REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 492 OF 2018

ONE WAY CLEANING SERVICES LIMITED.....APPELLANT

-VERSUS-

SIRAK BUILDERS LIMITED.....RESPONDENT

(Being an appeal from the ruling delivered by Honourable

D.W. Mburu (Mr.) (Principal Magistrate) on 21st September, 2018 in CMCC NO. 9165 OF 2017)

JUDGMENT

1. The respondent being the plaintiff in CMCC NO. 9165 OF 2017 filed a suit against the appellant vide a plaint dated 5th September, 2017 seeking the sum of Kshs.3,617,596/= as well as costs and interest of the suit.

2. In a nutshell, the respondent pleaded that the appellant had engaged its services as a contractor sometime on or about the 3rd of June, 2013 for the purpose of carrying out renovations and extension of an existing apartment block at Ngara, Nairobi on Land Reference Number 209/5938.

3. The respondent also pleaded that it carried out the necessary works as per the contract up until 10th November, 2016 when the appellant terminated the contract for lack of funds, but that later, the said appellant awarded the unfinished works to a different contractor.

4. The respondent further claimed that prior to the aforesaid termination, there was an outstanding payment of Kshs.2,272,040/= owing from the appellant as well as Kshs.1,345,556/= accounting for loss of profits suffered by the respondent. As such, the respondent was claiming the total sum of Kshs.3,617,596/.

5. Subsequently, the respondent took out summons to enter appearance and served the same together with copies of the pleadings upon the appellant. The record discloses that the respondent then requested for entry of judgment against the appellant under Order 10, Rule 4 of the Civil Procedure Rules *(the Rules)* for failing to enter appearance and/or put in its defence.

6. Judgment was entered as prayed on 22nd March, 2018, prompting the appellant to file a Notice of Motion dated 9th July, 2018 through its advocates on record in an attempt to have the *ex parte* judgment set aside. The Motion was opposed by the respondent by way of a replying affidavit and the appellant in its rejoinder filed a further affidavit.

7. The application was then argued orally before the trial court and ultimately allowed vide the ruling delivered on 21st September, 2018 on the condition that the appellant deposits the entire decretal sum plus costs in a joint interest earning account in the joint names of both advocates for the parties within 30 days from the aforementioned date and that the appellant files and serves its statement of defence within 14 days, failing which execution would issue.

8. The above ruling now forms the subject matter of the appeal. The appellant filed a memorandum of appeal dated 17th October, 2018 and later amended on 15th November, 2018 consisting of the grounds hereunder:

> ***(i) THAT the learned trial magistrate misdirected himself in ordering the appellant to deposit the decretal sum as a condition for setting aside the ex parte judgment.***
>
> ***(ii) THAT the learned trial magistrate erred in fact and in law by failing to make an unconditional finding in favour of the appellant.***
>
> ***(iii) THAT the learned trial magistrate erred in law and in fact by not considering that the appellant was not indeed served.***

(iv) THAT the learned trial magistrate erred in law and in fact by failing to appreciate the evidence tendered with regard to the location of the appellant's offices.

(v) THAT the learned trial magistrate misdirected himself in totally disregarding the evidence provided on the issue of lack of service of summons and pleadings on the appellant.

(vi) THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the appellant had proved its case on a balance of probabilities which was uncontroverted by the respondent.

(vii) THAT the learned trial magistrate erred in law and in fact by failing to provide for an alternative for security for the due performance of the decree.

9. Parties were directed to file written submissions on the appeal. In its submissions, the appellant has fervently argued that in agreeing to set aside the ex parte judgment, the learned trial magistrate should not have based this on the appellant's financial standing and that such decision was misdirected and made in error, citing the case of ***Kenya Power & Lighting Co Ltd v Abdulhakim Abdulla Mohamed & another [2017] eKLR*** in support of its arguments.

10. The appellant also maintained that it had tendered sufficient evidence to show non-service of the summons and plaint on the basis that it had relocated offices, hence the office in which the process server claims to have effected service was not its office of operation; and that the learned trial magistrate erred in failing to appreciate the evidence tendered.

11. Further to the above, it is the appellant's submission that since the respondent failed or otherwise refused to avail the process server for cross-examination, it is clear that the appellant had proved its case on a balance of probabilities.

12. The respondent in its opposing submissions contended that the appellant has only filed its defence but failed to comply with the order requiring it to deposit the decretal sum as security, hence terming the appeal as an abuse of the court process. The long and short of it is that the respondent urges this court to dismiss the appeal with costs. Reference has been made to various authorities.

13. I have carefully considered the rival submissions together with the cited authorities. I have equally re-evaluated the evidence presented before the trial court hand in hand with the Motion and affidavits in support of and in opposition thereto. I have as well perused the impugned ruling.

14. However, before I proceed to address the grounds of appeal, it is my observation that the parties addressed this court on the issue of whether the trial court considered the appellant's defence in terms of whether the same raises triable issues. The parties will appreciate that this particular subject did not constitute either of the grounds of appeal and I therefore have no basis on which to consider it. In any event, I am of the opinion that the subject has been overtaken by events given that the appellant was granted the opportunity of putting in its statement of defence and which defence it has already filed.

15. I will now address grounds (ii), (iii), (iv), (v) and (vi) of the appeal all revolving around service of summons. The appellant on its part insisted that service was never effected for the reason that it had moved offices sometime in 2013 and it was thus impossible for the process server to have served the said summons at the venue indicated in the affidavit of service. This was reiterated in *Mr. Njaramba's* oral arguments.

16. In opposition, the respondent maintained that there is no proof that the appellant relocated in 2013 as alleged and that service was properly effected.

17. Upon perusing the impugned ruling, it is my observation that the learned trial magistrate considered and analyzed the issue of service and having done so, decided to set aside the ex parte judgment. In the premises, there is no need for me to re-open the subject.

18. Having settled the above, I turn to grounds (i) and (vii) of the appeal concerning the provision of security of the decree. I have looked at the Notice of Motion filed; therein, the appellant sought an interim order for a stay of execution pending the hearing and determination of the said Motion.

19. The proceedings show that during oral submissions, *Mr. Ng'ang'a* then counsel for the respondent insisted on the provision of security in the event of setting aside the *ex parte* judgment, whereas *Mr. Njaramba* advocate for the appellant responded by arguing that the request for provision of security is untenable since such order can only be made in respect to security for costs.

20. In the end, the learned trial magistrate while referring to Order 22, Rule 22 of the Rules, ordered the appellant to deposit security for the due performance of the decree.

21. Having noted the above, I settle for the following view. In instances where an *ex parte* judgment is set aside, the impact is that the suit is re-opened for hearing and prosecution. By virtue of this, there is no judgment to be executed as it were and thus, *Order 22* of the Civil Procedure Rules which caters for stay of execution of a decree cannot apply.

22. Might I add that courts are bestowed with the critical responsibility of ensuring the efficient and timely disposal of cases as espoused in the overriding objective. In so doing, they are obligated to exercise their discretion judiciously.

23. In exercising his discretion in setting aside the judgment and granting the appellant an opportunity to defend its case, the learned trial magistrate ought to have appreciated that the claim as it stands has yet to be proved and therefore there is no decree/judgment to be secured.

Moreover, I am not convinced the learned magistrate's reasoning that the appellant had sound financial standing offered a proper basis for ordering the deposit of the decretal amount as security. In so finding, I take guidance from ***Kenya Power & Lighting Co Ltd v Abdulhakim Abdulla Mohamed & another [2017] eKLR*** where the Court of Appeal had the following to say on the subject:

> ***"The court had and still has the power to fast track the hearing of the suit and to set the time within which to hear and dispose of it. There was not even a remote suggestion that the appellant would be unable to pay or would delay payment of the sum in question if after a full hearing it were found that the respondents are entitled to the money. The contested order, which demands that a party pay substantial sums of money in a claim which is yet to be proved and in respect of which the court has found that there is an arguable defence raising triable issues, does not appear to us in any way to advance or facilitate the just, proportionate, affordable and resolution of disputes as demanded by the overriding objective."***

24. Going by the above, I am persuaded that the learned trial magistrate misdirected himself in ordering the appellant to deposit the decretal amount as a condition for setting aside the *ex parte* judgment. As did the Court of Appeal in the abovementioned case, I deem it necessary to interfere with the trial magistrate's rendition on this limb.

25. The upshot is that the appeal succeeds. I will allow prayer (b) of the appeal and make an order that the *ex parte* judgment is hereby set aside unconditionally. Costs shall abide the outcome of the suit.

Dated, signed and delivered at NAIROBI this 27TH day of JUNE, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent