that the Defence were properly served and the entering of judgment herein regular. The Defendants in my view does not raise triable issues to warrant that it be admitted. I find no merit in the same and proceed to dismiss it with costs to the Respondents.”*

#### **APPELLANTS SUBMISSIONS**

16. It is Appellants submission that they were not properly served with the pleadings and they relied on the following decided cases- **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others** [2013] eKLR; **Lee Mwathi Kimani v. NSSF & Another** [2014] eKLR; **Grace Wairimu Mungai v. Catherine N Muya** [2014] eKLR; **Karandeep sign Dhillon & Another v. Nteppes Enterprises Ltd** (2010) eKLR; **Fredrick Mburu Ndegwa v Geoffrey Kinyua Waruhi** [2015] eKLR; **Kenya Power & Lighting Co. Ltd v. Alliance Media Kenya Limited** [2014] eKLR; and **University v. Vishva Builders Limited** Civil Appeal No. 296 of 2004 (unreported)..

17. The Appellants in submitting that the defence is reasonable and should be heard on merit cited the following cases:

*i. Patel v. E.A Cargo Handling Services Ltd [1974] EA 75 at p. 76 Duffus P said. "in this respect defence on the merits does not mean in my view....."*

*ii. Equatorial commercial bank Ltd v. Jodam Engineering works Ltd & 2 others [2014] e KLR*

*iii. Olympic Escort international Co. Ltd & 2 others v. Parminder sign Sandu & Another [2009] eKLR.*

18. They submitted that the case was not heard on its merits and that they should be heard under Article 50 of the Constitution they cited *Sultan Hardwares Limited v Steel Africa Limited [2011] e KLR* Court of Appeal noted.

*"We are aware that the suit in the superior court was not heard on its merits and what is at stake before us is whether the Appellant should have been given an opportunity to be heard on its defence which had been filed. In the case of Lalji Ha Vakkep Building Contractors v casousel Ltd [1989] e KLR 386 the predecessors of this Court (Nyarangi J.A, Plat, JJA and Kwach Ag JA) held that;*

*"summary Judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist"*

19. On issue of the principles to set aside interlocutory judgment they cited -

*Mercantile Insurance Co. Ltd & Mohammed Hassim Pondir v. Prep Safaris International Ltd & Another [2012] eKLR* cited *Njagi Kinyunguti alia Karingi Kanyunguri & others v David Njeru Karingi C.A No. 181 of 1994 (UR).*

20. The Appellant thus prays for orders sought in the Memorandum of Appeal and reverse in its entirety the ruling and subsequent order/decreed arising from the ruling of Honourable Gesora, Chief Magistrate court delivered on 27 November 2012 and order the suit filed in the subordinate Court to proceed to full trial.

Further, the Court to order to costs and incidental to the appeal be awarded to the Appellant and any other relief, orders and remedies the Honourable court may deem just and expedient.

### **RESPONDENTS SUBMISSIONS**

21. The Respondents put the issues to be determined into 3 namely:

*a) Service of summons to enter appearance being invalid and improper*

*b) The claim in the plaint dated 10<sup>th</sup> January being unliquidated and*

*c) Their intended statement of defence raises triable issues.*

22. The Respondent submit that service was made upon the Appellant and that the same is corroborated by the Affidavit of service of the process server by the name John Muasya Mutinda. They further submit that there is a qualified presumption in favour of the process server recognized in *MB Automobile v Kampala Bus Service [1966] EA 480* at page 484, as having been the view taken by the Indian Courts in construing similar legislation. On *Chitale and Annaji, Rao, The Code of Civil Procedure* vol. 11 page 1670, the learned commentators states:

### **3. Presumption of service**

*"There is a presumption of service as stated in the process servers 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 is put in the witness box and opportunity of cross examination given to those who deny service".*

See *Joseph Nathaniel Kipruto Arap Ngok & another v EABS Bank Limited [2014] eKLR.*

23. The Respondents submit that the Appeal herein is not automatic but discretionary and cited *Patel v. EA Cargo Handling services Ltd [1974] EA 75*, it was held that a court's discretion is intended so 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". This was also as stated in *Shah v. Mbogo & Another [1967] EA 470* and *Kenya Commercial Bank Ltd v. Nyantange & Another (1990) KLR 443.*

24. The Respondent further submit that their claim is liquidated claim and thus rely on order 10 R 2 of the Civil Procedure Rules 2010 which provides:

*"where any defendants fails to appear and the plaintiff wishes to proceed against such defendant he shall file an affidavit of service*

*of the Summons Unless the Summons has been served by a process server appointed by the court.”*

25. The Respondent also cited Order 7 Rule 1 which states that upon service of Summons the Defendant shall file the defence within 14 days after entry of appearance.

26. It is the Respondents submissions that this is an old matter filed on 29 November 2012 and that is likely to suffer prejudice if the judgment herein is set aside. It is their contention that litigation must come to an end and that justice delayed is justice denied. They submit that the Appellant is deliberately delaying the conclusion of this matter.

27. The Respondents submit in ascertaining that the defence raises triable issues cite the following cases:

*a) Sameer Africa Limited Versus Aggrwal & Sons Limited Civil Case No. 40 of 2013 in the High Court of Kenya at Nairobi Commercial and Admiralty Division.*

*b) Sbc Kenya Limited v. Stelesal Global Limited Civil Suit No. 354 Of 2012 In The High Court of Kenya At Nairobi.*

28. The Respondent submit that the discrepancy of figures from Ksh. 723,000/- as indicated to the letter by Appellant to Equity Bank and Ksh.956,500/- as prayed in the Plaint is explained and supported by annexures at page 8 to 12 of the Record of Appeal.

29. The Respondents finally submitted that the Appeal should be dismissed with costs to the Respondent.

### **DETERMINATION**

30. In this matter, the appellate court did not have the benefit of the original trial court and, I consequently, only relied on documents set out in the Record of Appeal filed in this appeal. The issues for determination of this appeal were two-fold as follows:

*a) Whether there was a valid service of summons to enter appearance.*

*b) Whether the defence raised triable issues to warrant grant of leave to defend.*

### **SERVICE OF SUMMONS**

31. The Appellant denies to ever being served with the Summons to enter appearance while the Respondent claims the Deputy Principal was served as an agent of the Respondents who were sued in their Respective office and not as individuals.

32. The two main people who would have assisted the trial Court and Appeal court in coming to a considerable resolution is the Deputy Principal of the Respondent and the process server. The court ought to have called for cross examination both the Process Server and the Deputy Principal.

33. The trial Court in my view having been met by two opposing affidavits i.e (from the process server alleging service, and from the principal disputing service) could have summoned the 2 makers for cross-examination *suo moto* so as to make a well informed judgment of the situation. As the learned authors of the Book *Chitaley and Annaji Rao, The Code of Civil Procedure* Vol. II page 1670 observes:

*“.....But if the fact of service is denied, it is desirable that the process server should be put in the witness box and opportunity of cross-examination given to those who deny service.”*

34. The Appellants herein contested that service was never done and that they only learnt of the suit when Auctioneers visited the school on 3<sup>rd</sup> April 2012. The learned Magistrate should have taken note of what was indicated on the Proclamation of attachment by the 2<sup>nd</sup> Defendant, “Received under protest school not aware of any claim, judgment or decree.” which is on the face of the said document.

35. Apart from the presence of the Affidavit of Service by John Muasya Mutinda annexures ‘LNM 1 (a), ‘LNM 1 (b) and LNM 1 (c) annexed in the Respondents replying affidavit filed on 14<sup>th</sup> May 2012 do not show stamps or signatures acknowledging receipt of the Summons to Enter appearance. They alleged that the receiving was done at the back; in my view it would have assisted their case if the back side was also put as their evidence of service, or the original trial court file was availed.

36. The appellant also did not also execute their evidentiary burden in that they did not convince the trial Court that service was not done, by either -

*1) Calling of the Deputy Principal to the witness-box for cross examination.*

*2) Annexing their visitor’s record book for the day claimed by the process server to have effected service.*

37. Section 109 of the Evidence Act is clear that the burden of proof of particular fact, as in this case of the lack of service of summons, was on the defendant/appellant, as follows:

**“109. Proof of particular fact**

*The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

See also *The Code of Civil Procedure*, supra.

38. Section 2 (4) of the Evidence Act is clear that “(4) A fact is not proved when it is neither proved nor disproved.” I do not find that lack of service was proved in this matter.

### **THE DEFENCE**

39. As I understand the matter, where a trial issue is raised in defence to a claim in suit where default judgment has been entered the defendant ought to be given leave to defend. However, whether the leave to defend is unconditional or conditional depends on the court appreciation of the apparent strength of the triable issues. In the leading case on summary judgment, akin to default judgment, of *Continental Butchery Ltd- v- Samson Musila Nthiwa*, Civil Appeal No. 35 of 1977, the Court of Appeal held that -

**“With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under the summary procedure provided by Order 35 subject to there being no triable issue which would entitle the defendant leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defence raised is a sham.”**

See also *Peter Mwangi Mbutia & another v Samow Edin Osman* [2014] eKLR.

40. Similarly, the Court of Appeal (per Madan, JA) held in *GUPTA V. CONTINENTAL BUILDERS LTD.* [1978] KLR, 83 at P.87 held as follows:

**“The first thing to say is that this was an application for summary judgment. If a Defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the Plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence out to be rejected peremptorily.”**

41. The Appellant/Defendant has raised an issue, which this court considers a bona fide triable issue as to the extent of the liability of the respondent defendants in view of the discrepancy in the sum claimed in the Plaint of **Ksh.959,500/-** said in the demand letter of **29<sup>th</sup> October 2011** to be the value of supplies to the appellant for the period between **May and September 2010**; the Plaint pleading a different figure of **Ksh.956,500/-** for supplies for a different period between **May and October 2010**, and the amount of **Ksh.723,000/-** certified in the Principal’s letter of **23<sup>rd</sup> June 2011** to Equity Bank as the credit of the pertaining to the food supplies as at the said date. In view of the discrepancy and the apparent admission of the part of the claim upto Ksh.723,000/- the court shall make the grant of leave in this case subject to the deposit in a suitable facility of the amount equivalent of the apparently admitted figure, pending final determination by a full trial.

42. I find that the respondent can be compensated for the delay in enjoyment of the fruits of the judgment during period the matter has remained unresolved by an award of interest as prayed in the Plaint upon full trial.

43. For the reasons set out above, I find, respectfully, that the trial court was wrong in its determination that there was no triable issue raised by the defence.

### **ORDERS**

44. Accordingly for the reasons set out above, the Court makes the following Orders:

- a) The default judgment and the ruling of the trial court dated 27<sup>th</sup> November 2012 and any subsequent Order/Decree arising from the said ruling are set aside.
- b) The respondents/defendants are granted leave to defend and shall file their defence, if not already filed, within fourteen (14) days and the suit filed in the subordinate court shall proceed to full trial.
- c) The grant of leave is conditional upon, and shall lapse in default of, the appellants depositing the sum of Ksh.723,000/- in an interest earning joint account in the names of the Counsel for the parties within fourteen (14) days, or into Court within seven (7) days upon default thereof.
- d) There shall be no orders as to costs of the appeal.

Order accordingly.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF JANUARY 2019.**

**G.V. ODUNGA**

**JUDGE**

**Appearances:-**

M/S Mulwa Isika & Mutia Advocates for the Appellant.

M/S J.M. Mutua for the Respondent.