REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 116 OF 2007

PETER WAMBUA……..…….APPELLANT

VERSUS

MATHEKA MUATINE…… RESPONDENT

(Being an appeal from the ruling and orders in Kangundo SRMC No. 155 of 1999 delivered on 25.5.2007 by G.L. Nzioka, Principal Magistrate)

JUDGMENT

Introduction

1. The Appellant herein is appealing out of a ruling delivered by the trial magistrate setting aside an interlocutory judgment. The Appellant had sued the Respondent for general damages for pain and suffering and the court awarded him a sum of Ksh.100,000/=. The Respondent filed an application by Chamber Summons seeking stay of execution of the judgment and decree ruled as:

> *"The service of Summons was done by an incompetent person i.e Maurice M. Makanda an "alleged" advocate of the High Court of Kenya and whom the Law Society of Kenya has certified had no practicing certificate. In my opinion that service was not proper as per the provisions of Order V.* ***The fact that a Memorandum of Appearance was filed thereafter by a party who had no knowledge of the incompetence of the Counsel, does not validate the counsel's act. On that ground alone I would allow the application."***

The trial Court granted the defendant leave to defend the suit as follows:

> *"1). The judgment and all the consequential Orders given herein are set aside.*
>
> *2). The defendant to file a defence within 14 days of the delivery of this ruling.*
>
> *3). The defendant to pay throw away costs of Ksh.3000/= to the respondent.*
>
> *4). The suit be set down for hearing within 21 days from the date of this ruling.*
>
> *5). Each party to meet its own costs in relation to this Application."*

2. The Appellant/Plaintiff was aggrieved by the above ruling and appealed against it citing the following specific grounds in his Memorandum of Appeal dated 8th June 2007.

> *1)The Learned Lower Court Magistrate grossly misdirected herself in the manner she handled the matter and that she did not appreciate the facts of the case below.*
>
> *2) The Learned Lower Court proceeded to entertain an Application that had been heard and determined according to law.*
>
> *3) The Learned Lower Court Magistrate erred in law and fact when she proceeded to set aside a judgment of the year 1999 when the Respondent had notice of the same and had even settled the matter half way.*
>
> *4) The learned Lower Court Magistrate erred grossly in law and fact when he proceeded to consider.*

5) The Learned Lower Court Magistrate greatly misused her discretion in granting the Orders sought to the prejudice of the Appellants.

Reasons wherefore:

a. The Appellants appeal be grounded to the extent that the ruling dated 25th day of May 2007 is set aside and the appellant put at liberty to recover the decree therein.

b. The costs of the appeal to the appellants.

3. The parties agreed to canvass the appeal by way of written submissions.

SUBMISSIONS

Appellant's Submission

4. The Counsel urged that the Respondent's application was ***'res judicata'*** since there was a similar application seeking the same orders that was filed on 11.4.04 by the firm of Njenga Mwangi & Co. Advocates which was heard and determined. The respondents had even settled part of the notice to show cause. The trial Court erred by considering the issue of service on the respondent.

5. Further, the judgment was never obtained irregularly as alleged by the respondent. The execution process was conducted in accordance with the law. If at all the execution was irregular, the respondent could not have settled part of the decretal sum.

6. On service of Summons Order 5 Rule 6(3) of the Civil Procedure Rules was referred to, which provides as follows:

"No objection may be made to the service of Summons on the grounds that the person who served the summons either was not authorized so to do or that he exceeded or failed to comply with his authority in any way."

The trial Court had erred by disregarding the said provision since the respondent never denied service, but only the mode of service and had even entered appearance.

7. The application was an afterthought, brought in bad faith and the same ought not to have been allowed. Finally, the Court was urged to allow the appeal and set aside the ruling date 25.05.07.

Respondent's Submissions

8. They urged that the appellant filed a case at Kangundo Law Court PMCCC NO. 155 of 1999 claiming for damages for personal injuries. The summons were served upon the respondent by Mr. Maurice M. Makanda a court process server. The matter proceeded by way of formal proof and an ex-parte judgment was entered for a sum of Ksh.100,000/= as general damages for pain and suffering and Ksh.3,200 for special damages. The respondent was represented by the firm of Njenga Mwangi & Co. Adv., then Muthoga Gaturu & Co. Advocates and then M.M. Uvyu & Co. Advocates. The appellant's application was supported by Mr. Gichuhi who deponed **that the Affidavit of Service was sworn by an advocate who had no Practicing Certificate.**

9. Service of Summons is provided by Order V Rule 15(1) which provides the Procedure on how the Affidavit of Service states how the Summons were served and that the Process Server failed to state the time when he served the summons.

10. Further, Order XXI Rule 6 provides that when a judgment in default of appearance or defence has not been entered, then a ten (10) days' notice period of the entry of judgment before execution is issued. In this case execution was proper in accordance to Order IXA Rules 10 and 11.

11. The respondent referred the Court to ***Shah v. Mbogo*** [1967] EA 116 where the Judge held that the Court has unfettered discretion to set aside an ex-parte judgment to avoid an injustice. In ***Patel v. E.A Cargo Handling Service*** [1974] EA 75, the judge held that an Ex-parte judgment ought to be set aside, if there is a defence which raises triable issues. Also in ***Kingsway Tyres and Auto Mart Ltd v. Rafiki Enterprises Ltd*** [1995 – 1998] EA 143 the Court of Appeal held that an Appellate Court will not lightly interfere with exercise of discretionary jurisdiction unless it is based on a wrong premise. The trial Court allowed the appellant to file the defence.

Issues for Determination

12. The Court has referred to the Application, the Record of Appeal and the Submissions and has framed the following specific issues:

a. Whether the Application is re judicata; and if not,

b. Whether there was a valid service of Summons to enter appearance; and

c. Whether the court shall interfere with the exercise of discretion of the trial court in granting the respondent leave to defend the suit.

Determination

13. This Court notes that the respondent was represented by various law firms. The issue in contention is whether the application dated 25.03.2003 is ***res judicata.*** The Court has perused the entire Record of Appeal and the lower Court file and has not seen the said Chamber Summons application dated 25.03.2003. However, there is a ruling on the said Application which led to this instant Appeal. The trial magistrate granted the defendant leave to file their defence within 14 days. The ruling was on 25.5.07. The defendant was then required to file his defence on the 7.6.07. The Court indicates that both parties were present in Court when the ruling was delivered.

14. The appellant's contention is that the trial court erred to have set aside a judgment delivered in the year 1999 which had been partly paid and even a Notice to Show Cause issued. From the trial Court's file, there is, however, no evidence that shows the respondent had paid part of the judgment and decree award.

15. The respondent denies service of Summons. From the record of the lower Court file, the appellant's Plaint is dated 8.2.1999. There are Summons on record which indicate that they were issued on 9.2.1999. There is an Affidavit of Service under Order V Rule 15 (1) of the Civil Procedure Rules which indicates that one Maurice M. Makanda received summons on 20.2.1999 and served on the defendant/respondent on the same day. He was served with a copy of Summons to enter appearance together with a Plaint at his place of work at Matuu Market where he operated a shop. The Process Server further states that the defendant refused to sign the original summons. This statement is recorded at the back of the Summons. This Court is in agreement with the appellant that indeed the respondent became aware of the suit. This is because the firm of Mohammed Muigai Mboya, Advocates filed a Memorandum of Appearance on 16.4.1999. According to the rules, the defendant was to file its defence within 14 days from entering appearance. The respondent's allege that the Affidavit of Service was commissioned by J.M. Mutinda, Advocate who had not taken out a Practicing Certificate and thus the Affidavit was not properly executed in accordance with section 2 of the Oath and Statutory Declarations Act which states as follows:

> *"An advocate who practices after the period of grace without a valid Practicing Certificate commits an offence and is liable to Prosecution under section 14(1) of the Advocates Act."*

15. Therefore, the documents he prepared, signs and filed are invalid as he does so in perpetration of an offence under section 14(1) of the Advocates Act – Accordingly such documents are invalid and of no legal effect as the Court cannot sanction or condone an illegality which is brought to its notice.

16. The issue of the advocate not having a valid Practicing Certificate was raised in an Application filed by the defendant on 10.5.2002. The defendant was seeking a stay of execution of the decree. Annexure 'PG2' of the Supporting Affidavit by Paul Gichuhi who was a Legal Officer with United Insurance Co. Limited, the defendant's Insurer. The annexures is a letter from the Law Society of Kenya confirming that Joseph Muinde Mutinda had not taken out a Practicing Certificate for the years 1998, 1991, 2000, 2001 and 2002. The Advocates Act provides that it was an offence for an advocate to practice without a practicing Certificate as provided in sections 24 and 34 of the Act. Therefore, the Affidavit of Service dated 22.03.1998 was commissioned by unqualified advocate it was therefore invalid.

17. The Application dated 10.5.2002 which raised the issue above was heard and the court granted stay of execution of the decree and all its consequential Orders pending the hearing and final determination and i*nter partes* hearing fixed for 2.12.05. This Order was issued on 16.11.05. This Court has gone through the lower Court proceeding for 2.12.05 when this application was to be heard *inter partes*, and would appear that it did not proceed to hearing and determination. Instead the advocate for the Plaintiff fixed a hearing date for an Application dated 15.11.2005. This Court is in agreement with the respondent that this Application was never canvassed ***inter partes;*** the Court had only issued interim Orders. When a similar Application dated 25/5/2003 was heard, the Court set aside the default judgment by its ruling of 25/5/07. The trial court fixed the application of 10.5.2002 for *inter partes* hearing instead of allowing the defendant to file a similar application. This whole issue could have arisen out of the many changes of advocates representing the defendant. This Court thus finds the application dated 25.3.03 similar to the earlier one of 10.5.02. The Court in its ruling for this application had stated as follows:

> *"The main grounds for the application are;*
>
> *1. The defendant was not served with Summons to enter appearance.*
>
> *2. The process of execution is flawed and irregular for non-compliance with OrderXX1 of Civil Procedure Rules.*
>
> *3. Suit was incompetents as the driver of the motor vehicle was not sued as a co-defendant.*
>
> *4. The suit is an abuse of the Court Process.*
>
> *5. The judgment and decree was obtained irregularly in breach of Civil Procedure Rules.*
>
> *6. That it is in the interest of justice to grant the prayers sought for."*

18. The Court could in the application dated 10.5.02, which was never finalized, have granted the same Orders sought in the application of 25th March, 2003. The second application was barred by the principle of ***sub judice,*** and the court had no jurisdiction to proceed with it by virtue of section 6 of the Civil Procedure Act which ousts jurisdiction in proceeding with repeat suits (including applications) by the ***sub – judice*** principle as follows:

> **6. Stay of suit**

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, *or between parties under whom they or any of them claim, litigating under the same title,* ***where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.***

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court. [Act No. 10 of 1969, Sch.]

19. The word 'suit' is defined in section 2 of the Civil Procedure Act to include applications, as follows:

"suit" means ***all civil proceedings commenced in any manner prescribed.***

[Act No. 17 of 1967, s. 38, Act No. 10 of 1969, Sch., Act No. 4 of 1974, Sch., Act No. 12 of 2012, Sch.]

Service of Summons

20. The issue on service of Summons was raised by the respondent. Order V Rule 15(1) provides as follows:

"The Servicing 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 and Affidavit of Service stating the time when and the manner in which summons were served and witnessing the delivery or tender of summons. The Affidavit of service shall be in Form No. 8 of Appendix A with such variations as circumstances may require."

The Affidavit of Service by one Maurice Mukanda did not specify the time when he served the defendant. The defendant nonetheless entered appearance and thus issue of service does not arise. Once a defendant files an appearance he demonstrates that he is aware of the suit, which is the object of service of summons, and he cannot be heard to object that there was no valid service. Indeed, the objection herein is not that there was no service but that the Affidavit of Service was commissioned by an advocate who did not at the time possess a valid practicing certificate. Such a defect on the validity of the affidavit of service should not affect the otherwise valid service by a competent process server. In any event, Order V Rule 6 (3) of the Civil Procedure Rules 1998 (now Order 5 Rule 5 (3) of the 2010 Civil Procedure Rules) is clear that service may not be defeated even by lack of authority of the person serving the process; the key consideration is that the matter of the suit or other court process is brought to the attention of the person affected by it or the person sought to be served therewith. Having filed an appearance, the defendant was clearly aware of the suit against him.

Res Judicata and Abuse of Court Process

21. It is evident from this matter that the respondent had filed two similar applications. The initial application dated 10th May, 2002 was never heard to its conclusion, and the issue of *res judicata* would not arise as this application was not finally determined.

22. The second application dated 25.03.03 upon which the trial court ruled on the 25th may, 2007 and which is the subject of the appeal herein is an abuse of the court process. The applicant should have fixed the application dated 10.5.02 for hearing *inter partes* rather than present a similar application dated 25th March, 2003. Courts have consistently held that the filing of second application after the determination or dismissal a similar earlier one is barred by ***res judicata,*** where the matter was finally decided or where the issues raised in the second could have been raised in the first, or an abuse of the process of the court where the earlier application has not been decided on the merits. In ***Mburu Kinyua v. Gachini Tuti*** [1978] KLR 69, 81, Law JA had this to say on the matter of the second application:

"As regards the filling of a second application to set aside an Ex-parte judgment, Mr. Khanna submitted that successive application can be made, and that every change of circumstances justified a fresh application. ***I would agree if the fresh circumstances consisted of facts not known to the applicant at the time of the earlier application.*** *This is not the position here.*

To sum up my views of this aspect of the case, ***an applicant whose application to set aside an ex parte judgment has been rejected has a right to appeal. Alternatively, he may apply for a review of the decision, under section 80 of the Civil Procedure Act. He can only successfully file a second application if it is based on facts not known to him, his second application will be dismissed as re judicata, as happened here. The position otherwise would be intolerable. A decree-holder could be deprived of the benefits of his judgment by a succession of applications to set aside the judgment, and judges would in effect be asked to sit on appeal over their previous decisions or those of other judges. As regards Madam J A's expressed feeling that justice can only be done by giving the appellant the right to defend, I would respectfully point out that there are always two aspects to the concept of justice. A successful litigant is convinced that justice has been done, the loser is unlikely to share that view."***

23. In ***Heritage Insurance Company Limited v Patrick Kasina Kisilu*** [2015] eKLR, this court considered the validity of a repeat similar application to a prior application and held:

"17. To prevent abuse of the court of process where parallel proceedings are had before two different courts with concurrent jurisdiction or before the same court at different times, section 6 of the Civil Procedure Act requires that the latter application be stayed to allow the hearing and determination of the earlier proceedings. The filing of an application before this court while a similar application is pending hearing and determination before a lower court of competent jurisdiction is, clearly, an abuse of court process…."

24. Similarly, in ***Moses Ndungu Mungai v Co-operative Bank of Kenya ltd. & another*** [2009] eKLR Joyce Khaminwa, J. held as abuse of

process of the court the filing of second application for injunction after the dismissal of an earlier application for injunction for non attendance of the plaintiff's counsel.

Whether the appellate court will interfere with the discretion of the trial court

25. The application of 25th march, 2003 was barred by the principle of ***sub judice*** and also an abuse of the process of the court being a second application for the same relief sought in an earlier undetermined application dated 10th February, 2002. Being an incompetent application it could not give arise to valid orders of the trial court, and the appellate court would be justified on the test in ***Mbogo v. Shah*** (1968) EA 93, to interfere with the discretion of the court in setting aside the default judgment on an application which was not properly before it. See also ***Kingsway Tyres and Auto Mart Ltd v. Rafiki Enterprises Ltd*** [1995 – 1998] EA 143. But the issue of *sub judice* was not raised by the appellant whether at trial court or on appeal, and this cannot properly decide the matter on a ground not raised by the parties.

26. In truth, however, the objection on service was that the Affidavit of Service was **commissioned** by an unqualified advocate not that the service of summons was **effected** by an unqualified person, and the trial court was on error in finding that *"the service of summons was done by an incompetent person"*. Had this been the only defect, it would have been curable by Order V Rule 6 (3) of the Civil Procedure Rules 1998 (now Order 5 Rule 5 (3) of the Civil Procedure Rules 2010) that:

> *"(3) No objection maybe made to the service of a summons on the grounds that the person who served the summons either was not authorized so to do or that he exceeded or failed to comply with his authority in any way"*.

27. With respect, the trial court set aside the judgment not only because *'service was done by an incompetent person i.e. Maurice M. Makanda an alleged advocate of the High Court of Kenya and whom the Law Society has certified had no practicing certificate'* but also because the defendant had raised a triable issue or a good defence on jurisdiction, saying:-

> *"The issue of jurisdiction of the court where the suit should have been filed is hefty and cannot be wished away. I must, however, observe that the same could only be raised before the trial commenced. I have perused the defence and note indeed the jurisdiction of the court was denied."*

28. As held in ***Patel v. E.A. Cargo Handling Services*** [1974] E.A. 75, following ***Evans v Bartlam***, supra, the discretion of the court is not limited and even though the trial court but erroneously held that the service of Summons had been effected by an unqualified advocate, the other considerations of the respondent's objection as to jurisdiction of the court and the delay on the part of the appellant in prosecuting the case were matters that a court may properly take into account in exercising its discretion to set aside a default judgment and grant leave to defend.

29. As Duffus, P, with whom Law, Ag. V-P and Musoke, J.A. agreed said in ***Patel v. E.A. Cargo Handling Services,*** supra–

> *"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 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 which raises a prima facie defence and which should go to trial fro adjudication."*

30. In the circumstances of this case, the appellate court shall not interfere with the exercise of the discretion of the trial court in setting aside the default judgment.

ORDERS

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

1. The appeal is dismissed.

2. There shall be no order as to costs.

Order accordingly

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 23RD DAY OF JANUARY 2019.

G.V. ODUNGA

JUDGE

Appearances:-

M/S B.M. Mung’ata & Co. Advocates for the Appellant.

M/S M.M. Uvyu & Co. Advocates for the Respondent.