



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 189 OF 2011

NANCY MUSILI.....APPELLANT

VERSUS

JOYCE MBETE KATISIRESPONDENT

(Being an appeal from the ruling of the Chief Magistrate's Court of Kenya at Machakos delivered on the 8/11/2011 by the Honourable Thuranira Jaden in Machakos Chief Magistrate's Civil Suit No. 518 of 2007)

JOYCE MBETE KATISI.....PLAINTIFF

=VERSUS=

NANCY MUSILI.....DEFENDANT

JUDGEMENT

1. By a plaint dated 13th June, 2007, the Respondent herein claimed from the Appellant Kshs 900,000/= together with costs and interests.
2. The cause of action according to the plaintiff arose from the fact that by an agreement dated 23rd March, 2007, the Respondent lent to the Appellant Kshs 1,050,000.00 which was due for repayment on 30th March, 2007nd June, 2009. In part payment of the said sum, the Appellant paid to the Respondent a sum of Kshs 150,000/= leaving a balance of Kshs 900,000.00.
3. On 18th July, 2007 a default judgement was entered in favour of the Respondent against the Appellant in the sum of Kshs 900,000.00 together with costs. According to the affidavit of service, the Appellant was served with summons to enter appearance on 21st June, 2007 at Precious Blood Secondary School where the appellant was working as a teacher upon being pointed out by the Respondent. While the Appellant accepted the same, she declined to acknowledge service by signing for the same.
4. By an application dated 7th September, 2007, the Appellant sought an order that the judgement dated 18th July, 2007 and all consequential orders be set aside and that she be granted unconditional leave to enter appearance and file a defence out of time and that her annexed draft defence be deemed as duly filed and served upon payment of the requisite fees. In the same application was a prayer that the process server be summoned for cross-examination on the alleged service on the Appellant. The said application was based on the fact that the Appellant was never served as alleged by the process server. According to the Appellant she had never met the said process server and only became aware of the suit on 29th August, 2007 when she was informed by one **Kibe Kimana** that her property had been proclaimed and confirming through her advocates that a default judgement had been entered against her on 18th July, 2007. The Appellant also disputed the same process server's allegation that he served her with Notice of Entry of Judgement on 18th July, 2007. It was the Appellant's position that he had a defence which discloses triable issues hence she ought not to have been condemned unheard.
5. From the ruling delivered on 8th November, 2011 the subject of this appeal, that application seems to have been dismissed on 1st December, 2009 for non-attendance.
6. By an application dated 27th October, 2010, the Appellant applied for similar orders to the application dated 7th September, 2007. The

grounds for non-appearance were the same as in the dismissed application though the Appellant added that what was entered was an interlocutory judgement as no formal proof had been undertaken hence the judgement was not a final judgement.

7. In her ruling dated 8th November, 2011, the learned trial magistrate found that since the affidavit of service was not defective, if the process server's information was false and misleading, the Appellant was at liberty to have him summoned and cross-examined on the contents of the affidavit. It was further noted that a similar application was filed and was dismissed for non-attendance and no step was made to have the same reinstated till almost one year later when the appellant filed the subsequent application. It was therefore the court's view that the filing of two similar applications is an abuse of the court process and further that the conduct of the appellant showed a person not keen in pursuing the matter. She proceeded to dismiss the application on those grounds.

8. In this appeal, the appellant has raised the following grounds:

- 1. The Subordinate Court erred in law and fact by finding that the Appellant had been served with summons to enter appearance when evidence on court record states otherwise.**
- 2. The subordinate court erred in law by failing to find that the respondent had requested for an interlocutory judgment only, and that having not set the matter down for formal proof, the execution process commenced by the respondent was illegal and premature.**
- 3. The subordinate court erred in law by ignoring to consider the binding authorities by the High Court which authorities contained legal points which, had they been considered would have changed the decision of the subordinate court.**
- 4. The subordinate court erred in law by failing to find that the affidavit of service sworn by the process server on the alleged service of summons to enter appearance was fatally defective and incapable of being relied upon to enter any judgment in favour of the respondent.**
- 5. The subordinate court erred in law and fact by failing to set aside the interlocutory judgment when circumstances for setting aside were demonstrated.**

9. It was submitted on behalf of the appellant that the learned trial magistrate erred in finding that the affidavit of service was valid. According to the appellant, the affidavit of service sworn by one **Maurice Makanda** states in paragraph 1& 2 that on 21st June 2007 he went to Precious Blood Kilungu School and served the appellant with summons but does not state the time the service was effected and the manner of service contrary to the mandatory provisions of Order 5 Rule 15 of the **Civil Procedure Rules**. Further, it was submitted that the affidavit does not state in which part of the school the appellant was when she was served. Indeed, the school is a big and expansive place. It is equally not realistic that one will simply walk into a school, worse off a girls school, a place whose entry and exit is regulated and restricted and serve summons upon a teacher thereat. How did the process server gain entry into the school? Did he find any security guard at the gate, did he go to the Head teacher's office to ask for the appellant, or he walked into the school through the fence? To the appellant, the affidavit does not even attempt to describe the person who was being served whether she is tall, short, dark, light et al. Did the Process Server even introduce himself and explain the purpose of his visit to the person being served?

10. It was submitted that though the affidavit of service contains the description of the journey to the school, the process server does not state that he went for the service in the company of anybody, BUT as an afterthought, without explaining wherefrom the plaintiff had emerged, he states that the appellant was pointed out to him by the Plaintiff.

11. It was submitted that from all the above it is crystal clear that the affidavit of service was a make up for the case. There was no service and as always when lying, cracks can be seen. It was therefore completely unsafe for the trial court to proceed on the basis of such doubtful service. With all the above anomalies the Trial Magistrate was wrong to find that there was proper service of Summons. At worst the court should have given the appellant the benefit of doubt and exercise its discretion at that early time in allowing the appellant to defend the case then at the price of thrown away costs.

12. It was submitted, based on **Kenga Mwaduna Mwambire & Another v National Bank of Kenya Ltd [2006] eKLR** that the Trial Magistrate's refusal to set-aside the interlocutory judgment entered on the basis of such a false affidavit of service was a manifestly wrong exercise of discretion which this court can interfere with.

13. Furthermore, the Appellants draft defence had raised very fundamental trial questions which entitled the appellant to a chance to be heard before being condemned to pay such a large amount of money of Kshs. 1, 202, 205/= then and even now. For example, at paragraph 3 of the draft defence the Appellant denies having entered into any lending agreement with the plaintiff and challenged the plaintiff to strictly prove that claim.

14. On the other part the Plaintiff in her paragraph 3 of the Plaint claims a sum of Kshs. 900, 000/= being money she had lent to the appellant vide an agreement dated 23rd March 2007. In support of the submissions the appellant relied on **Multiscope Consulting Engineers vs. University of Nairobi & Another [2014] eKLR**.

15. According to the Appellant, under Order 10 Rule 6 interlocutory judgment is applied for where a party fails to file defence and/or enter appearance as a basis of confirming liability against the sued party pending hearing and determination. According to the appellant, based on **Black's Law Dictionary**, interlocutory means interim temporary and not the final, while interlocutory judgment is an intermediate judgment that determines a preliminary point but does not finally decide the case. It was therefore submitted that in the circumstances a party who applies for interlocutory judgment by its very nature purposes that the judgment being sought is interim pending hearing on evidence to prove the claim for the court to enter the final judgment and therefore an application for Interlocutory Judgment cannot go to a Decree level. If Plaintiffs thought they had a proved liquidated claim, they could have simply applied for final Judgment as anticipated in Order 10 rule 4

of the said Rules.

16. It was therefore submitted that it was not proper for the court to enter a full judgment and even draw out a decree for execution on the basis of an application for interlocutory judgment. In any event the nature of the Claim by the Plaintiff based on a written agreement not produced in Court could not allow the Court to enter full Judgment before hearing.

17. In the Appellant's view, since the nature of the Respondent's claim as pleaded invited an inquiry, this a case where direct judgment could not be entered and a decree issue without a formal proof hearing as contemplated under Order 10 Rule 6 of the Rules and the trial magistrate was therefore wrong in fact and law to dismiss the defendant's argument that this was not a case which called for formal proof hearing. In support of her submissions the Appellant relied on **Andrew Washington Njenga vs. Co-Operative Merchant Bank Ltd [2004] eKLR**, **Mint Holdings Limited & Another vs. Trust Bank Limited [2000] eKLR** and **Kenga Mwaduna Mwambire & Another vs. National Bank of Kenya Ltd [2006] eKLR** and urged the court to allow the appeal, set aside all orders in CMCC 518/07 against the appellant and allow her to file her defence and allow the said case to be heard on merit. The appellant also prayed for the costs of this appeal to be awarded against the respondent.

18. In opposing the appeal, the Respondent submitted that the appellant was properly served with summons to enter appearance according to Order 5 of the ***Civil Procedure Rules***. The appellant, it was submitted, has never sought to cross-examine the process server if it is indeed true she was not served with summons to enter appearance as she alleges. In this regard the Respondent relied on **Kenya Orient Insurance Limited vs. Cargo Stars Limited & 2 others (2017) eKLR** in which the court adopted with approval the ruling of the Court of Appeal in **Shadrack arap Baiywo vs. Bodi Bach [1987] eKLR**.

19. It was submitted that it is settled law that anybody who disputes personal service should issue notice to cross-examine the process server with regards to the contents of the affidavit of service. If this is not done the contents of the affidavit of service are deemed as sufficient evidence of service. The appellant herein has never sought to cross-examine **Maurice Makanda** the process server who served her and therefore the affidavit of service sworn on the 9/7/2007 and filed in court on the same day should be considered as sufficient proof of service.

20. It was further submitted that the provisions of Order 10 rule 4 of the ***Civil Procedure Rules*** are very clear that if a plaintiff makes a liquidated demand only and the defendant is served with summons to enter appearance and fails to appear, the court shall enter judgment as against the defendant/defendants for the sum not exceeding the liquidated claim together with interests. According to the Respondent, the plaintiff's claim in the subordinate court was for the sum of Kshs. 900,000/= plus interests from 30/3/2007. The defendant was duly served with summons to enter appearance but chose not to enter appearance and file her defence. The plaintiff being diligent did request for judgment as against the defendant in line with the provisions of order 10 rule 4 of the ***Civil Procedure Rules*** and the court entered judgment as prayed in the plaint which is in accordance with the provisions of the law.

21. It was submitted that the learned magistrate in delivering her ruling on the 8th November, 2011 considered the grounds contained in the application, the facts contained in the replying affidavit and submissions by both parties.

22. In support of her submissions the Respondent relied on **Richard Murigu v Attorney General & Another (2018) eKLR** in which the court adopted the principles of setting aside interlocutory judgment as outlined in **Shah vs. Mbogo (1967) EA 166**.

23. It was submitted by the Respondent that the record bears witness that the appellant herein has been determined to frustrate this matter. The appellant has filed numerous frivolous and vexatious application which were only aimed at wasting valuable judicial time and further delaying this matter. The appellant has engaged numerous advocates in this matter which advocates have also contributed to the further delaying this matter. From the foregoing, it is very clear that the appellant has not met the criteria set out in the above cases and the Respondent argued that the appellants appeal be dismissed with costs to the respondent.

Determinations

24. I have considered the foregoing, the submissions filed on behalf of the parties herein and the authorities relied upon in support thereof.

25. That the decision whether or not to set aside *ex parte* judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See **Shah vs. Mbogo & Another [1967] EA 116**.

26. In this case the ground upon which the application to set aside the judgement was made was that service of the summons was never effected on the Appellant. That there was an affidavit of service on the record is not contested. In the application dated 7th September, 2007, the Appellant sought, *inter alia*, an order that the process server be summoned for cross-examination on the alleged service on the Appellant. That application was however dismissed for non-attendance. Instead of applying to have the said dismissed application reinstated, the applicant applied nearly a year later for the orders similar to the dismissed application. In my view by choosing to proceed as if no application had been made and without proffering an explanation for non-attendance by the Appellant, I agree with the learned trial magistrate that the Appellant was guilty of an abuse of the court process. That was the position adopted by the Court of Appeal in **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593** where **Platt, AJA** held that:

“If a party to a suit does not appear to prosecute his application, and it is dismissed, he cannot be allowed to bring a second application since there would be no end to litigation. Having failed to appear he must seek to explain to the Court why he failed to appear and thus pray for reinstatement. It is an abuse of the process of the Court to ignore its order given when the party is at fault and simply bring further proceedings without explaining or redeeming the fault.”

27. In the said earlier application, the appellant set out, rightly in my view, to cross-examine the process server. That course of action was however abandoned midstream. The issues and questions which have been posed by the appellant in this appeal would have been resolved had that course been taken. In the case of Justus Kariuki Mate & Another vs. Martin Nyaga Wambora & Another [2014] eKLR the Court of Appeal had this to say in regards to Affidavits of Service:

“An Affidavit of Service consists of sworn factual evidence of the deponent. This Court in Baiywo --vs- Bodi Bach, Civil Appeal No. 122 of 1986 (UR) while applying the principles restated in; Miruka -vs- Abok & Another, [1990] KLR 544, Platt, JA stated: -

“There is a qualified presumption in favour of the process server recognized in MB Automobile -vs- Kampala Bus Service [1966] EA 480 at p 484 as having been the view taken by the Indian courts in construing similar legislation. On Chitaley and Annaji Rao: The Code of Civil Procedure Vol. II p 1670, the learned commentators say: -

‘3.Presumption as to service – There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.’

See also this Court’s decision in Kingsway Tyres & Automart Ltd. –vs- Rafiki Enterprises Ltd., – Civil Appeal No. 220 of 1995. Going by the material that is before us regarding the service of the order and the dicta enunciated the aforesaid authorities we agree with counsel for the 1st respondent that the burden lay with the appellants to demonstrate that the affidavit of service was incompetent.”

28. As the affidavit of service remained unchallenged, I cannot interfere with the decision by the learned trial magistrate in that regard.

29. It was further submitted that since the Respondent only requested for interlocutory judgement, the matter ought to have proceeded to formal proof. Entry of default judgements is provided for under Order 10 rules 4, 5, 6 and 7 of the *Civil Procedure Rules*. It is important to set out the full text of the said provisions for the proper understanding of their scope, extent of application and relevance. The said provisions are as follows:

4. (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

5. Where the plaintiff makes a liquidated demand with or without some other claim, and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against any defendant failing to appear in accordance with rule 4, and execution may issue upon such judgment and decree without prejudice to the plaintiff’s right to proceed with the action against such as have appeared.

6. Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

7. Where the plaintiff is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders.

30. From the foregoing it is clear that a final judgement can be entered where the suit is for a liquidated demand only. In Charles Mwalia vs. The Kenya Bureau of Standards [2001] 1 EA 151, Ringera, J (as he then was) held that:

“A liquidated demand is in the nature of a debt, a specific sum of money due and payable under or by virtue of a contract. Its amount must either be ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specific or named as a definite figure requires investigation beyond mere calculations, then the sum is not a “debt or liquidated demand”, but constitutes “damages”...The words “debt or liquidated demand” do not extend to unliquidated damages, whether in tort or contract, even though the amount of such damages be named as a definite figure.”

31. In J C Eksteen vs. Kutusi S/O Bukua [1951] LRK 90 it was held that:

“For an action to constitute a liquidated demand it is sufficient that it should state the amount demanded and give sufficient particulars of the contract to disclose its nature.”

32. In this case what was claimed was a mere debt arising from money alleged to have been advanced. It was a specific sum of money which did not require any further step to be taken in order to ascertain the sum due. In my view what was before the trial court was a liquidated demand and final judgement could be entered in default of appearance. In fact, in that event the entry of interlocutory judgement would have been erroneous. That was the position in Coach Safaris Ltd. vs. Gusii Deluxe Ltd. Civil Appeal No. 117 of 1996 where the Court of Appeal held that formal proof is unnecessary in liquidated claims where ex-parte judgement has been entered and the formal proof, if carried out, is a nullity.

33. In this appeal it was contended that considering the sum involved in the suit it was inappropriate for the final judgement to be entered. However, in Kavindu & Another vs. Mbaya & Another [1976] KLR 164; [1976-80] 1 KLR 202, it was held that:

“Final judgement having been regularly obtained, it cannot be recalled or the assessment of damages on the ground that the award was inordinately high and to entertain such a ground would be tantamount to reconstituting the same court into an appellate court.”

34. In this case it is my view that the circumstances do not satisfy the conditions for setting aside default judgement. As was held in Shah vs. Mbogo (1967) EA 166:

“this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

35. By filing a fresh application seeking orders similar to the ones which were sought in an earlier application dismissed as a result of the unexplained failure by the appellant to prosecute the same, the appellant may well be properly termed as a person who is deliberately seeking either by evasion or otherwise to obstruct or delay the cause of justice. That is not a person for whom favourable discretion can be exercised.

36. In the premises this appeal fails and is dismissed with costs.

37. It is so ordered.

Read, signed and delivered in open Court at Machakos this 23rd day of October, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Muema for Mr Muumbi for the Respondent

CA Geoffrey