REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 13 OF 2011

KAPARI LIMITED.....APPLICANT

VERSUS

NESTER DISHON GATUKU.....1ST RESPONDENT

COMPUTECH LTD.....2ND RESPONDENT

R U L I N G

A. Introduction

1. This ruling is in regard to the application dated 5th September 2018 by the 2nd respondent seeking the following orders: -

a) That the ex-parte judgement as against the 2nd applicant in respect of PMCC 295 of 2009 dated 22nd July 2010 be set aside.

b) That all subsequent Orders and Judgements as against 2nd Defendant be set aside.

c) That the 2nd applicant be granted leave to file defence in respect of PMCC 295 of 2009

2. This being an appeal there are no defendants as indicated in this application. The applicant in this application was the 2nd defendant in CMCC 295 of 2009. The respondent s in this application were the plaintiff and the 1st defendant in the magistrate's court civil suit.

3. The parties disposed of this application by way of written submissions. The 2nd respondent did not file any pleadings in response to this application.

4. The background facts are that the appellant was dissatisfied with the judgement of Embu Senior Resident Magistrate in CMCC No. 295 of 2009 where he was awarded general damages of Kshs. 60,000/=. This court on appeal enhanced the general damages to Kshs. 600,000/=. The 2nd respondent asserts that it did not receive any summons to enter appearance in the trial court and only became aware of the suit when they were served with the notice of taxation and a party and party bill of costs in this appeal.

B. Applicant's Submission

5. It is the applicant's submission that the appellants never served it with summons to enter appearance in compliance with the provisions of Order 5 rule 3 and as such there was no proper service. The applicant submits that the first document they were served with by the appellant was the notice of taxation.

6. It is the applicant's further submission that its draft defence raises issues such as the occurrence of the accident as well as issues of liability, that put the respondent to strict proof and as such it would amount to a miscarriage of justice if it was not afforded a chance to be heard.

7. The applicant further submits that conditions given by the respondent in case the court grants the instant application are punitive and targeted at frustrating the applicant.

8. The applicant relies on the case of **Shah v Mbogo (1967) EA 116** that provided for the principles the courts must consider in exercise in their discretion to set aside ex-parte judgement. Further it relies on the case of **Barclays Bank of Kenya Limited v Sparkle Food Manufactures Limited Civil Appeal 618 of 2000** which stated that the main concern of courts while granting stay of execution is to do justice.

9. The applicant further submitted that its application was not incompetent as submitted by the respondent as Article 165(6) and (7) provided the High Court with supervisory jurisdiction over subordinate court and further that the provisions of section 18 (1) of the Civil Procedure Act provided that the High Court may at any stage transfer any suit, appeal or other proceedings pending before the subordinate court to itself or to another court.

C. Respondent's Submissions

10. It is the respondent's submission that the applicant's application be dismissed and the interim orders vacated as it was brought in contravention of Order 10 Rule 11 that provides for setting aside judgement in default. The respondent further submits that such applications should be brought in the court of first instance and consequently that this court has no original jurisdiction to set aside judgement entered by the magistrate's court. He relies on the cases of **Abraham Lenauia Lenkeu v Charles Katekeyo Nkaru [2016] eKLR** where the court emphasised the need of applications to set aside judgement to be handled by courts of the first instance.

11. The respondent further submitted that in any case the applicant has not satisfied requirements for setting aside default judgement in that it has not shown good cause as provided in the cause of **Ecobank Kenya Limited v Minolta Limited & 2 Others [2018] eKLR** especially given that the judgement entered against the applicant was a regular judgement as service was effected upon the applicant.

12. He further submitted that there was a general presumption that the summons to enter appearance was properly served and the burden to disprove the same was upon the applicant to rebut the same as it reserved the right to cross examines the process server on oath which it didn't do. He relied on the cases of **Amayi Okumu Kasiaka 7 2 Others v Moses Okware Opari & another [2013] eKLR** where the Court of Appeal upheld a decision where the trial judge held that where service is in dispute, a process server could have been impeached if he had been cross- examined but this was not carried out. The same sentiments were echoed in the case of **Kenya Orient Insurance Limited v Cargo Stars Limited & 2 Others [2017] eKLR.**

13. He further submitted that the 2nd respondent having established that judgement in default was entered regularly, the applicant had failed to satisfy the requirements of setting aside a regular ex-parte judgement as set out in the case of **William Ntomauta M'ethanga** sued as **M'mauta Nkari v Baikiamba Kirimania [2017] eKLR**. The aforementioned case stated that an applicant must prove that the application was brought without undue delay, there would be no prejudice on the respondent if the orders were granted and that its defence raised triable issues.

14. The respondent submitted that the application was brought too late in the day especially considering that its counsel was aware of the hearing date of 20th June 2000 and chose not to take any action and as such the delay of filing the application for setting aside after 8 years was inordinate, unreasonable and inexcusable. He relied on the case of **Joseph Ondiek Tumbo v Sony Sugar Co Ltd [2014] eKLR** where it was held that the applicant was guilty of inordinate delay and had failed to explain a 4½ years delay to the satisfaction of the court.

15. The respondent further submitted that if the application had been allowed, it would prejudice the respondent and in any case if the court were to exercise its discretion in favour of the applicant it was only fair that the applicant be ordered to deposit the decretal amount together with interest in an interest earning account.

16. The respondent further submitted that the defence attached to the applicant's application raised no triable issues as the applicant had failed to establish the same and that re-opening the matter would serve no useful purpose as it would lead to the same conclusion.

D. Analysis & Determination

17. It is important to consider that in this case, the trial court entered judgment in favour of the 1st respondent. He appealed against quantum of damages resulting in enhancement of damages of Kshs. 600,000/=.

18. I take not the fact that it was the magistrate's court that ought to have dealt with this application had it been brought on time and before the case was concluded in the court of first instance. This application has now been filed after the appeal has been finalized. This being rare position, I do not find it proper to send the applicant to the trial court for hearing of this application. If I were to do so, the lower court has no power to deal with the developments that followed after its judgment was delivered which include setting aside orders of a superior court.

19. The powers of this court under Article 165 of the Constitution are unlimited in both civil and criminal matters. It has jurisdiction to deal with issues that the magistrate ought to have dealt with but for some reason, the issues were not dealt with. The jurisdiction of this court was contested but I find that I have jurisdiction to deal with this application under the provisions of Article 165 of the Constitution.

20. The Court's power in considering an Application to set aside an interlocutory judgment is discretionary. It was held in the case of ***Patel vs E.A. Cargo Handling Services Ltd (1974) EA 75*** *that: -*

> ***"There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. 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 it by the rules."***

21. However, the discretion of the Court must always be exercised judicially with the sole intention of dispensing justice to all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to consider is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit and thus be completely shut out of the doors of justice. This application therefore calls for interrogation of the applicant's case as to whether it raises any triable issues among other factors.

22. In determining whether good cause has been shown for the exercise of the discretion of the court, it is often helpful to make a distinction

and determine whether the default judgment is a regular or irregular. It was held in the case of **Fidelity Commercial Bank Ltd Vs. Owen Amos Ndung'u & Another, HCCC No. 241 of 1998 (UR),** by **Njagi, J**. (as he then was) thus:

> ***"A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex parte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all of the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right."***

23. In the instant case, the applicant states that it never received summons to enter appearance in the original suit and only became aware of the suit when it was served with the notice of taxation. The respondent has already obtained interlocutory judgement against the applicant and was awarded enhanced general damages of Kshs. 600,000/= on appeal.

24. It is the applicant's case that contrary to allegations by the respondent, service of the summons to enter appearance was not effected upon it as alleged as the company's office was situated at Godown No. 46 at Plot L.R. No. 209/12042/46 Alpha Centre, Mombasa Road, Nairobi. A copy of the lease agreement for the premises was annexed to support the denial of the applicant's office location.

25. In response to the assertions by the applicant, the respondent submits that the applicants were duly served with the summons to enter appearance. The affidavit of service sworn by a process server by the name Daniel Sila Uswii, who depones that he served the applicant's manager one David Nyaga Nthigu at Kavutiri in Embu with the summons to enter appearance on the 23rd June 2010.

26. I do note that the lease agreement relied on by the applicants came into effect on the 8th July 2009. The respondent does not contest the legitimacy of the lease agreement but rather insists that he served the applicant's manager one David Nyaga Nthigu. It is the respondent's case that the burden to prove that service was effected is upon the applicant to establish that David Nyaga Nthigu was either not a manager in its company or was not served.

27. The respondent further submitted that the applicant did not cross examine the process server and thus failed to rebut the fact that service was effected. The respondent however said that it reserved the right to cross examines the process server on oath.

28. **Order 6 Rule 1 (1) of the Civil Procedure Rules** provides that when a suit has been filed, summons to enter appearance shall issue to the defendant giving time to prepare to appear in the case.

29. Under **Rule (3) (a)** where the suit is against a corporation, the summons may be served on the secretary, director or other principal officer of the corporation or if the process server is unable to find any of the officers of the corporation mentioned herein, (i) leave it at the registered office of the corporation. From the affidavit of service filed in court, there is no evidence that the process server ever intended or sought to effect service of the summons on the secretary, director or other principal officer of the corporation. There must be good reason why the law has that requirement to ensure that persons served on the corporation are those who understand the nature and importance of documents served on the corporation and who may determine what action to be taken upon receipt. The process server focused on a "gentleman" named David Nyaga Nthigu.

30. Further it is noteworthy that the lease agreement filed in support of the applicant's case was not challenged and it clearly designated the applicant's premise of business. The 2nd respondent did not adduce any evidence to the contrary. There is no explanation in the affidavit of service as to why the summons to enter appearance were not stamped or acknowledged in any way by the alleged recipient thus raising doubts as to service on the applicant. Or did the manager refuse to sign? This is not indicated in the affidavit either.

31. Under **Order 5, Rule 13**,

> ***"where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgment of service on the original summons;***
>
> ***Provided that, if the court is satisfied that the defendant or such agent or other persons has refused to so endorse, the court may declare the summons to have been duly served."***

32. In the absence of such evidence, this court is unable to find that there was, indeed any service of summons that was effected on the applicant to enable them enter an appearance within a specified period of time as required by Order 6 Rule 1 of the Civil Procedure Rules.

33. Although the 1st respondent alleges that the applicant was aware of one of the hearing dates, no evidence was annexed to the replying affidavit to support this allegation. Again, the possibility of doubtful service of the hearing notice may arise if the issue was to be followed up.

34. The record shows that interlocutory judgment was entered against the applicant on 22nd July 2010 for non-appearance and or for failure to file defence, according to the process server's affidavit of service.

35. The applicant herein was enjoined as a co-defendant for reasons that the 1st defendant Computec Limited sold the vehicle to one Farouk who later sold it to the applicant. The 1st respondent said that it was the applicant who was in physical possession and ownership of the vehicle at the time of the accident. It was a consent order signed by the counsels for the appellant and the 1st respondent dated 12/04/2010 that enjoined the applicant in the suit.

36. I have looked at the affidavit of service dated 29/06/2010 that purports to show that service was effected on the applicant. I note that it does not indicate the date the process server received the summons to enter appearance and the amended plaint for service. He then said he embarked on investigations to trace the applicant but falls short of indicating how and where he traced the registered office. He then states in paragraph 4 that he went to Kavutiri at the place of business of the applicant on 23/06/2010 where he effected service on the applicant's manager David Nyaga Nthigu.

37. The affidavit if service curiously leaves out very vital details on how service was effected.

38. The applicant as would be expected did not apply to call the process server for cross-examination. This would have assisted the court to get some truths or facts on the questionable service.

39. It was not contested that the applicant only came to learn of this case when he was served with the taxation of the bill of costs in this appeal. It said that it immediately filed this application despite the fact that judgment was entered several years ago.

40. **Order 10 Rule 11 of the Civil Procedure Rules** gives this court unfettered discretion to set aside interlocutory judgment, on conditions. This discretion must be exercised judiciously depending on the facts of each case.

41. I reach a conclusion that the respondent has not established service of the amended plaint and the summons to enter appearance on the applicant.

42. I am of the considered view tht in the absence of service on the applicant, the interlocutory judgment was irregular.

43. I have perused the draft defence. The applicant totally denies the claim and states that he is a total stranger to the particulars of negligence pleaded in the plaint. I am of the considered view that the applicant has raised triable issues and ought to be given a chance to defend the suit.

44. For the foregoing reasons, I hereby allow the application on the following terms: -

a) That the ex-parte judgement against the applicant in respect of PMCC No. 295 of 2009 dated 22nd July 2010 be and is hereby set aside.

b) That the applicant deposits Kshs. 300,000/= in PMCC No. 295 of 2009 as security within thirty (30) days in the joint names of the advocates on record or the applicant and the 1st respondent.

c) That all subsequent Orders and Judgement in this appeal are hereby set aside.

d) That the applicant is hereby granted leave to file defence in respect of PMCC No. 295 of 2009 within thirty (30) days.

e) Each party to meet their own costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JUNE, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Nyaga for Makumi for Appellant/Respondent