REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 72 OF 2011

(Arising from the judgment of the Hon. S.N.K Andriessen (PM) delivered on 17th June 2011 in Meru CMCCC No. 178 of 2008)

(CORAM: F. GIKONYO J.)

FESTUS.M. MURITHI.....APPELLANT

-VS-

OBED MBAE (Suing as the Guardian of

PATRICIA KINYA MUTUIRI).....RESPONDENT

JUDGMENT

Setting aside of interlocutory judgment

1. The Memorandum of Appeal filed herein on 29.6.2011 raises the following grounds of Appeal;

> **a. That the learned Magistrate erred in both law and in fact by failing to find that the appellant had not been served with summons to enter appearance or the plaint.**
>
> **b. That the learned Magistrate erred in both law and in fact by failing to find that the appellant was condemned unheard.**
>
> **c. That the learned Magistrate erred in both law and in fact by failing to consider the appellants grounds for setting aside the judgement.**
>
> **d. That the learned Magistrate erred in both law and in fact by failing to consider that there was a miscarriage of justice on the part of the Applicant.**
>
> **e. That the Learned Magistrate made her ruling against the weight of the evidence.**

2. The foregoing grounds attack the ruling delivered by the trial court on 17.6.2011 in which it refused to set aside the interlocutory judgment entered against the Appellant. The major point of contention in the appeal is that the Appellant was not served with Summons to enter appearance as required in law and was therefore condemned unheard. The specific arguments are contained in the submissions below.

Submissions by parties

3. Following the directions by the court on 25/5/2017, parties filed their respective submission the gist of which is discussed below.

Appellant's submissions

4. The Appellant insisted that he was not served with the summons and Plaint in the trial Court. He also submitted that the attached draft defence to the Application dated 23.10.2008 raised triable issues and warrants this Court to set aside the trial Court's Judgment issued on 23.10.2008. He cited authority of **Yamko Yadpaz Industries Limited vs Kalka Flowers Limited [2013] eKLR.**

Respondent's submissions

5. The Respondent argued that the Appellant seeks to delay the Course of justice as it is clear from the record that the Learned Magistrate took into account the averments made by the Appellant. He relied on the following authorities; **Maina vs Muriuki [1984] KLR 407** as cited in **Netplan East Africa Limited v Investment Mortgages Bank Limited [2013] eKLR** & **Evans vs Barltam [193] AC 473**

ANALYSIS AND DETERMINATION

6. This is a first appeal. The court is therefore required to expend its judicial wit on the evidence on record and draw independent conclusions. Except, however, the court is reminded that it neither saw nor heard the witnesses give their testimonies, and so, such matters as nuances of demeanor of witnesses are best observed by the trial court. The exercise is however not one of finding fault in or looking for something or anything that may support the decision of the trial court. See **Selle v Associated Motor Boat Company Ltd [1968] EA 123, Williamson Diamonds Ltd v Brown [1970] EA 1.**

7. In essence, the appeal is asking the court to set aside the refusal by the trial court to set aside the interlocutory judgment in default of appearance entered against the Appellant. The yardstick was formulated in the case of **SHAH v MGOGO& ANOTHER (1976) EA**, And from a legion of judicial decisions on this subject agree that, whereas the court has unfettered discretion to set aside ex parte judgment, the discretion is to be exercise *to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice"*.

8. Non-Service of Summons to enter appearance is the prominent ground of this appeal. I will pay due proportion to this matter as service of summons and plaint is not a mere formality but a matter of fair trial, for service of summons and plaint brings the case to the attention of the defendant. It is therefore imperative that summons and plaint is served upon the Appellant as by law required. The question becomes; was the Appellant was served with summons to enter appearance and plaint? I will examine the facts of the case and apply the test of law.

Service of Summons

9. The Appellant argued that he was not served with Summons to Enter Appearance as required in law. See Order 5 of the Civil Procedure Rules on personal service which states that;

> **7. Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.**
>
> **8.(1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.**

10. The Learned Magistrate determined the question of service and more particularly stated the following;

> **" I had occasion to glance at the applicants signature on the reverse of the summons to enter appearance filed vide the return of service dated 6.08.2008 and that in respect of the notice to show cause in as much as I do mind myself I am not an expert. However even to a layman resemblance is very distinctive and I have no doubt the applicant did receive both the summons and notice to show cause…."**

11. I have also taken the liberty to look at the affidavits of service of Summons to enter appearance and the notice to show cause. There is a striking similarity in the signatures appended on both the notice to show cause and in the summons to enter appearance. I see a venial but pardonable error in the return of service for the summons to enter appearance when it stated that the process server served the 1st Defendant who received summons on behalf of the 2nd Defendant (the appellant herein), yet it is clear it is the 2nd Defendant who signed on the reverse of the original summons returned to court. This is buttressed by the fact that the return of service on summons to enter appearance as well as that for the notice to show cause show that both were served at the same location whose description fits the home of the Appellant. The 2nd Defendant neither denied this was his residence nor the signatures are his. He merely stated that he was not served with summons to enter appearance. I find that the Appellant was served with summons to enter appearance.

12. It is worth stating that, from the record, it appears that there was a mix-up in the description of the party served with summons to enter appearance. I have found that evidence before court show that it was the 2nd Defendant (Appellant) who was served with summons to enter appearance. Except, the Appellant now seems to be taking advantage of the mix-up in the description of the person served. Such confusion should be avoided; and it is desirable therefore that the process server should describe the individual served by name, and his position in case of a company rather than only by the legalese description of, say, 1st or 2nd defendant or plaintiff. In this manner, the mix-up of parties in the return of service is inadvertent and the anomaly is easily reconcilable on the basis of the evidence on record which shows that the 2nd Defendant received and signed on the reverse of the summons to enter appearance in this matter.

13. In passing, notably, the law on service is taking a leapfrog development and substituted service through electronic media including the WhatsApp messaging application will be permitted mode of service. See **Chama Cha Mashinani Elections Board & 2 others v Beatrice Chebomui [2017] eKLR** Again, knowledge of court orders and processes is gaining prominence in our judicial system as sufficient notice of judicial proceedings especially in the realm of contempt of court.

14. It is clear the direction the court is taking. Ultimately, I find that the trial Magistrate considered all facts before the trial court and the grounds stated in support of the application to set aside the ex parte interlocutory application and was correct in holding that summons to enter appearance and Plaint were served upon the Appellant herein.

Indolence and bona fide triable issues

15. Is there anything that may cause the court to set aside the judgment in the interest of justice? From the record, the Appellant is just but an indolent suitor and who is using the Application to set aside the interlocutory Judgement as a vehicle to delay the course of justice. His application was brought after a considerable time had lapsed and was tinctured with bad faith; it was also an after-thought. It bears repeating that the Appellant is merely trying to take advantage of the confusion in the return of service. And a court of law should never use its processes or discretion *to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice"*. He was aware of the proceedings but did not act for reasons known to him.

16. The upshot of the foregoing analysis is that the Appellants appeal lacks merit and is dismissed with costs to the Respondents.

Dated, signed and delivered at Meru on 29th April, 2019.

F. GIKONYO

JUDGE

In presence of

Kaume for appellant – absent

Mutuma for Mbaabu for respondent

F. GIKONYO

JUDGE