



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 139 OF 2015

HUSSEIN DAIRY LIMITED.....APPELLANT

VERSUS

MICHAEL OSINDE.....RESPONDENT

(An appeal from the ruling and order of Mombasa Resident Magistrate

Hon. R. M. Kitagwa delivered on 21st July, 2015 in Mombasa

RM Civil Case No. 1207 of 2013).

JUDGMENT

1. The appeal herein arises from a ruling delivered on 21st July, 2015 following an application dated 11th December, 2014 that sought orders for setting aside an *ex parte* judgment of 4th December, 2014 and for the defendant (appellant) to be granted leave to defend its suit. The Hon. Magistrate considered the said application and dismissed it. The appellant, Hussein Dairy Limited being dissatisfied by the said ruling filed a memorandum of appeal on 10th September, 2015 raising the following grounds of appeal; That:-

- i. The Learned Trial Magistrate erred in law and in fact in failing to hold that the proposed defence as drawn disclosed various triable issues;
- ii. The Learned Magistrate erred in Law and in fact and disregarded precedent in failing to grant the defendant unconditional leave to defend, and in departing from the binding precedent;
- iii. That the Learned Trial Magistrate erred in law and in fact in holding that the applicant had not deponed on the status of Mr. Kazungu and in failing to appreciate the provisions of Order V Rule 2 of the Civil Procedure Rules now reproduced as Order 5 Rule 3 of the 2010 Civil Procedure Rules and apply them correctly;
- iv. That the Learned Trial Magistrate erred in law and fact in holding that there was no proof that the issue of liability had been determined in RMCC No. 2378 of 2012 when the issue had not been controverted and could be proved at the hearing;
- v. The Learned Trial Magistrate erred in law and in fact in holding that service of the notice of judgment is prima facie evidence of service of summons and in failing to appreciate that the entity served with the notice of judgment was the insurer not the appellant;
- vi. That the Learned Trial Magistrate erred in law and in failing to hold that summons can only be left at the principal office of a corporation if protracted attempts at finding the principal officers of the corporation are futile;
- vii. The Learned Trial Magistrate erred in law in holding that the applicant had not challenged the issue of quantum in the affidavit in complete disregard of the averments of paragraph 11 of the supporting affidavit and the annexed proposed defence;
- viii. That the Learned Trial Magistrate erred in failing to set aside the *ex-parte* judgment took into account irrelevant factors and in some instances failed to consider the relevant factors hence arrived at a wrong decision.
- ix. The Learned Trial Magistrate erred in law and fact in trying to conduct a hearing or a trial of the defence case on the basis of the supporting affidavits and in trying to resolve the contentious issues summarily contrary to the case law and jurisprudence and in holding that no triable issues were disclosed.

2. The appellant prays for:-

a. The order dismissing the applicant's Notice of Motion dated 11th December, 2014 to be set aside and be replaced with an order allowing the application with costs; and

b. The costs of the proceedings in the subordinate court and in this appeal be given to the appellant.

3. The appellant's Counsel filed his written submissions on 17th November, 2016. Counsel for the respondent filed his on 15th February, 2017. A rejoinder thereto was filed by Counsel for the appellant on 11th April, 2017. In highlighting the said submissions, Mr. Jengo, Counsel for the appellant submitted that the appeal arises from an interlocutory ruling from the Notice of Motion dated 11th December, 2014 which sought the setting aside of an *ex parte* judgment. He stated that the power to set aside an *ex parte* judgment is a discretionary one and this court can only interfere if it sees that the Hon. Magistrate exercised her discretion wrongly. Counsel indicated that the said Magistrate made a finding of fact that the defence as drawn raised no triable issue.

4. Counsel stated that they had filed an affidavit that deposed to the fact that the issue of quantum of damages and negligence were triable issues, therefore, if the Magistrate had considered those issues her ruling would have been different. Counsel cited the provisions of Order 2 rule 11(4) of the Civil Procedure Rules that provides that "*any allegation that a party has suffered damage and any allegation as to the amount of damages shall be deemed to have been traversed unless specifically admitted*".

5. Counsel relied on the case of **David Kinyanjui and 2 Others vs Meshack Monyoro**, Civil Appeal No. 121 of 1993 to show that the issue of damages is a triable issue. Mr. Jengo also stated that they had in the lower court raised the issue that resulting from the road traffic accident giving rise to this case, some cases had been decided and there was a test suit, namely, Mombasa RMCC No. 2378 of 2012 where the issue of liability was determined. He indicated that they had pleaded that they had another party they wanted to join to the said case but the Hon. Magistrate refused to allow them to do so. The appellant's Counsel relied on the case of **Winnie Wambui Kibinge and 2 Others vs Match Electricals Ltd**, HCCC No. 222 of 2010, where the court said that the fact that there was a Third Party to be joined was a triable issue if an application was made to join the said party within 14 days of the close of pleadings.

6. Counsel for the appellant amplified the point that the Hon. Magistrate disregarded case law laid before her and failed to consider applicable principles. It was stated that in instances where she did, she misapplied the same.

7. It was contended that the Hon. Magistrate failed to consider the issue of service of pleadings on the appellant which is a company. It was argued that the respondent ought to have served the Company Secretary or the Principal Officer of the said company but a Secretary was served. He added that their supporting affidavit explains who Kazungu and Bahati were, and that they had left employment. He stated that the said assertion was not controverted as no replying affidavit was filed. In addition, service should have been in accordance with Order 5 rule 3 of the Civil Procedure Rules. He cited the case of **Cooperative Insurance Co. Ltd. vs Faisure Insurance Brokers Ltd**, HCC No. 534 of 2007 and **Royal Mackenzie vs Car Track Kenya Ltd**. [2014] eKLR, which addressed the issue of service on a company.

8. Mr. Jengo submitted that the notice of entry of a judgment was served on the appellant, the insured. Counsel urged the court to consider the case of **John Peter Kiria and Another vs Pauline Kagwiria**, HCCA No. 44 of 2009, which highlights the need of the Court to do substantive justice under Article 50(1) of the Constitution by giving parties a right to be heard. Counsel prayed for the appeal to be allowed and they be granted leave to defend the matter in the subordinate court.

9. Mr. Kinuthia, Learned Counsel for the respondent in opposing the appeal submitted that it questions the discretion of the Hon. Magistrate in declining to set aside an *ex parte* judgment. He relied on the case of **Shah vs Mbogo** [1966] EA where the Court addressed the issue of the exercise of discretion or any powers of the court. He urged this court to consider if the Hon. Magistrate in the court below exercised her discretion appropriately.

10. On the issue of the mode of service of the summons and the plaint, Counsel submitted that was a matter of technicality but the appellant had not denied being served. He added that the appellant did not apply for the setting aside of the interlocutory judgment and therefore this court cannot interfere with the same. The court was informed that since the appellant did not set aside the interlocutory judgment, the submission of Third Party proceedings do not arise. In referring to the case of **Roy Mckenzie vs Car Track Kenya Limited and Another** (supra), Counsel submitted that Judge Kasango declined to grant similar prayers to those being sought in this case. He prayed for the appeal to be dismissed.

11. In response to the respondent's submissions, Mr. Jengo stated that the appellant's deponent in his affidavit had deposed to the fact that Ms Bahati and Mr. Kazungu had left the employment of the appellant, as at the time of the purported service thus there was no proper service.

12. In distinguishing the case of **Roy Mckenzie** (supra) from the present case, Counsel stated that service in the former case was effected on a Manager but if service had been on a junior officer, the Judge would not have considered the service as being proper.

13. Counsel submitted that the appellant tried to set aside the *ex parte* judgment but the Hon. Magistrate declined to grant the orders, thereby exercising her discretion wrongly. He prayed for the appeal to be allowed and that they be given an opportunity to defend the case in the lower court.

ANALYSIS AND DETERMINATION

The gist of the matter is if the trial court exercised its discretion judiciously by declining to set aside the *ex parte* judgment in Mombasa RM Civil Case No. 1207 of 2013.

14. The genesis of this appeal is the application dated 11th December, 2014 that was filed on the 15th December, 2014, by the appellant before the subordinate court. It sought the following orders:-

- i. That service of the application be dispensed with in the first instance it be heard *ex parte* and the same be certified as urgent;
- ii. That the execution of the judgment dated 4th December, 2014 be stayed pending the hearing and determination of the application *inter partes*;
- iii. That after the hearing of the application *inter partes* the court be pleased to set aside the *ex parte* judgment dated 4th December, 2014 and the defendant be granted leave to defend the suit; and
- iv. Costs.

15. The Hon. Magistrate declined to grant prayer No. (iii) above in her ruling delivered on 21st July, 2015 which forms the basis of the appeal herein. I bear in mind the duty of the 1st appellate court as enunciated in the case of **Mbogo and Another vs Shah** [1968] EA p. 93 where De Lestang V.P.) as he then was) stated thus:

“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

16. In an affidavit attached to the application in issue sworn on 15th December, 2014 by Mr. Ismail Kassam, he deposes in paragraph 4 that neither he nor his co-director were ever served with summons to enter appearance and they first heard of the matter when Mr. Jengo called their company on 11th December, 2014.

17. In paragraphs 5 and 6 of the said affidavit, the deponent refutes that Ms Bahati who used to be a Secretary at their company had authority to accept service of summons. He further deposes that Mr. Kazungu who has been described in the affidavit of service as the appellant's legal representative was a Clerk. He avers that the two persons cannot be described as the Secretary, Director or Principal Officers of the appellant. He states that the two had left the appellant company as at the time of the purported service.

18. I have perused the lower court file and the affidavit of service filed on 6th November, 2013 by Counsel for the respondent which indicates that the Process Server, one Ben Ochieng' Osinja served summons to enter appearance, plead, verify affidavit, list of witness, statements and list of documents on a Secretary, working for the appellant, one Mrs. Bahati. The said Process Server in paragraph 5 of his affidavit deposes that the said Mrs Bahati confirmed to him that she had full authority and instructions from the defendant's legal representative one Kazungu to accept legal documents on the defendant's behalf.

19. I note that one Bahati has been referred to as Mrs Bahati by the Process Server and as Ms Bahati by Mr. Kassam, the appellant's deponent. I will adopt the latter title given to her name as her former employer is best placed to know her title.

20. In the face of the affidavit by Mr. Ismail Kassam sworn on 15th December, 2014, wherein he deposes in paragraph 5 and 6 that neither Ms Bahati nor Mr. Kazungu, who had in any event left their company at the time of the purported service, can be described as Secretary, Director or Principal Officers of the appellant; it was erroneous for the Hon. Magistrate to find that there was proper service of pleadings by the respondent.

21. Order 5 rule 3 of the Civil Procedure Rules is very clear on the mode of service on a corporation. It states as follows:-

“Subject to any other written law, where the suit is against a corporation the summons may be served –

a. on the secretary, director or other principal officer of the corporation; or

b. if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a) –

i. by leaving it at the registered office of the corporation;

ii. by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or

iii. if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or

iv. by sending it by registered post to the last known postal address of the corporation.”

22. It is evident from the affidavit of the Process Server that he was aware that Ms Bahati was not a Principal Officer of the appellant but he went ahead to serve her with the summons to enter appearance and pleadings. The said Process Server did not depose in his affidavit that he had made attempts to serve the Company/Corporation Secretary, Directors or the Principal Officers of the appellant in vain, thereby resorting to serving Ms Bahati. The respondent did not file a replying affidavit to controvert the averments contained in the affidavit sworn by Mr. Kassam. His depositions therefore carry the day.

23. The appellant's deponent is categorical that Ms Bahati had left employment of the appellant as at the time she was purportedly served with the pleadings for the case in the lower court. In **Total Kenya Limited vs Supa Haulier Limited** [2002] eKLR the court when addressing the issue of service of summons on a company stated thus:-

“How is the court to know that attempts were made in vain by the process server, to effect service of summons on the officers of a Corporation? It must be deponed in the affidavit of service to justify the mode of service opted for.”

24. It is clear that the Hon. Magistrate misdirected herself when she held that *a party who serves a notice of judgment obviously must have served summons to enter appearance*. It is evident that the foregoing was an assumption on the part of the Hon. Magistrate as it was not backed by any fact. Paragraph 2 of the affidavit by the appellant's deponent states that he was called on 11th day of December, 2014 by Mr. Jengo Advocate who informed him that he had been given a letter by the appellant's insurers, Kenya Orient Insurance Company Limited, from the respondent's Advocates notifying them of the judgment. It is thus clear that the judgment in the lower court was not served on the appellant herein.

25. On the issue of whether the defence attached to the affidavit in support of the said application raises triable issues, I have perused the same and it is clear that the appellant while denying liability attributes the accident to a Third Party. That on its own is a triable issue subject to Third Party proceedings being taken out.

26. The principles guiding the setting aside of an *ex parte* judgment were pronounced in **Sebei District Administration vs Gasyali and Others** [1968]EA 300, where at p. 301- 2, Sheridan J., cited with approval the words of Ainley J., (as he then was) in **Jaminadas vs Sodha Gordhandas Hemraj** [1952] 7 ULR 11. The court stated:-

“ The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court”

27. In the face of the facts laid before this court by both Counsel, the submissions made and authorities cited, I am inclined to find in favour of the appellant and I hereby hold that the Hon. Magistrate exercised her discretion wrongly by failing to set aside the *ex parte* judgment in light of the depositions in the appellant's affidavit in support of the application dated 11th December, 2014.

28. I am satisfied that the appellant is entitled to the orders sought and I allow the appeal in its entirety. For the avoidance of doubt;-

- i. The *ex parte* judgment dated 4th December, 2014 is hereby set aside;
- ii. The appellant (defendant) will file and serve its defence within 14 days from the date of this Judgment;
- iii. Mombasa RM Civil Case No. 1207 of 2013 is remitted to the subordinate court for hearing and final determination before another Magistrate save from Hon. M. Kitagwa whose ruling forms the subject of this appeal;
- iv. The costs of the application dated 11th December, 2014 and this appeal are awarded to the appellant.

DELIVERED, DATED and SIGNED at MOMBASA on this 19th day of January, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Jengo for the appellant

Mr. Kinuthia for the respondent

Mr. Oliver Musundi - Court Assistant