



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**CIVIL APPEAL NO. 2 OF 2016**

**ADAN SORA GINDICHA.....APPELLANT**

**VERSUS**

**MOLYN CREDIT LIMITED.....RESPONDENT**

*(An appeal from the Ruling and Order of the Principal Magistrate's Court at Nairobi (Hon. Obura PM) delivered on 9 September 2016 in Milimani CMCC No. 2572 of 2015)*

**JUDGMENT**

[1] The Appellant herein, **Adan Sora Gindicha**, was the Defendant in **Milimani CMCC No. 2572 of 2015: Molyn Credit Limited vs. Adan Sora Gindicha**. The suit had been filed by the Respondent, **Molyn Credit Limited**, to enforce the repayment of an outstanding balance of a loan that had allegedly been advanced by the Respondent to the Appellant. As of **11 February 2011**, the balance was said to be **Kshs. 1,620,240/=**. From the Record of Appeal filed herein, the Respondent evidently failed to enter appearance or file Defence. Consequently, a Default Judgment was recorded against the Appellant in **Nairobi CMCC No. 2572 of 2015 (Milimani)** on **22 September 2015** and a Decree issued on **9 December 2015** for **Kshs. 2,169,646/=** together with costs.

[2] On the **26 April 2016**, a Warrant of Arrest in execution was issued at the instance of the Respondent herein, thus provoking the filing of an application before the lower court for stay of execution, and for setting aside the default judgment. That application, dated **20 May 2016**, was thereafter heard and determined by **Hon A. M. Obura, PM**, who rendered her decision on **9 September, 2016** in the following terms:

**"I have considered the Process Server's affidavit of service sworn on 4/8/13 alongside the Applicant's annexure "ASG 1(d)". The said letter does not have an official stamp to verify its authenticity. Further, when considered against the credit Application and Agreement ... wherein the details of the Applicant are provided, and the card ("FN-1"). I find that the Applicant may not be telling the truth. My view is that he was properly served and Judgment entered was regular. It ought not be set aside unless there are triable issues. (PATEL VS. CARGO HANDLING SERVICES LIMITED [1974] EA 75)...I have considered the draft defence. The Defendant denies any loan agreement with the Plaintiff but at the same time, claims that he fully paid his loan account. He does not specifically state why he denies the existence of the said agreement or explain when he paid and how much. Further, the averments in paragraphs 6, 7, 8 of the Replying Affidavit have not been expressly challenged or replied to in the Further Affidavit too. The claim that the Respondent is not licensed to charge interest is also not raised in the Defence. In my view, the Defendant/Applicant is inconsistent hence my view that he has no defence to this claim. There are clearly no triable issues. Justice cuts both ways. The Defendant/Applicant has not satisfied this Court that he is deserving of the orders sought. Reasons wherefore, I see not merit in the application. It is hereby dismissed with costs."**

[3] Being aggrieved by the Ruling of the Learned Principal Magistrate and the dismissal aforementioned, the Appellant filed this Appeal on the **23 September 2016** on the following grounds:

[a] The Learned Magistrate erred in law and fact when she disregarded the evidence of the Appellant while making her ruling;

[b] The Learned Magistrate erred failed to consider that the Appellant had raised a triable defence;

[c] The Learned Magistrate erred in law in taking into account extraneous matters in arriving at her decision;

[d] The Learned Magistrate erred in law and fact in finding that the Respondent proved that there was proper service of Summons and Pleadings upon the Appellant;

[e] The Learned Magistrate erred in law and in fact in failing to appreciate that denying a party the right to be heard, which is a constitutional right, should only be done sparingly, in most plain and obvious cases, and only in special circumstances which did not exist in the instant case;

[f] The Learned Magistrate erred in law and in fact in failing to take into account the pleadings filed by the Appellant;

[g] The Learned Magistrate erred in law and in fact in finding that the Appellant had not raised the issue of the Plaintiff not being licensed to charge interest yet it was clearly raised in the Appellants Draft Defence;

[h] The Learned Magistrate erred in law and in fact in failing to appreciate that where service of Summons to Enter Appearance and Pleadings is in doubt, the Defendant ought to be entitled to the benefit of the doubt.

[4] In urging the Court to allow the Appeal with a view of setting aside the ruling of the Court dated **9 September 2016**, Counsel for the Appellant relied on the written submissions filed herein on **12 September 2017** in which he submitted that the Trial Magistrate failed to exercise her discretion correctly, and that she considered extraneous issues that were not raised before her to make a determination on the issue of service. It was further the submission of the Appellant that the Learned Magistrate failed to take into account the Draft Defence filed by the Appellant together with the application dated **20 May 2016**. Several authorities were relied on by the Appellant's Counsel including **Pithon Waweru Maina vs. Thuga Mungiria [1983] eKLR** and **A.K. Abdulgani vs. Geoffrey Nzioka Ndumbu [2016] eKLR**.

[5] Counsel for the Respondent on his part, argued that the Appellant was properly and duly served with Pleadings and Summons to Enter Appearance as evinced by the Affidavit of Service sworn by **Wycliffe Shikuku M'Mada**, sworn on **24 August, 2013**. He further urged the Court to note the failure by the Appellant to invoke the provisions of **Order 19 rule 2** of the **Civil Procedure Rules, 2010**, which would have presented him with an opportunity to have the Court Process Server called for purposes of cross-examination to test the veracity of his Affidavit of Service; and to draw the conclusion therefrom that service was indeed effected on the Appellant as averred therein.

[6] It was further the submission of the Respondent that, despite stating that his office is in **Harambee Sacco House**, the Appellant did not disown his card that was annexed to the Respondent's Replying Affidavit as **Annexure FN-1** and which showed that he was then working at Parliament Buildings; and that in his Further Affidavit, the Appellant abandoned his original stance and stated that his work place was Parliament Buildings. The Respondent also pointed out that the Appellant's business card contained the same information as to his place of work, thus confirming the Respondent's posturing that service was duly effected on the Appellant. Counsel relied on the cases of **Julius Wafula Chebi vs. Gibon Akifuma & Another [2014] eKLR** in support of the argument that the Court's discretion is intended to avoid injustice or hardship resulting from inadvertence, but is not designed to assist those whose intention is to obstruct or delay the course of justice.

[7] As to whether the Appellant's Defence raised triable issues, Counsel for the Respondent posited that, whereas the Respondent's Plaintiff consisted of concise and specific claims against the Appellant, detailing how the Appellant applied for and was advanced a loan facility which he failed and/or refused to repay, the Appellant's Draft Statement of Defence comprised merely of denials, with an alternative averment that if any sums were due to the Plaintiff then the same had been fully paid. Thus, it was the contention of the Respondent that the Trial Magistrate was right in holding that the proposed Defence did not raise any triable issue. Counsel relied on the case of **Equitorial Commercial Bank Ltd vs. Jodam Engineering Works Limited & 2 Others [2014] eKLR** to support this argument, and urged the Court to dismiss this Appeal with costs.

[8] The principal laid down in **Selle vs. Associated Motor Boat Company Limited [1968] EA 1** is that I am obliged to re-evaluate the evidence presented before the lower court and arrive at my own conclusions on the issues that presented themselves before the Learned Trial Magistrate for determination. Similarly, it is a cardinal principle in our courts system that an appellate court will not interfere with the exercise of the trial court's exercise of discretion unless the magistrate, in exercising his/her discretion, misdirected himself and as a result arrived at a wrong decision, or unless it is manifest that there has been a miscarriage of justice. Hence, in **Mbogo vs. Shah [1968] EA 93** the Court of Appeal held thus:

**"...it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the 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 failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at the wrong conclusion."**

[9] From the Grounds of Appeal filed, there are only two main issues emerging therefrom for consideration, and these are: firstly, whether the Learned Magistrate erred in law and in fact in holding that there was proof of proper service of process upon the Appellant; and secondly, whether the Learned Magistrate erred in law and in fact in finding and holding that the Appellant's Draft Defence did not raise any triable issues. With regard to service, a perusal of the lower court record reveals that the Respondent's Plaintiff dated **8 May 2015** was filed on even date at the Milimani Commercial Courts. The Respondent's cause of action was that, pursuant to the Appellant's application for a loan, the Respondent had advanced to him a loan of **Kshs. 500,000/=** on or about the **4 September, 2013** at an agreed interest rate of 4.5% per month on the outstanding balance. The loan was to be repaid in 72 consecutive monthly instalments of **Kshs. 23,505/=** each, with effect from **30 September 2013**; but that, in breach of his contractual obligations, the Defendant failed to fully repay the loan, such that by **11 February 2015**, there was an amount of **Kshs. 1,620,240/=** outstanding. The suit before the lower court was therefore for recovery of the aforesaid amount together with attendant interest, attendant penalties and costs of the suit.

[10] An Affidavit of Service, sworn by **Wycliffe Shikuku M'Mada** on **24 August 2013** (at page 362 of the Record of Appeal) shows that the Appellant was personally served with Plaintiff and Summons to Enter Appearance. At pages 363 and 364 of the Record of Appeal is an Affidavit of Service to show that the Appellant was similarly served with Notice of Entry of Judgment dated **10 December 2015** and Notice to Show Cause dated **3 February 2016**; and while the Appellant admitted having been served with the Notice to Show Cause, he denied that he was served with Plaintiff and Summons to Enter Appearance. It was therefore his postulation that the Affidavit of Service must be fictitious, adding that he had never met any such person, or had his office at Parliament Buildings. The document marked **Annexure "ASG 1(d)** to his

Supporting Affidavit aforementioned was exhibited to show that his office was at all material times located at Harambee Sacco Plaza.

[11] Having admitted that he was served with the Notice to Show Cause at his place of work, the Appellant thereby acknowledged that he could be reached at Parliament Buildings, for the Affidavit of Service in respect of the said Notice to Show Cause, sworn by **Wycliffe Shikuku M'mada**, confirms that service was effected on **24 February 2016** at Parliament Buildings. Besides, in response to the Appellant's application, the Respondent exhibited the Appellant's business card as an annexure to the affidavit of **Faith Njuguna**, sworn on **15 June 2016**. That business card gives the Appellant's address as Parliament Buildings. According to the Respondent, the Appellant gave this business card to the process server at the time of service; and although the Appellant denied this, he did concede, in his Further Affidavit that he may have given his business card to several people including the employees of the Respondent, thus admitting in principle and acknowledging the address thereon to be his correct address.

[12] Thus, whereas it may be true that the Appellant may have had an office at Harambee Sacco Plaza as alleged, there is no dispute that he was at all material times an employee of Parliament as First Clerk Assistant and that his address for all intents and services was Parliament Buildings. The record shows that the Trial Magistrate, duly considered the process server's Affidavit of Service sworn on **4 August 2013** alongside the Appellant's **Annexure "ASG 1(d)"**. She noted that the said letter did not have an official stamp to verify its authenticity. She further considered the letter against the Credit Application and Agreement wherein the details of the Appellant were provided, and the business card ("marked **Annexure FN-1**") and came to the conclusion that the Appellant was properly served and therefore that the Default Judgment was regularly entered. She indicated in her ruling that she had taken into account the principles enunciated in the case of **Patel vs. E.A. Cargo Handling Services Ltd [1974] EA 75** in exercising her discretion. It cannot therefore be said that she misdirected herself or that she took into account extraneous factors that ought not to have been taken into consideration, in connection with the aspect of service, as alleged by the Appellant.

[13] It is noteworthy that, whereas the Appellant had the option to have the process server called for purposes of cross-examination, and whereas in his Further Affidavit he indicated, at paragraph 4 that he would seek to have the process server cross-examined on oath, he did not pursue this angle to its logical end. Thus, in **Dickson Daniel Karaba vs. John Ngata Kariuki, Nairobi Civil Appeal No. 125 of 2008**, the Court of Appeal was of the view that:

**"There is a presumption that the court process was properly served unless such presumption is rebutted and that the burden lies on the party questioning the affidavit of service to show that the same is incorrect. Where service is denied it is normally desirable that the process server should be put in the witness box and the opportunity given to those who deny service to cross-examine him."**

Accordingly, the Trial Magistrate was perfectly entitled to conclude, as she did, that service was duly effected as deposed to by the process server.

[14] It is however trite in such matters that, even where the Default Judgment is found to be regular, the Court still retains the discretion to set it aside should it be satisfied that the justice of the case so demands. The words of **Ringera, J.** (as he then was) in **Remco Limited vs. Mistry Jadva Parbat & Co. Ltd & 2 Others, Milimani HCCc No. 171 of 2001** are apposite in this regard, namely:

**"...if the default judgment is a regular one, the court has unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order IXA Rule 10 of the Civil Procedure Rules. Case law on the exercise of the discretion is plenty. The cases show that the main concern of the court is to do justice between the parties...In exercising the discretion the court should consider among other things, the facts and circumstances both prior and subsequent, and all the respective merits of the parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by the setting aside of the judgment should be considered and it should always be remembered that to deny a person a hearing should be the last resort for the court."**

[15] Thus, it was the contention of the Appellant that the Trial Magistrate erred in law and in fact in not paying attention to the issues raised in his Draft Defence; particularly the issue as to whether the Respondent was licensed to charge interest. Counsel for the Respondent however reiterated the Respondent's contention that the proposed Defence comprised of mere denials, and directed the attention of the Court to paragraphs 3, 4, 5, 6, 7 and 8 thereof in urging the Court to find that the Learned Trial Magistrate was correct in coming to the conclusion that the Draft Defence did not raise any triable issue.

[16] A perusal of the Draft Defence does confirm that the Appellant thereby denied having been advanced any loan by the Respondent as alleged in paragraph 4 of the Plaintiff or at all. He denied the averments in paragraphs 5, 6, 7 and 8 of the Plaintiff, in which the salient terms of the subject contract were set out, and put the Appellant to strict proof thereof. He however specifically traversed the averment that he owes the Plaintiff **Kshs. 1,620,240/=** and in the alternative contended that if any sums were due then the same had been fully paid off by him. In her ruling on this point, the Learned Trial Magistrate held that:

**"The Defendant denies any loan agreement with the Plaintiff but at the same time, claims that he fully paid his loan account. He does not specifically state why he denies the existence of the said agreement or explain when he paid and how much."**

[17] In my consideration, in so holding, the Learned Trial Magistrate misdirected herself, for **Order 2 Rule 3(1)** of the Civil Procedure Rules simply states that:

**"...every pleading shall contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits."**

Accordingly, any explanations as to why the money was not due or when the debt was repaid or even how much was paid are matters that could only be adverted to at the hearing. Thus, the Appellant is therefore right in saying that had he been given the opportunity to defend the

suit, he would have been in a position to demonstrate that the loan had been fully repaid. It was therefore premature for the Learned Trial Magistrate to conclude that the Appellant had failed to prove that he had fully repaid the loan.

[18] It was also a misdirection for the Learned Trial Magistrate to say that the claim by the Appellant, that the Respondent is not licensed to charge interest, was not raised in the Defence. This is a misdirection because at paragraph 3 of the Draft Defence, the Appellant specifically pleaded that:

**"The Defendant denies that the plaintiff is authorized to carry out the business of [l]ending money at an interest and puts the Plaintiff to strict proof thereof."**

[19] By that assertion, the Appellant joined issue with the Respondent in connection with the averments in paragraphs 4, 7 and 8 of the Plaint wherein the Respondent laid claim to interest on the principal sum. Indeed, interest was one of the specific reliefs sought by the Respondent in its Plaint dated **8 May 2015**. Additionally the Appellant raised the technical point, at paragraph 9 of the Draft Defence, that the suit was bad in law and therefore incompetent. Accordingly, had the Learned Trial Magistrate given the matter careful thought, she would have come to the conclusion that the proposed Defence was worth proceeding to trial for. Needless to say that *a defence that raises triable issues is not necessarily one that must succeed at the trial*. In **Patel V East Africa Cargo Handling Services Ltd (supra) Duffus, P.** expressed himself thus in this regard:

***"...defence on the 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."***

[20] For the foregoing reasons, I would allow this appeal, set aside the ruling of the Principal Magistrate in Milimani Commercial Courts **Civil Case No. 2572 of 2015** dated **9 September 2016** and all the Orders flowing therefrom. I would substitute therewith an Order granting the Appellant leave to defend the suit in the following terms:

*[a] That a Defence be filed and served by the Appellant in **Civil Case No. 2572 of 2015** within 14 days from the date hereof;*

*[b] That costs of this appeal and any thrown away costs in **Civil Case No. 2572 of 2015** be borne by the Appellant.*

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY 2018**

**OLGA SEWE**

**JUDGE**