



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 71 OF 2014**

**HASHIM SALIM MOHAMED (Suing as Guarding and next friend of**

**SAID HASHIM SALIM.....APPELLANT**

**VERSUS**

**1. EDWARD OTIENO**

**2. GORRETY ATIENO OLUM.....RESPONDENTS**

**J U D G M E N T**

1. On 24/7/2013, the lower court Hon. Onzere EM delivered a judgment in favour of the plaintiff. He found the defendant, now appellant, liable to the Respondent at 100% and assessed general damages in the sum of Kshs.450,000 and special damages in the sum of Kshs.158,815. That judgment was consequent to a formal proof itself flowing from a default judgment entered on the 15/6/2011.

2. Come the 10/10/2013, the Respondent now, as defendant before the trial court, filed an application in which they sought setting aside of the *ex parte* judgment and the consequential proceedings and orders arising therefrom and that the memorandum of Appearance and statement of defence filed be deemed duly filed. Those documents were admittedly filed in January 2013 but only served on 14/9/2013.

3. The application to set aside was support by the affidavit of one ERIC NYABINCHA and grounded on the facts that an appearance and defence was filed on the 7/1/2013 and an invitation to negotiate the dispute made to the plaintiffs advocate by three letters all of which were never responded to until the 3/10/2016 when a notice of entry of judgment was served. Prior to the service of notice of Entry of judgement, the Respondent swore that no notice of hearing had been served upon them.

4. The application was opposed by the Replying affidavit of the Appellant, as the plaintiff then, one the grounds that there had not been made any application to set aside the default judgment allegedly entered on the 15/6/2011; that the application was omnibus; it was brought after undue and inordinate delay, that the judgment was regularly entered and not fit for being set aside and that the thresholds for setting aside had not been met as efforts had been made to serve the defendants on the hearing notices but they did not answer or attend court.

5. Additionally the Appellant in opposing the application to set aside swore that the Respondent had, when charged with the traffic offence of careless driving, pleaded guilty and was fined by the court hence there would be no triable issue raised in the defence filed and that the letters of invitation towards negotiations were never received by the Appellants advocate moreover the same were on a without prejudice basis and thus not admissible in evidence.

6. From the Record of Appeal filed it is apparent that parties filed written submissions. Submissions by the Respondent are dated 20/1/2014 while those by the Appellant are dated 19/2/2014. The record suggest that no oral submissions were offered and the court determined the application on the basis of the written submissions.

7. In its determination, the trial court found that by the time appearance and defence was filed, there had been requested and entered an interlocutory judgment and no account or explanation was given for the period between date of service on 12/11/2010 and the 7/1/2013 when the instructions were given. The court found that if there was any mistake it was the mistake of the party and not the advocate which mistake deserved not being visited upon the plaintiff/appellant. In coming to its ultimate decision to set aside the court said:-

**“In any event and from the affidavits of Hassan Jefa Katana sworn on the 15/12/2002, the defendant declined to receive the hearing notices and told the process server to serve the notices upon their insurer which the process server did and this is not challenged by the defendant. The defendants were therefore indolent and their indolence should not be visited upon the plaintiff”**

**VIII The court has discretion to set aside a judgment entered *ex parte* but the discretion should be exercised judiciously. In this case, it has been proved that the defendants deliberately sought to obstruct and delay the cause of justice. From the affidavits of service filed by Hassan Jefa Katana, the defendants have evaded service on several occasions and they refereed the process server to their agents and insurers. In CMC Holdings Ltd vs Nzioki (2004) eKLR it was held that the Court in exercising its discretion to set aside an *ex parte* order ought to ensure that a litigant does not suffer in justice or hardship as a result of a mistake, inadvertence, accident or error. There was no mistake, inadvertence or error on the part of the defendant’s in this case.**

**IX The second consideration is an application for setting aside an *expert* judgment is whether the applicant has a reasonable defence which raises triable issues. Counsel for the defendant avers that the defendants have a good defence which raises triable issues. I have perused through the defence and note that at paragraphs 3, 4 and 5, the defendants specifically denies ownership of motor vehicle KBH 658Z, occurrence of the accident and pleads that if the accident occurred, the plaintiff was to blame for the same. I find that these are triable issues and it is in the interests of justice that this suit is heard and determined on its merits.**

8. It is that ruling and finding by the trial court which have provoked this appeal in which the Appellant faults the trial court for having failed to exercise its unfettered judicial discretion improperly by holding that there were triable issues raised in the defence filed and by setting aside yet there was a finding by the court that there had been due aid proper service. In effect the trial court is faulted for basing her discretion to set aside on completely wrong and erroneous principles and the misinterpretation of known and crystalized principles of law applicable.

9. This being a first appeal the court proceeds by way of a retrial and for that reason the court has a duty to re-assess, re-appraise and re-examine the facts and evidence laid before the trial court with a view to coming to own a conclusion. Being a decision based on discretion this court must always remind itself that an appellate court ought to be a slow before setting to interfere with a decision made pursuant to exercise of discretion and would only do so where there is demonstrated misdirection by the trial court on the applicable principles.

10. The mis-direction that would entitle an appellate court to interfere would take the form of failure to take into account matters the court is bound to take into account or taking into account matters that it ought not take into account and short of that the exercise of discretion is manifestly and wholly wrong and has led to an injustice see ***Mbogo & Another vs Shah [1968] EA 93 and Lalji Karsam Rebadia vs Commercial Bank of Africa Ltd [2015] eKLR.***

11. Now, the discretion of a court to set aside default judgment is wide and unfettered but like all judicial discretions is only due for exercise upon reason supported by facts and on known principles. The principal principles for consideration are:-

- a) Whether or not the defendant/applicant was served with the summons in which event the question is whether or not the judgment was regularly entered.
- b) Whether or not there has been brought to the attention of the court a defence, which prima facie, raises even only one single triable issue.
- c) What prejudice, if any is likely to be occasioned to either party by the order so made and if such prejudice can be assuaged by an award of costs.

12. I have opted to consider the three questions *seriatim* but note that ultimately a court of law in considering whether or not to set aside bears in mind the only purpose for which the court system exist; the just fair and proportionate resolution of disputes while keeping a guard, always, that there is not rewarded an action that demonstrates a design to delay or obstruct justice.

#### **Analysis and determination service of summons to enter appearance**

13. There are atleast two affidavits of service by one Mr. Hassan Jefa Katana whose effect is that by use of a telephone number obtained from Bamburi Police Station, she spoke to one Ms. Goryety Atieno Olum who directed him to one Mr. Steven Maranga who did receive the summons on behalf of the two Respondents in his capacity as their agent. However when a request for judgment was made, the trial court deemed the service insufficient as no attempt had been made at personal service.

14. On the 7/3/2011, the process server having spoken to the 2<sup>nd</sup> Respondent on phone, the two met at the offices of Ms. Insurance Company of East Africa Ltd. The two did meet indeed and it is deponed in the affidavit of service sworn on the 17/3/2016 that she accepted service on her own behalf and on behalf of the 1st defendant who the process server says was her husband. That service has not been impugned contested or challenged even though to this court it was important for the process server to disclose an attempt made at personal service upon the 1st defendant and how he came to know that he was the husband to the 2nd Respondent. However, the question of service being not in contestation, it is not available for me to determine the sufficiency thereof.

15. What is in contention is whether the Respondents acted appropriately, after being served, to defend the suit. It is a principle of law that a party who fails to take a step which failure leads to a default order has the obligation and onus to explain that delay or default. For this matter, as properly found by the trial court no attempt was made or preferred for the delay with the inevitable result that the judgment was regularly entered. Where the judgment is regularly entered, the plaintiff is entitled to the benefit thereof and the court will not usually set it aside unless it is satisfied that there is a triable issue which raises a prima facie defence which should go to trial. See ***Chemwolo vs Kubende [1986] eKLR 492*** where however there was no service then the defendant is entitled to setting aside as of right. Equally where there is a triable issue the defendant is entitled to setting aside but on terms.

#### **Is there a trial issue disclosed in the defence filed?**

16. For purposes of setting aside a triable issue is an issue raised by a party in his defence, however irregularly brought to the attention of the court, which prima facie, would merit some interrogation by the court by way of evidence to be tendered. It is not a defence that must succeed. On the same footing it must not be any bare or just a strenuous allegation.

17. In the defence filed and acted 25/1/2013, to be found at pages 77 & 78 of the Record of Appeal, the Respondent denies all including the occurrence of the accident the particulars of negligence, the ownership of the motor vehicle but in the alternative avers that if any such accident occurred then it was wholly contributed to by the plaintiff for the particulars of contributory negligence pleaded and particularised at paragraph 4 of the defence. To this court, this is the type of a defence that befits the description of a general and bare denial. In the court of appeal decisions in ***Magunga General Stores vs Pepco Distributors Ltd [1982 – 1988] 1 KAR 89*** and ***RAGHBIR SINGH CHATHE VS NATIONAL BANK OF KENYA LTD [1996]eKLR***, the Court of Appeal reinstated the point that a bare denial of a succinctly pleaded fact raises no triable issue meriting proceeding to trial.

18. In this case, the papers filed by the Appellant included a charge sheet, proceedings evidencing plea of guilt and conviction, a receipt for payment of fine imposed and a police abstract all showing that the 1st defendant was the registered owner or atleast the insured owner, while the 2nd defendant was the driver. Those documents prima facie begged of the defendants to give other reasons why the prima facie position taken by the Appellant was not tenable. That should have been done by availing other facts to provide some meat to the skeleton in the bare denial. That task upon the Respondents was never discharged.

19. The second point is that the defence as filed is one capable of being seen as evasive. Evasive 'because' there are two defendants sued but the statement of defence is expressed in singular. It is therefore difficult to know on whose behalf it was filed and therefore who was denying, the occurrence of the accident, ownership and alleging contributory negligence. Such a defence cannot be said to be made in good faith. It is framed in a cloudy and shadowing manner to mislead and can therefore not be deemed to be genuine. If not genuine and lacking in good faith then I doubt if it can said to raise triable issue.

20. I find that the defence raised no triable issue and although the trial court exercised an unfettered discretion, in finding that there was a triable issue raised it misdirected itself for which misdirection this court is entitled to interfere with that discretion.

21. Having found that there was no explanation for delay and further that there is no triable issue raised in the defence on record, it is not necessary to consider the prospects of prejudice to be occasioned to the party applying to set aside. It would be unjust to set aside purely to please the defendant who has shown indolence and has no genuine defence to present at trial. It would be an endeavor at waste of judicial resource in time.

22. The upshot is that this appeal succeeds and the decision of the trial court embodied in the ruling of 9/5/2014 is set aside and in its place substituted an order dismissing the application dated 10th October 2013 with costs to the appellant.

23. The appellant is equally awarded the costs of this appeal.

**Dated and delivered this 24<sup>th</sup> day of February 2017.**

**HON. P.J.O. OTIENO**

**JUDGE**