



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 164 OF 2011**

**MARY MUCUGU KINYUA.....APPELLANT**

**VERSUS**

**JOSEPH IRUNGU MWANGI & THOMAS THUKU NGANGA**

**t/a IRUNGU MWANGI NGANGA T.T. & CO ADVOCATES.....RESPONDENT**

*(An appeal from the ruling delivered on 18<sup>th</sup> March, 2011 in CMCC NO. 7174 OF 2008 by Honourable R.A. Oganyo (Principal Magistrate))*

**J U D G M E N T**

1. The respondents who were the plaintiffs in the abovementioned suit filed a plaint dated 11<sup>th</sup> April, 2008 praying for special damages of Kshs.43,160/= together with costs and interest on the suit against the appellant for unpaid instruction fees resulting from a taxed advocate-client bill of costs.
2. The Respondents aver that they served copies of the summons to enter appearance and the filed plaint upon the appellant. The record shows that the appellant neither entered appearance nor filed a statement of defence, prompting the respondent to request for entry of judgment in default and which judgment was entered on 6<sup>th</sup> August, 2009.
3. The Appellant filed a Chamber Summons seeking inter alia to have the *ex parte* default judgment set aside and further seeking leave of the court to defend the suit.
4. The application was opposed by the respondents, who filed Grounds of Opposition. Upon hearing the same, the trial court vide its ruling delivered on 18<sup>th</sup> March, 2011 dismissed the said application for the reasons that the interlocutory judgment was properly entered; no draft defence had been annexed thereto for purposes of ascertaining whether the Appellant has a defence that raises triable issues; and there had been proper service of the summons/plaint.
5. The appellant has now lodged an appeal against the aforesaid ruling. The memorandum of appeal dated 31<sup>st</sup> March, 2011 is anchored on the eight (8) grounds set out hereunder:

***(i) THAT the learned trial magistrate erred in holding that there was proper service of the summons to enter appearance upon the appellant on 3<sup>rd</sup> December, 2008 while evidence shows that the appellant was attending a course at Reef Hotel in Mombasa on the material day.***

***(ii) THAT the learned trial magistrate failed to properly evaluate the certificate of attendance verifying the appellant's presence in Mombasa between 24<sup>th</sup> November, 2008 and 19<sup>th</sup> December, 2008.***

***(iii) THAT the learned trial magistrate erred in holding that there was service of the notice of entry of judgment upon the appellant on 20<sup>th</sup> March, 2010 while evidence shows that she was not at her place of work on that day.***

***(iv) THAT the learned trial magistrate erred in taking into account extraneous matters and/or matters not raised by the parties.***

***(v) THAT the learned trial magistrate erred in concluding that similarity of signatures in the appellant's affidavit and the summons to enter appearance is proof that summons to enter appearance were served upon the said appellant.***

***(vi) THAT the learned trial magistrate erred in failing to consider and appreciate that the process server, like the respondents, had admitted to knowing the appellant from previous interactions.***

**(vii) THAT the learned trial magistrate erred in holding that it was for the appellant to prove lack of service instead of putting the burden of proof on the respondents and/or their agent, the process server.**

**(viii) THAT the learned trial magistrate erred in holding that the appellant cannot be granted unconditional leave to defend the suit *ex debito justitiae* for lack of a draft defence.**

6. At the hearing of the appeal, the parties were directed by this court to file written submissions. I have considered the rival submissions alongside the cited authorities. I have also reconsidered the Chamber Summons and Grounds of Opposition placed before the trial court.

7. Having identified that grounds (i), (ii), (iv), (v), (vi) and (vii) all revolve around service of the summons to enter appearance, I will address them contemporaneously. To begin with, the appellant largely contends that she could not have been served with the summons since she was not at the venue where the process server claims to have effected service. The appellant went ahead to submit that on the alleged date of service, she was out of office attending a conference in Mombasa between 24<sup>th</sup> November, 2008 and 19<sup>th</sup> December, 2008 and that a certificate evidencing her whereabouts was attached.

8. The appellant further contends that notwithstanding the fact that the issue of the signature appearing on the reverse of the served summons was not raised by the parties, the same was analyzed by the trial court without the involvement of an expert and in so doing, the trial court acted wrongly. The appellant adds that the learned trial magistrate was wrong in faulting her for not calling the process server for cross-examination on his affidavit of service and ultimately, the judgment entered was irregular and a nullity. The cases of ***Remco Ltd v Mistry Javda Parbat & Co. Ltd & 2 others (HCCC No. 171 of 2001)*** and ***Abraham K. Kiptanui v Delphis Bank Ltd & Another (HCCC No. 1864 of 1999)*** were relied upon.

9. On their part, the respondents maintain that the appellant was properly served with the summons and an affidavit of service drawn and filed, notwithstanding that the said affidavit was sworn close to seven (7) months later. As concerns the subject of the signatures, the respondents maintain that the same are similar and any inconsistencies arising therefrom are the fault of the appellant, adding that the appellant never applied to have the process server cross-examined on his affidavit, thereby making the appeal a mere afterthought.

10. Having laid out the above, I now turn to the record of appeal. To start off, the affidavit of service sworn by Benjamin N. Mutua on page 8 indicates that service of copies of the summons and plaint was effected upon the appellant on 3<sup>rd</sup> December, 2008 at her place of work at the Ministry of Youth Affairs, Kencom House, 3<sup>rd</sup> floor, room 338.

11. The appellant's application dated 7<sup>th</sup> December, 2010 and found on pages 12-17 seeking to have the consequent *ex parte* judgment set aside is premised on grounds similar to those constituting the appellant's submissions. In addition, the appellant annexed as MMK-2 a copy of a Certificate issued by the Eastern and Southern African Management Institute-Arusha, Tanzania reading that she had attended a Management Development Programme at Mombasa between 24<sup>th</sup> November, 2008 and 19<sup>th</sup> December, 2008.

12. In her ruling, the learned trial Magistrate reasoned that the makers of the Certificate annexed by the Appellant ought to have deponed an affidavit that they issued to the Defendant since documents of such nature can easily be cooked and that in any event, the process server ought to have been called for cross-examination in the event that the contents of his affidavit were in doubt but no such request was made by the appellant. The learned Magistrate also held that whereas she cannot claim to be a signatures expert, she was persuaded the signature appearing at the back of the summons purported to have been served upon the appellant was similar to that appearing on the appellant's affidavit in support of her application.

13. In the end, the magistrate found that there was proper service of the summons, thus providing proper and regular basis for entry of the judgment.

14. From the foregoing, it is now upon this court to determine whether the learned trial magistrate's reasoning and finding were correct in respect to the service of summons and subsequently, the entry of judgment. The respondents have taken the position that service was properly effected while the appellant is of a contrary view.

15. On the subject of service of summons, *Order 5 of the Civil Procedure Rules (the Rules)* generally makes provision for the issuance and service of summons. More specifically, *Order 5, Rule 8(1)* of the Rules expresses that service should be personal as much as is practically possible. Upon service, it is a requirement that an affidavit of service be drawn and filed as proof of service. With regards to the contents thereof, I make reference to the case of ***Govindmehji & 2 others v M. Aggarwal & another [2017] eKLR*** where the court reasoned that a return of service should comprise of:

***“i. Evidence of service on the person to whom the summons are directed by endorsement on the summons.***

***ii. The manner service was effected and the place of service. The name of the person identifying the person served where he is not personally known to the process server...”***

16. It is evident from the record that an affidavit of service sworn by Benjamin N. Mutua was filed pursuant to *Order 5, Rule 15 of the Rules*. I am able to confirm from its contents that the details and manner of service have been set out. To add on, it is indicated that upon service, an endorsement was made on the back of the summons; this is verified by the date and signature appearing on the last page of the summons issued on 18<sup>th</sup> November, 2008.

17. Suffice it to say that the appellant has challenged both the service of summons and veracity of the apparent signature, and has availed a Certificate pointing to her whereabouts on the date of the purported service. I have looked at the aforesaid Certificate and noted one key element: the same is not a certified copy of the original but a mere copy, thereby making it difficult to ascertain its authenticity. In the

circumstances, I would agree with the learned trial Magistrate that there is no certainty as to whether the Certificate was authentic. As it stands therefore, nothing really substantial was availed before the trial court to ascertain the appellant's account of her whereabouts at the material time.

18. Moreover, I have noted from the proceedings that the appellant at no point requested to have the process server called for cross-examination on his affidavit.

19. On the question of the signature, no handwriting or signatures expert was called to either verify or dispute the sameness of the signatures, a fact which was acknowledged by the learned trial magistrate. Consequently, this issue could not have been deliberated on or determined by the learned trial magistrate. In this sense, I am inclined to agree with the appellant that the said magistrate's approach and conclusion on this issue were wrong.

20. Needless to say that I am satisfied there was proper service and proof of service for that matter which was not challenged by way of concrete evidence. Consequently, the *ex parte* judgment was properly and regularly entered. As such, I see no reason to interfere with the learned trial magistrate's finding in this respect and the abovementioned grounds fail.

21. Ground (iii) of the appeal concerns the service of the notice of entry of judgment. In her submissions, the appellant argues that service was effected on 20<sup>th</sup> March, 2010 being a Saturday and hence, a non-working day. As a result, the appellant has urged this court to take judicial notice of this fact.

22. In their rival submissions, the Respondents contend that service of the notice was effected upon the appellant at her place of work, asserting that the mere fact that the aforementioned date happens to be a Saturday does not automatically mean the Appellant was not at work. The Respondents added that this particular affidavit of service has similarly not been challenged.

23. That being the case, I have re-evaluated the challenged affidavit of service equally sworn by Benjamin N. Mutua and found on *page 11* of the record of appeal. Therein it is indicated that the deponent served the appellant with a copy of the notice of entry of judgment on 20<sup>th</sup> March, 2010 which she accepted but that she declined to sign his copy.

24. I have also had the opportunity of reviewing the application and specifically, a copy of the diary extract annexed as *MMK-3* thereto. To sum it up, the appellant deponed therein that she was never served with the notice.

25. Turning to the impugned ruling, the learned trial magistrate opined that whereas the annexed copy of the diary page revealed that 20<sup>th</sup> March, 2010 was a Saturday, the veracity of the affidavit of service was not challenged, and further, there is no law that prohibits service of summons on Saturdays and the fact that Saturday is not an official working day for Public Servants, it does not mean that one cannot go to the office if there is need to do so.

26. The remaining ground (viii) of appeal touches on failure by the Appellant to file a draft defence. The Appellant argues that the learned trial magistrate erred in faulting her for failing to file a draft defence, while the respondent supported the trial court's decision on that aspect.

27. Looking at the impugned decision, the learned trial magistrate reasoned that since the appellant had not annexed a draft defence to her application, it was impossible to tell whether she indeed had a good defence.

28. In view of the foregoing, I deem it necessary to mention that in determining whether or not to set aside an *ex parte* judgment, a court is required to similarly consider whether a party has a defence with triable issues even where service of summons is found to be proper. In so saying, I cite with approval the rendition in *Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) IEA 324* as relied upon in *M/S Jondu Enterprises Limited v Spectre International [2019] eKLR* thus:

***“Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”***

29. I have perused the entire record of appeal before me and failed to come across a draft defence. It therefore follows that as it stands, there is no way of determining whether the appellant has a defence that raises triable issues. Resultantly, the learned trial magistrate was right in finding that it had no material to assess whether or not the appellant has a good defence.

30. The upshot is that the appeal is dismissed for lacking merit. The respondents shall have the costs thereof.

**Dated, signed and delivered at NAIROBI this 20<sup>TH</sup> day of JUNE, 2019.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondents