REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 56 OF 2017

THE CHAIRPERSON EMBAKASI CENTRAL CONSTITUENCY....1ST APPELLANT

JOHN NDIRANGU.....2ND APPELLANT

VERSUS

JOHN KANYI MUNGAI .....RESPONDENT

(Being an appeal from the ruling and order of Honourable D.O. Mbeja (Mr) S.R.M. delivered on the 16th February, 2017 in Civil Suit No. 4637 of 2016 – John Kanyi versus John Ndirangu & Another (Milimani Commercial Courts)

JUDGMENT

The appellants were sued by the respondent herein who claimed a sum of Kshs. 1,243,200/= being the value of a motor vehicle which was burnt while transporting what was alleged to be illicit brew for disposal, in a campaign against the said product and in compliance with the Presidential directive at the time. In addition to the value of the motor vehicle, the respondent had claimed towing charges, valuation fee, loss of user and the contract amount.

The appellants did not enter appearance in time or at all and therefore the respondent applied and obtained interlocutory judgment in default. The said interlocutory judgment crystallized into a decree in the sum of Kshs. 3,168,689.80 which the respondent moved to execute by way of garnishee proceedings. An order nisi was issued by the court on 18th November, 2016 in the said sum which aggrieved the appellants.

An application to review and set aside the order nisi was made by the appellants which however was dismissed on 16th February, 2017. This appeal is against the said dismissal order. In the Memorandum of Appeal dated 17th February, 2017 the appellants complained that the trial court was wrong to have dismissed the said application and ordering garnishee order absolute to attach the first appellant's money held by the garnishee, Equity Bank Limited.

The trial court was also faulted for finding that service of summons upon the appellant was proper, and failing to review and set aside the ex parte judgment. The appellant also complained that the lower court erred in law in failing to grant leave to file a defence to the suit, and that the draft defence lodged by the appellants raised triable issues which needed to go for trial. When the appeal came up for hearing parties agreed to file submissions which I have on record.

The starting point should be whether or not the lower court was wrong to have dismissed the appellants' application dated 24th November, 2016 which sought to set aside the ex parte judgment entered on 8th September, 2016.

The answer is to be found on the mode of service of summons to enter appearance that was disputed by the appellants herein. A perusal of the record would show that the process server the name George Okwemba went to the offices of the appellants but was informed that the 2nd appellant was held up in a meeting. Upon calling him on telephone number disclosed in the affidavit of service, the 2nd appellant instructed the process server to serve his personal secretary, whose name is also given as Lydia, which the process server complied with. The said Lydia was personally known to the process server.

The orders sought by the appellants before the lower court are discretionary, which discretion however should be invoked judicially. Ordinarily, where service of process is challenged the best practice would be to call the process server for cross-examination. Order 19 Rule 2 (1) of the Civil Procedure Rules provides as follows,

> **"Upon any application, evidence may be given by affidavit but the court may, at the instance of either party, order the attendance for cross-examination of the deponent."**

The appellant were represented by counsel. In the event they contested service of process, they were at liberty to summon the process server

to be cross-examined on the authenticity and veracity of the contents of the affidavit of service. No steps were taken in that regard.

It is true that the court may set aside default judgment but this should be done without occasioning injustice to the opposing party. – see **Geeta Bharat Shah & four others vs. Omar Said Mwatayari & Another (2009) e KLR**. This court may not interfere with the discretion of the lower court unless it is satisfied that that court in exercise of its discretion, misdirected itself in some matter as a result of which it arrived at the wrong decision. – see **Price & Another vs. Hilda (1984) e KLR.**

My assessment of the record is that the default judgment may not be faulted because the summons to enter appearance was properly served upon a party authorised for and on behalf of the appellants, and that in the ruling dated 16th February, 2017 the court exercised its discretion in the correct manner. The said judgment and all orders that followed thereafter may not be set aside without resultant injustice on the respondent.

I find that the appeal lacks merit and is therefore dismissed in its entirety with costs to the respondent.

Dated, signed and delivered at Nairobi this 28th Day of March, 2019.

A. MBOGHOLI MSAGHA

JUDGE