



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 611 OF 2017**

**(Being an appeal against the ruling made on 17<sup>th</sup> October, 2017 by Hon. E. Nyaloti (CM) in CMCC No. 2481 of 2014)**

**(CORAM: F. GIKONYO J.)**

**DICKWAYS CONSTRUCTION CO. LTD...APPELLANT**

**VERSUS**

**JOHN MACHIMBO KANGALA..... RESPONDENT**

**JUDGMENT**

1. The appellant was the defendant in the primary suit in which it was sued by the respondent for general and special damages for injuries he sustained while working for the appellant. On 11<sup>th</sup> December 2015 judgment was entered in favour of the plaintiff in the sum of Kshs. 968, 203/- as damages plus cost of the suit and interest. Thereafter, the Appellant filed an application dated 27<sup>th</sup> July 2016 seeking among other orders the setting aside, review and or vacation of the interlocutory judgment and leave to file a defence and defend the suit. On 17<sup>th</sup> October 2017 the trial court dismissed the said application due to lack of merit. The appellant was aggrieved by the said ruling and filed this appeal citing ten grounds of appeal. The said grounds may be collapsed into the following three:

- 1. That the learned Magistrate's appreciation of the law to setting aside *ex parte* judgment was flawed;**
- 2. The learned Magistrate misdirected herself on analysis of evidence and the issues before her; and**
- 3. The Learned Magistrate misdirected herself on the law relating to review under Order 45 of the Civil Procedure Rules, hence, she failed to review *ex parte* judgment.**

**Submissions**

2. The appeal was canvassed by way of written submissions. The appellant submitted that the Learned Magistrate misdirected herself on the law relating to setting aside *ex parte* judgment. The appellant stated that it placed before the trial court uncontroverted evidence to the effect that; (1) it was never served with summons to enter appearance; (2) the respondent had filed multiple suits; (3) the court relied on inadmissible evidence; and (4) they had a plausible defence but the trial court did not attempt to establish whether the appellant's statement of defence raised triable issues or not. It was argued further that the Learned Magistrate misdirected herself on the law relating to review under **Order 45 of the Civil Procedure Rules**.

3. The respondent submitted that the reason given by the appellant in seeking setting aside of the judgment was that it had not been served with summons. It pleaded not any a mistake or inadvertence on its part which it requested the court to excuse.

**ANALYSIS AND DETERMINATION**

**Duty of court**

4. This being a first appeal, the court shall re-evaluate, re-assess and re-analyze the evidence on record come own determination of the matter in controversy.

**Issues**

5. A single issue emerges for determination, to wit:

a) Whether the court should set aside and or review the ex-parte interlocutory judgment entered herein against the Appellant.

#### Setting aside ex parte judgment

6. Under **Order 10 Rule 11 of the Civil Procedure Rules:**

**“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”**

7. The court therefore has unfettered discretion to set aside default judgment. Except, however, it will exercise discretion in order to do justice between the parties. See some of the factors that the court should consider in applications such as this which were tabulated by the Court of Appeal in the case of Linumark Investments Limited v Diamond Shield International [2014] eKLR as follows:

**“We think the principles applicable to setting aside a default judgment are settled. The court’s discretion to set aside such judgment is unfettered. The discretion is to be exercised in order to do justice as between the parties. (See Patel - V - E.A. Cargo Handling Services Ltd [1974] EA 75). In weighing the interests of justice the court considers such matters as the reasons, if any, for the default of the applicant; the conduct of the parties with particular reference to the effect it has on the course of justice in the particular case; the *prima facie* merits of the defence if disclosed from the papers filed by the applicant. [See Evans - V - Bartlam [1937] AC 473]; whether the respondent can be compensated by costs for any delay which may be occasioned by the setting aside of the default judgment and it should always be borne in mind that to deny a person a hearing should be last resort of a court of law.**

....

**We will not lightly interfere with the exercise of discretion by the learned Judge unless we are satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision, or unless it is manifest on the case as a whole that the Judge was clearly wrong in the exercise of his discretion and as a result a miscarriage of justice occurred. (See Mbogo - V - Shah [1968] EA 93).**

8. The appellant seeks setting aside of the default judgment on various grounds. The first ground is that they were not aware of the suit for there was no proper service or any service of summons at all on them. The respondent stated that the appellant was served as evidenced in the affidavit of service sworn by Patrick Juma Yuka. The process server averred that summons were received and stamped by the appellant. Where service of process has been adverted to, a party who cites non-service or improper service as a basis for setting aside a default judgment bears the onus of faulting the service. The Appellant should thus, fault the service. I am guided by the case of Tree Shade Motors Limited v D.T. Dobie And Company (K) Limited & Another [1998] eKLR where the Court of Appeal made reference to Kingsway Tyres and Automart Ltd v Rafiki Enterprises Ltd (Civil Appeal No. 220 of 1995) (Unreported) where it was held as follows:

**“To our minds, the onus was on the respondent to fault the service. Having failed to do so, and in the absence of evidence on record to lead us to hold that the service was improper, it is our view and so hold that ex parte judgment was a regular judgment. It would only, if at all, be properly, vacated on grounds other than non-service of summons.”**

9. Has the appellant proved that there was improper service, or non-service of summons? I expect the appellant to prove two things; (1) that the averments made by the process server were not true; and (2) that the person said to have been served does not work for them. I do not find any evidence to so prove. Accordingly, the appellant failed to discharge its burden. Thus, I hold that there was proper service.

10. Be that as it may, are there other grounds other than service on which the ex parte judgment may be set aside? The appellant brought to the attention of the court the existence of multiple suits by the Respondent on similar issues. It cited case number CMCC No. 1481 of 2012 and CMCC No. 2481 of 2014 which were initiated on 28<sup>th</sup> March 2012 and 7<sup>th</sup> May 2014 respectively. Perusal of the complaints in each of the suits reveals that the cases were based on the same issues and the prayers sought are the same. Judgment was entered in CMCC No. 1481 of 2012 where the respondent was awarded Kshs. 504,050/- . Thereafter, judgment was entered in the suit form which this appeal originates and an award of Kshs. 968, 203/- was made in favour of the respondent on 11<sup>th</sup> December 2015.

11. The foregoing turn of events throws the court to the law stipulated under **Section 6 and 7 of the Civil Procedure Act** as follows:

**“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

**7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

12. Had the trial court been made aware of the existence of CMCC No. 1481 of 2012 which was similar to the suit from which this appeal emanates, would have appreciated such is a matter of multiplicity of suits and application of the principle of res judicata would have to bear as an important judiciable to be resolved in the proceeding. This would affect CMCC No. 2481 of 2014. In this case there is high possibility

of abuse of court process for two reasons. One; the Respondent filed another suit with full knowledge of an existing similar suit. And, two; the Respondent did not bring to the attention of the trial court of the existence of another similar earlier suit. When judgment was rendered in his favour in CMCC No. 1481 he allowed CMCC No. 2481 of 2014 to proceed on. After realizing that judgment in the latter case awarded him higher damages the respondent sought to withdraw and discontinue his earlier suit. See the notice of withdrawal and discontinuation of suit dated 15<sup>th</sup> September 2016.

13. The law has been careful to provide apt procedures on withdrawal and discontinuance of suits. See explicit explanation of these procedures and reasons thereof by the Court of Appeal in the case of **Beijing Industrial Designing & Research Institute vs. Lagoon Development Ltd (2015) eKLR** where it held as follows:

**“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filling a written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the Plaintiff must obtain leave of Court to discontinue the suit or withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the Plaintiff’s right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the Court. That such leave is granted on terms suggests that it is not a mere formality”.**

14. For good reason, I leave the withdrawal and discontinuance of suit CMCC No. 1481 of 2012 at that. Nonetheless, in continuing with CMCC No. 2481 of 2014 the foregoing considerations would come to bear. All the above have not been denied by the respondent. Consequently, these matters are relevant in adjudication of cases. These matters warrant the setting aside of a default judgment obtained in such circumstances so as to give room for proper evaluation of these incidents and avoid an injustice to any of the parties. . The judgment was delivered in a later suit on 11<sup>th</sup> December 2015 Needless, to state that affording a bona fide triable issue an opportunity to go for adjudication on merit is an element of natural justice- now a principle of justice. It should not have proceeded to trial as the issues herein were directly and substantially in issue and had been determined completely in CMC No. 1481 of 2012.

15. On the issue of review, **Order 45 of the Civil Procedure Rules** states when a review may be ordered to wit, when there is discovery of new and important matter or evidence, some mistake or error apparent on the face of the record or for any other sufficient reason. Existence of similar suit and which had been determined is sufficient reason to review a judgment which is obtained through concealment of material facts or fraudulent intent. The trial court adjudicated upon a matter that had already been determined. The judgment thereto is irregular as per **Section 7 of the Civil Procedure Act**.

16. Accordingly, I find the appeal meritorious and make the following orders:

- 1. The ruling and orders made on 17<sup>th</sup> October 2017 in CMCC No. 2481 of 2014 dismissing the appellant’s notice of motion dated 27<sup>th</sup> July 2016 is set aside**
- 2. The judgment delivered in CMCC No. 2481 of 2014 on 11<sup>th</sup> December 2015 is set aside.**
- 3. Costs awarded to the appellant**

**Dated and signed at Nairobi this 12<sup>th</sup> day of October 2019**

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**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court at Nairobi this 31<sup>st</sup> day of October, 2019**

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**L. NJUGUNA**

**JUDGE**