



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 52 OF 2012

HILLARY AMBWERE (ALIAS SAITOTI).....APPELLANT

VERSUS

DANSON MWAZUMBO MWASARU

JESMILY WAKESHO MWAZUMBO.....RESPONDENTS

J U D G M E N T

1. In this appeal the appellants challenges the exercise of discretion by the trial court by which the court refusal to set aside a default judgment and dismissed an application by the appellant in that regard.
2. In its decision the trial court having considered the papers filed by the parties and submissions offered delivered itself as follows:-

“However, for the interest of justice to be served, I will consider the affidavit of service vis a vis the signature appearing at the back of the summons and the signature of the defendant in the supporting affidavit. In doing so, I will warn myself that I am not an expert in signatures but a look at the signature appearing at the back of the summons and dated 6/4/2011 in comparison to that in the supporting affidavit, I do find that the same are similar, thus giving evidence to the averments in the affidavit of service dated 26/4/11 that the defendant was served.

A further reason that makes me believe that the defendant was served are the averments in the further affidavit dated 2/11/11. The defendant averred that he was not within Mombasa on 6/4/2011. He produced a receipt for travelling on 5/4/11, a receipt for Ugara opticians and a receipt for Galexon Hotel showing he took two tuskers at the said hotel on 6/4/2011.

With all due respect, I think the averments in the further affidavit are afterthoughts. If the defendant was in Nairobi on 6/4/11, nothing would have been simpler than for him to state so in his supporting affidavit. He did not state so and therefore I don't believe that he was in Nairobi.

The upshot of this ground of non service is that the same has no merit and the application must therefore fail. That aside, the defendant has filed a draft statement of defence in which he states that the plaintiff owes him Kshs.250,000/- but the defendant has not filed any counterclaim. In my view, I do not see any triable issue in the defence (draft) which would necessitate this case to go to full trial or to persuade me to set aside the Judgment herein as

the defendant clearly admits that he received the monies on behalf of the plaintiff as alleged. Accordingly, I find no merit in the application dated 28/4/11 and I dismiss it with costs”.

3. It is not in doubt that incoming to the conclusion now challenged the trial court did address its mind to the two important consideration in the matter before it; whether there was service and whether there was a triable issue disclosed in the exhibited defence.

4. This being a first appeal, the court is bound to reassess and re- appraise the entire record afresh and to come to own conclusions without necessarily setting out to dismiss or concur with the trial court.

Facts as pleaded by the parties to the application for setting aside

5. In the application to set aside and the affidavit in support thereof, the Appellant complained of lack of service and that the existence of the suit was brought to his attention by his advocates having come by a mention of the suit in suit no. 542 of 2011. He denied personal service upon him and blamed the advocate for the Respondent for the “behind the scenes actions” against him.

6. There was a further affidavit by the applicant which then introduced an assertion that on the date the summons to enter appearance was allegedly served, he was not in Mombasa as alleged by the process service but was away in Nairobi. The Appellant then exhibited a bus ticket, an opticians receipt and a captain order issued by Galaxon Hotel, Nairobi, all showing that the Appellant travelled to Nairobi by bus on 5/4/2011, visited an optician on 6/4/2011 and entertained self with two bottles of tusker on the same 6/4/2017.

7. Prima facie, the Appeal did demonstrate that on the 6/4/2011 he was not in Mombasa but Nairobi. The fact was not held back from the trial court but fully disclosed. However trial court dismissed the same as an afterthought and castigated the appellant for having failed to state so in the supporting affidavit. The trial court did so having warned itself of not being an expert in handwriting and abrogated to himself the duty to compare the signatures in the agreement founding the dispute and that allegedly acknowledging service and came to the conclusion and opinion that the same were similar and therefore that the Appellant was duly served.

8. On my part, I hold the view that the trial court fell into double error.

The court was least qualified to venture into the task of comparing signatures and making the same the basis of establishing service of process. In any event the similarity of signatures is not to say they are by one hand. It would be different if that was credible evidence that the signatures were by one hand.

9. At that juncture the court was a trier of facts. He was only expected to weigh the facts of lack of service as put forth by the applicant against the assertion of service by the process servicer and give his reasons for believing one set of facts and disbelieving another set. It was not open for the court to ground his finding on the factual situation of service based on opinion on whose signature it was. It was equally not within the courts discretion to dismiss documentary evidence showing the Appellant was some over 500 kilometres away from the location he was allegedly served without assigning any valid reason for dismissing the document.

10. A court of law retains the power to set aside any process and order reached purely on an account of default in order to do justice between the parties and that duty is only tinkered with where the court forms the opinion that the party in default has sought to delay, obstruct or defeat the course of justice. See ***Shah vs Mbogo [1967] EA 116***.

11. In the matter at hand and this being a first appeal, I have reviewed the material on record and I do not find any indication that there Appellant can be fairly accused of such a design. I would and do believe that the Appellant was away from the place he was allegedly served and therefore he was not personally served. That finding, without advancing to the consideration of the nature of the defence exhibited is enough to dispose this matter. Where there is no service, a defendant is entitled to setting aside the

default order as right and *ex debito justitiae*.

12. I find that the trial court was wholly in error when it dismissed the Appellant's application dated 28/4/2011. I set aside the order made on 20/3/2011 and in its place substitute an order allowing the application but with an order that each party bears the costs of both the application and this appeal.

Dated and delivered at **Mombasa** this **16th** day of **June 2017**.

HON. P. J. O. OTIENO

JUDGE