



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 582 OF 2018

C. M. CONSTRUCTION (E.A) LIMITED.....APPELLANT

-VERSUS-

SAMWEL OMINA MUTINYU.....RESPONDENT

(Being an appeal from the ruling and orders of Hon. A. Makau (Ms.) Senior Resident Magistrate at the Chief Magistrate's Court, Milimani Commercial Courts Nairobi delivered on the 7th December 2018 in CMCC No. 3317 of 2016)

JUDGEMENT

1. The plaintiff/respondent lodged plaint on 20/5/2016 claiming damages for injuries he sustained while in course of duty. He claimed he had been employee of the defendant/appellant as at 23/1/2016.
2. The appellant upon service of the summons failed to enter appearance thus judgment was entered and formal proof ensued. In a judgment the court awarded respondent Kshs.400,000/= general damages, Kshs.4,150/= special damages plus costs.
3. Execution followed where of motor vehicle KBU 200P was attached property of the appellant.
4. This triggered the filing of notice of motion dated 11/10/2018 seeking the release of the motor vehicle KBU 200P, setting aside of judgment and filing defence also for cross examination of the process server.
5. The appellant averred that summons were not served and in alternative if same were served upon the Human Resources Manager same officer was not authorized to receive the same. That the defence raises triable issue.
6. On respondent's side via a replying affidavit he averred that service was effected but appellant opted not to defend and that no triable issues are raised in the draft defence.
7. Upon hearing the parties, the court dismissed the application triggering the instant appeal in which appellant set out the following grounds:-

(1) The learned magistrate erred in law and in fact when she failed as she did not find that there were proper grounds in law or otherwise not to allow the applicants application dated 11th October, 2018.

(2) The learned magistrate erred in law and in fact when she failed, as she did not find that there was proper service to warrant her dismissal of the appellants application dated 11th October 2018 and shut the appellant from being heard in a full trial.

(3) The learned magistrate erred in law and in fact when she found, as she did that there was no merit in the applicant's application dated 11th October 2018.

(4) The learned magistrate erred in law and in fact when she only chose to address herself to the issue of service and failed and/or refused to address herself to the draft defence filed with the application dated 11th October 2018 and which defence raised real triable issues which should go to trial for adjudication.

(5) The learned magistrate erred in law and if fact when she failed to consider the reasonable explanation given by the appellant as to why it did not file its defence in civil suit number 3317 of 2018 dated 11th October 2018.

(6) The learned magistrate erred in law and in fact when she did not exercise her discretion in favour of the appellant and thereby resulting to great injustice to the appellant which could only be interpreted as closing the appellants' access to natural justice.

(7) The learned magistrate erred in law and in fact when she failed to consider the merited submissions by the appellant in making his ruling on the said application dated 11th October 2018.

(8) The learned magistrate erred in law and in fact by failing to consider the nature of the action and whether as the last resort the respondent could have been compensated by way of costs for any delay occasioned by the appellant not filing a defence thereof.

(9) The learned magistrate erred in law and in fact by failing to appreciate that the appellant had met the requisite test for setting aside any court order obtained *ex parte*.

8. The parties were directed to file submissions but only appellant filed the same.

APPELLANT'S SUBMISSIONS:

9. It is appellant's submissions that the learned magistrate erred in law and in facts when she accepted the respondent's assertion that the appellant's offices are located in Westland area of Nairobi.

10. The learned magistrate respectfully should have appreciated the fact that indeed if the process server was honest enough, he would have effected service upon the appellants in an office to be described in a certain building floor, room and street. The process server only stated Westland's Office.

11. The learned magistrate's ruling stated that, **"the return of service is sufficient prove of service, because the defendant does not deny location of its offices."**

12. The appellant denies the same as per the supporting affidavit sworn by Mr. Manji Ravji Vekariya on the 11th day of October 2018. Moreover, in appellant's submission, the appellant clearly stated that its offices are situated on Mombasa road, behind Tuskys supermarket as such, the learned magistrate erred in believing and refusing to acknowledge the appellant had indeed clearly stated that its offices are not situated in Westland.

13. The appellant stated that on Miriam allegedly the appellant's Human Resource Officer was not its employee as such she was the proper person moreover with no authority to receive court documents on behalf of the appellant. To the appellant M/s Miriam is a stranger and a stranger could not be served as an authorized person for the appellant.

14. Further, it is the appellant submission that the trial defence raises triable issues. The appellant in the annexed draft defence stated:

"The defendant denies the contents of paragraph 4 of the plaint and states that the defendant did not owe any duty of care to the plaintiff because it was not its employee, the defendant therefore cannot owe a duty of care to a stranger. The plaintiff is put to strict proof."

15. The respondent claim must establish a key ingredient of employer employee relationship. The respondent averred in his plaint to have existed an express or implied term of contract of employment between the appellant and the respondent.

16. The fact that the appellant denied having employed the respondent is a triable issue. A stranger could not have any cause of action against the appellant relating to employment; as such the learned magistrate erred in law and in fact by merely dismissing the appellant's defence. See *James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR*

17. The principles to be applied in setting aside *ex parte* judgment is that the Court of Appeal has the discretion to interfere with the ruling to set aside *ex parte* judgment in the event the judge has misdirected himself and thus reached a wrong conclusion. See In *Pithon Wawere Maina vs Thuka Magiria [1983] eKLR*

18. The appellant filed a draft defence together with the application however the trial magistrate failed to consider the said defence which raises triable issues and as such it should have been best adjudicated in a full trial. The appellant vehemently denies any employment relationship with the respondent.

19. It is significant to note that the appellant filed its application without any delay. The appellant's lorry was repossessed on the 8th October 2018. The appellant learnt of the suit when its motor vehicle registration number KBU 200 Mitsubishi, Fuso Lorry, Fire Extinguisher, Car jack, wheel stunner, life saver and a spare wheel was confiscated on the 8th day of October 2018 by Chador Auctioneers through Mr. Eliud Wambu in execution of a decree for the sum of Kshs.488,227/=.

20. That was the first time the appellant's agent/driver Mr. Henry Muthee was shown the notification of sale of property, warrant of sale of property and warrant of attachment of property in execution of the decree.

ISSUES:

21. After going through the pleadings proceedings and submissions on record, I find the issues are; whether the application was merited? If above in affirmative what are the appropriate orders? What are the orders as to costs?

ANALYSIS AND DETERMINATION:

22. In *Pithon Wawere Maina vs Thuka Magiria [1983] eKLR* the court in setting out the principles held as follows:

“The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:

Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such term 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. Patel vs EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E. (b) Secondly, this discretion is intended so 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 course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand [1955] 22 EACA 47. (c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some mater and as a result has arrived at a wrong decision, or unless it is manifest from the case as whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA

23. Further in the case of *Patel vs East Africa Cargo Handling Service* where **Duffus V.P.** stated;

"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 to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

24. The trial court considered the explanation given by the defendant’s Managing Director and found the same to be mere denial as to service of the summons because there was evidence that the defendant was duly notified of the suit against it.

25. The appellant raised the issue that the purported person served with summons one Miriam allegedly the appellant’s Human Resource Officer was not its employee as such she was not the proper person with authority to receive court documents on behalf of the appellant. To the appellant M/s Miriam was a stranger and a stranger could not be served as an authorized person for the appellant.

26. In the instant matter, the Defendant was a corporate or company. The accepted practice is to serve the company secretary, a director or any principal officer of the company. When serving the principal officer one must take full particulars of the officers and indicate it in the affidavit.

27. If you cannot find any of these persons then you can effect a service by way of registered post to the last known available address of the corporation you can look this up in the company registry. Under Order 5 rule 3(b)(iii) CPR (in case of corporations) and 5(1)(e) CPR summons may be served by licensed couriers.

28. There was no evidence same provisions were complied with by the process server.

29. Further, it is the appellant contention that the draft defence raised triable issues. The appellant in the annexed draft defence stated:

“The defendant denies the contents of paragraph 4 of the plaint and states that the defendant did not owe any duty of care to the plaintiff because it was not its employee, the defendant therefore cannot owe a duty of care to a stranger. The plaintiff is put to strict proof.”

30. However the trial magistrate ignored that neither did she interrogate the proposed defence.

31. Thus the court finds that this is fit case for the appellant to be given chance of defend. The court thus makes the following orders ;

- i. The trial court judgement is set aside and the appellant is to file and serve defence within 14 days.***
- ii. The Ksh. 400,000 awarded by trial court shall be deposited in interest earning account in joint names of the parties advocate within 30 days of this order and in default the setting aside shall stand vacated and execution for entire decretal amount to proceed.***
- iii. The appellant to pay auctioneer charges to be agreed and or assessed.***
- iv. Costs of the appeal to abide by results of the suit once heard denovo.***

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2019.

.....

C. KARIUKI

JUDGE