



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 5060 OF 1987

JULIUS K. KIERU.....PLAINTIFF

VERSUS

GILBERT G. GITACHU

D.W. KIIRU.....DEFENDANTS

RULING

1. By their Chamber Summons dated 26th May, 1999 expressed to be brought under Order XXI Rules 19 and 22; Order IX A Rule 10; Order XLIV Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act the Defendants sought the following orders:-
 - a. that there be a stay of execution of the decree and all consequential orders granted in this matter;
 - b. that the ex parte judgment entered in this matter on 3rd November, 1988 be reviewed and set aside as against the Defendants;
 - c. that the Plaintiff be ordered to serve summons to enter appearance on the Defendants; and
 - d. that the Defendants be allowed to file their defence out of time.
2. The application is premised on the grounds on the body of the application and the supporting affidavits of the Defendants sworn on 26th May, 1999. It is the Defendants' case that they have never been served with summons in respect of this suit and only learnt of its existence when they were served with Notices to Show why execution should not be levied against them. The 1st Defendant was categorical that he has never resided in Punda Milia Settlement Scheme in Makuyu Division Murang'a District where the alleged service was effected. The 2nd Defendant contended that the suit against the 1st Defendant abated following his death and that since the 1st Defendant's wife admitted on oath through an affidavit that he had no interest in the ill-fated vehicle at the time of the accident and that that fact being his defence, he ought to be given a chance to defend the suit since that fact raises a triable defence. The 2nd Defendant relied on **C.A. No. 68 of 1993, Kenya Bus Service (Mombasa) Limited v. Mohamed Ngonia Mukusi and Maina v. Muriuki (1984) KLR page 407-410**. In both cases, the court was of the opinion that courts should have a policy of deciding cases on merit rather than on technicalities.
3. The Plaintiff opposed the application vide a Replying Affidavit sworn on 18th October, 1999 in which he maintained that service was effected upon the Defendants. He stated that the Defendants were guilty of unreasonable and inordinate delay of 10 years in acting on the summons.
4. In submissions, it was argued that the requirement for granting orders of review have not been met since there is no new matter, evidence, error or mistake on the record. On this point the Plaintiff cited **Kodak Kenya Limited v. Edward Kamau Ndungi t/a Endkon Photo Studio (HCCC No.**

292 of 2004) and **Express (Kenya) Ltd v. Manji Patel (C.A. No. 158 of 2000)**. It was further submitted that the judgment of 3rd November, 1988 is non-existent and that the application is an abuse of court process for the reason that the decree sought to be reviewed is not attached. Relying on Section 35 (1) of the evidence Act, the Plaintiff argued that the affidavit of service of the process server was admissible in evidence. Further, it was argued that the Defendants having endorsed their signatures in the summons, service was considered effected in terms of Order 5 Rule 13 of the Civil Procedure Rules. Finally, the Plaintiff argued that this application is res judicata considering that similar applications dated 15th September, 1995 and 24th June, 1997 were dismissed. On res judicata the Plaintiff relied in **Ernest Mungai Kamau v. Standard Chartered Bank Limited and Another (HCCC No. 7 of 2011)** and **Uhuru Highway Development Limited v. Central Bank of Kenya & 2 Others (Civil Appeal No. 36 of 1996)** in support of his submissions. I have considered the Affidavits on record, the submissions of Counsel together with the authorities relied on.

5. The Application is basically for setting aside the ex parte judgment entered on 21st November, 1998. The discretion to setting aside a judgment entered ex parte is wide and unfettered, however that discretion must be exercised according to law. In **Mbogo v. Shah (1968) EA 93**. The said principles were applied by the Court of Appeal in **Philip Keipto Chemwolo and another v. Augustine Kubende, Civil Appeal No. 103 of 1984** it was held that:-

“But the court went on to explain (in page 76) that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given to it by the Rules. On the other hand where a regular judgment had been entered, the court would not usually set aside the judgment unless it was satisfied that there were triable issues which raise a prima facie defence which should go for trial...”

In **Baiywo v. Bach (1987) KLR 89** at page 3, Platt JA stated:

“The first ground emphasises that if there is no service then ex debito justitiae the judgment by default must be set aside. Of course, judgment by default can only be entered if there has been an initiating process concerning which the Defendant is in default...”

6. In this case the process server in his return of service stated that he served the 1st Defendant with summons on 27th January, 1988 at about 12.30 p.m. at Punda Milia Settlement Scheme in Makuyu Division, Muranga District. The facts regarding service were disputed by the Defendants. The process server was however not availed to court for cross-examination despite the Defendants applying for that fact. I am on this issue fortified by the case of **Baiywo** (supra) where it was stated:-

“...Presumption as to service - There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.”

7. In view of the foregoing I am satisfied that the qualified presumption in favour of the process server stated in Baiywo’s case has been rebutted by the Defendants. Even if I were to be found wrong on qualified presumption, it is worth noting that the return of service relied on to enter the original interlocutory judgment does not indicate that service was ever effected on the 2nd Defendant, it only addressed service on the 1st Defendant. Secondly, I have taken the liberty of reading the court record, no signed summons as alleged were annexed to the return of service for court’s benefit.
8. On the merit of the case, the 2nd Defendant stated that he had no interest in the suit motor vehicle at the material time as deponed in the 1st Defendant’s wife’s affidavit sworn on 8th June, 2004.
9. The Plaintiff contended that the order sought to be reviewed has not been annexed and that the

orders of review are not available since there is no new material or evidence intended to be introduced and no error apparent on record. A close reading of the prayers sought will show that this was not an application for review under Order 45 (formerly 44) of the Civil Procedure Rules but an application to set aside ex parte judgment. Accordingly, the principles applicable are not those for review but setting aside ex parte judgment.

10. In view of the foregoing I find merit in the application and allow it. The Defendants shall file and serve their defences within 14 days of the date of this ruling. Costs shall be in the cause.

Dated and Delivered at Nairobi this 23rd day of January, 2015

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A MABEYA

JUDGE