

REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT KISII

CIVIL APPEAL NO.131 OF 2013

JASON MATONDA.....APPELLANT

-VERSUS-

MARY WANJIKU.....RESPONDENT

(An Appeal from the Ruling of Hon. Mugendi Nyaga Resident Magistrate made on 19/9/2013 in Kisii CMCC NO.340 A of 2012)

JUDGMENT

1. The appellant seeks to have the ruling of the Hon. Mugendi Nyaga R.M. made on 19/9/2013 set aside and to be allowed to file his memorandum of appearance and defence so as to proceed to hearing.
2. Counsels submitted orally in court. My attention was drawn from the proceedings of the court of 1/10/2012 the trial court entered judgment for the plaintiff as prayed with costs of the suit. This was on the basis that the defendant had not been served and failed to enter appearance. The affidavit of service at page 36 of the Record of Appeal indicates that the defendant was served on the 12/9/2012 at his place of work. The affidavit of service does not indicate who summoned the appellant so that he could acknowledge service. It was important to indicate the person who identified the appellant as he stated that he was not served.
3. The proceedings of 1/1/2012 also indicate that the matter was to be set down for formal proof. The proceedings did not indicate whether the matter was set down for formal proof after the interlocutory judgment was entered. The proceedings of 22/11/2012 indicate that the matter was fixed for Notice to Show Cause.
4. The trial court correctively observed that the court has discretion to set aside an ex parte judgment (**See Shah vs- Mbogo & Another 1967 EA**). Looking at the affidavit of service there is a doubt that service was effected upon the appellant. He therefore ought to have given a chance to defend the suit. As was stated by Justice Sitati in the Ruling delivered in the 9/10/2014 one should not be condemned unheard. The judgment that was to be executed was based on evidence adduced by the respondent. I have looked at the draft defence that was attached to the appellant's application. It raises triable issues as to whether the defendant owed the money as he pleads coercion at paragraphs 4 and also whether the money claimed was owed.
5. I find that the appeal has merit and set aside the order of dismissal dated the 19/9/2013. The ex parte judgment entered on the 1/10/2012 is set aside. The defendant shall file his defence within 21 days from the date of this judgment and serve the plaintiff. The Plaintiff has a right to reply within 7 days from date of service. Parties to appear before the SPM Kisii Law Courts for purposes of taking directions on the hearing after the said 28 days. In default of filing the defence judgment shall be entered against the appellant and the matter proceeds to formal proof on a date to be given by the court. Each party to bear their own costs.

Dated, signed and delivered this 19th day of December 2018.

R.E. OUGO

JUDGE

In the presence of;

Mr. Okenye

For the Appellant

Mr. Onguti

For the Respondent

Ms. Rael

Court Clerk