



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 24 OF 2009

FRANCIS NJANJA KARIUKI.....APPELLANT

VERSUS

LYDIA MUTHONI MUNYERIA.....RESPONDENT

(An appeal from the Ruling of the Hon. Ms. Mokaya SRM dated 12th January 2009

in the Chief Resident Magistrate's Court Case No. 10258 of 2007

at Milimani Commercial Law Courts).

JUDGEMENT

The appellant was sued by the respondent for the sum of Kshs. 160,000/= being the balance of the sum of Kshs. 220,000/= lent to him by the respondent. The record shows that after service of summons to enter appearance and file a defence, the appellant did not comply as a result of which the respondent applied for judgment which was granted.

The process of execution was then initiated and that is when the appellant filed an application dated 25th November, 2008 seeking a stay of execution and setting aside the interlocutory judgment. That application was dismissed leading to the present appeal.

In the Memorandum of Appeal the appellant faulted the lower court for finding that there was proper service of summons yet the evidence before the court did not support that. Further that, the court erred in finding that the affidavit of service was proof of such service as required by law. In addition, the court was faulted for failing to find that the respondent had made a liquidated claim together with other demand of interest at commercial rates. Finally, that upon request to enter judgment, the court should have set the matter down for formal proof and award costs after final judgment. Both parties have filed submissions which I have noted.

The order sought is discretionary which discretion should be exercised judicially. I have read the entire record of the lower court which includes the affidavits of service by one James Maina Mwangi, a process server authorised by this court to effect service. In the said returns where service upon the appellant was required, he has given a detailed account of how he came to know the appellant, his residence and his motor vehicle. He has also detailed his communication with the appellant whenever he encountered him for purposes of service.

The contents of affidavits of service outweigh the counter allegations by the appellant that he was never served with summons to enter appearance.

The record of the lower court shows that at some stage a warrant of arrest was issued against the appellant. On 24th November, 2008 the advocate for the appellant appeared and in the presence of the appellant a consent order was recorded in the following manner,

“Before: W. Mokaya (M/s) Ag P.M.

CC: Munene

Mr. Nzavi for D/H

J/D Present

Mr. Nzavi

By consent jd has paid Kshs. 100,000/= today. The balance of Kshs. 150,930/= to be paid on or before 31/1/2009.

I/d execution to issue by way of arrest and committal to civil jail.

W. Mokaya (M/s)

A.g P.M.

Judgment debtor: Francis Njanja Kairuki

That is so.

Court consent adopted parties to sign.

Signed

A.g P.M.

Nzavi for plaintiff/decreed holder signed

Francis N. Kariuki signed.”

It is instructive that the application, the ruling of which led to present appeal, was for stay of execution and setting aside the interlocutory judgment. The consent judgment cited above came after the interlocutory judgment sought to be set aside. The learned trial magistrate correctly observed that the setting aside of a consent judgment or order required proof of existence of fraud, and that the principles of setting aside an interlocutory judgement and those of setting aside a consent are distinguishable.

She also observed that the defendant had an opportunity when he first appeared in court to state that he had not been served and that he had a good defence. That he came to raise the issues later was clearly an afterthought. She was also correct that the court could not deal with the application to set aside the interlocutory judgment before the consent order was set aside.

The consent order cited above was binding upon the appellant. He was present and agreed with the terms set out therein. He also signed the court record. He has not alleged any coercion or misrepresentation on the part of the respondent. He is bound by that consent.

It appears to me that the appellant is bent on postponing an obvious eventuality. My assessment of the entire record is that the appellant was served with summons to enter appearance but did not do so or file any defence. The judgment entered in favour of the respondent was legal and cannot be faulted. The trial magistrate was correct in dismissing his application to set aside the said judgment and this appeal must therefore fail. The same is dismissed with costs to the respondent.

Orders accordingly.

Dated, signed and delivered at Nairobi this 20th Day of March, 2018.

A. MBOGHOLI MSAGHA

JUDGE