



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 193 OF 2007

(An appeal from the Ruling of Senior Resident Magistrate, Nakuru – T. Matheka, in SRMCC No. 2071 of 2005 delivered on the 15/10/2005)

GACHAGUA SAW MILLS LTD.....APPELLANT

VERSUS

FRANCIS OUMA OМУJIRIE.....RESPONDENT

JUDGMENT

1. The appellant herein Gachagua Sawmills Limited being dissatisfied with the Ruling of the Senior Resident Magistrate, T. Matheka delivered on the 15th October, 2005 in Nakuru Chief Magistrate's Case No. 2071 of 2005 appeals to this court and put forth 7 grounds of appeal that may be summarised as follow:

1. whether the appellant was properly served with summons to enter appearance.
2. whether the trial court cited the in law and fact in dismissing the appellant's application to set aside the ex parte judgment.

This court is urged to set aside the said ruling and allow the appeal.

2. A brief background of the suit before the trial court is that Respondent sued the Appellant for compensation in damages arising from an alleged Industrial accident whereof the respondent was injured while in the cause of this duties. Upon service of the summons and plaint upon the appellant no appearance and defence were filed. The suit proceeded ex parte and judgment was duly entered in favour of the Respondent in the sum of shs. 150,000/= in general damages and shs. 2,000/= in special damages were assessed and certified at shs. 25,185/=.

3. Upon being served with a Notice of entry of Judgment, the appellant filed an application on the 26th April, 2007 seeking to set aside the ex parte judgment on the **main ground that summons to enter appearance were not served upon the appellant completely or at all**. The application was opposed and upon interpartes hearing, the trial court dismissed the application with costs on the 15th October, 2007. Thereafter, the Appellant filed this appeal and by its application dated the 1st November, 2007 sought an order of stay of execution of the decree pending hearing and determination of the appeal against the order of dismissal of the application issued on the 15th October, 2007.

On the 17th December, 2007 the parties to this matter recorded a consent order staying execution of the trial courts decree pending hearing and determination of this appeal.

4. A careful perusal and consideration of the appellants grounds of appeal revealed two main issues that this court ought to determine:

1. Whether the appellant was properly served with the summons to enter appearance.
2. whether the trial court erred in law and fact in dismissing the appellant's application to set aside the exparte judgment on the ground of none service of the summons to enter appearance.

5. **The Appellant's case and submissions**

The appellants Advocate in his submissions argued that an exparte judgment may be set aside pursuant to the provisions of Order 10 rule 11 of the Civil Procedure Code, and upon rules of natural justice as enshrined in Article 50(1) of the Constitution. He argued that the appellant was not accorded a fair hearing. He further urged that Article 159(2) of the Constitution mandates that justice shall be administered without undue technicalities.

It was his contention that the appellant was not given a fair hearing despite its application to set aside the exparte judgment and thus the trial court condemned it unheard. Service of the summons is not denied but that the person served with the summons to enter appearance and a copy of the plaint was not an authorised person as envisaged under Order 5 rule 3 of the Civil Procedure Code, and that the trial court erred when it recognised one Rose Nyawira who received and stamped the summons, and later the Notice of Entry of Judgment as a recognised and authorised person by the appellant company under Order 9 rule 2, Civil Procedure Code without following express procedures where a party ought to be authorised by a memorandum under seal of the company. The court was thus urged to set aside the ruling, exparte judgment and decree of the trial court, and allow the appellant to file its defence.

6. **The Respondent's submissions**

The appeal is opposed and the court is urged to pronounce that the appellant was properly served with summons to enter appearance and a copy of the plaint, and that no reasons at all have been advanced to persuade the court to exercise its discretion to set aside the exparte judgment.

7. In his submissions, the Respondents Advocate, Mr. Kisila argued that no where did the appellant state that Rose Nyawira, the officer served with the summons was not an employee of the appellant and that the trial court, upon considering the affidavit of service was satisfied that proper service had been effected upon the company, in that the recipient Rose Nyawira accepted the documents, signed and stamped the same. It was his argument that the appellant never deponed or shown that its official stamp had been lost or misused. It was his submission that under Order 5 rule 3 Civil Procedure Code that service upon a corporation may be by leaving the documents at its registered place of business or by registered post to its postal address,

that service was not an issue as the documents were received and stamped at the appellants place of business, and that the trial court was satisfied that proper service was effected.

The court was urged to take note that the courts discretion is unfettered to do justice but not to aid those who wish to delay justice and in this case that the appeal was brought in bad faith as the appellant was given an opportunity to participate in the proceedings but did not rise to the occasion. He urged the court to dismiss the appeal as meritless.

8. **Analysis of submissions and determination**

This court being the first appellate court is obligated to re-evaluate the evidence, and in this case the submissions tendered before it and come up with its own findings and conclusions as stated in the case of **Selle and another -vs- Associated Motor Boat Company and Another (1968) EA 123.**

9. This court has perused the affidavit of service sworn on the 20th January 2006 by one James Gitau a

duly appointed process server. It is clear that the said summons to enter appearance and a copy of the plaint were served at the respondents place of business and received by one Rose Nyawira who signed and stamped with the stamp of the appellant on the **18th January 2006**. A careful perusal of the affidavit referred to above and filed on the 19th October, 2012 shows that, in paragraph 3, that he served the summons on the 17th January 2006 having received them for service on the 18th December 2006. On the reverse of the summons to enter appearance, the said summons were received signed and stamped by Rose Nyawira on the 18th January 2006, and there lies the problem.

10. As stated earlier, the issue of whether or not the summons were served does not arise. They were indeed served, received, signed for, and an affidavit of service file. So then, given the above scenario, were the summons properly served upon the respondent? Order 5 rule 3 of the Civil Procedure rules provides for persons who ought to be served with court process in a corporation, the Principal Secretary or Director of the company. It is not exclusive. The documents could also be left at the business premises of the corporation, or could be served by registered post at its postal address. Indeed the postal address and physical premises of the company are not disputed. In her ruling delivered on the 15th October, 2007 subject of this appeal, the trial court found, and quite correctly that proper service was effected and in exercise of her discretion, dismissed the application to set aside the *ex parte* judgment.

12. The principles upon which a court may set aside an *ex parte* judgment for lack of service of summons were laid in the case of **Shah -vs- Mbogo (1967) EA 116** thus,

“The court's discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, in advertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

The main concern of the court is to do justice to all the parties before it by exercising its unfettered discretion that ought to be exercised judiciously.

The court ought to treat each case according to its nature and conduct of the parties, prior, during and after the judgment.

The court will also consider whether the defence has an arguable defence to the claim.

12 On the matter whether the respondent has an arguable defence, I have noted that no draft defence was ever been filed or exhibited in the initial application to set aside the *ex parte* judgment in the trial court. This requirement was laid down in the case **Tree Shade Motors Ltd vs. D. T. Dobie & Another (1995-1998) EA 317**. The Court of Appeal stated ***“where a draft defence was tendered with an application to set aside a default judgment the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim, where the defendant showed a reasonable defence on merits the court could set the *ex parte* judgment aside.”***

I have noted that in this instant case, no draft defence was filed. The court is thus left to wonder in the wilderness as to what type of defence if any, the appellant may have had on the respondents claim. See the case of **TNT EXPRESS WORLDWIDE (K) LTD -VS- ELSEK & ELSEK (K) LTD (2012) KLR.**

13. The respondent submitted that all what the appellant was doing was to obstruct justice and the fair and fast completion of the case by bringing the appeal to court with unclean hands, and urged dismissal of the appeal. On the other hand, the appellant argued that, the *ex parte* judgment be set aside to allow the appellant the benefit of Article 159(2) and 50(1) of the Constitution that provides that nobody should be condemned unheard, and that justice should be administered without undue technicalities.

In the same breath, it is worth to state that justice cuts both ways and ought to be dispensed to all. Having considered all the aspects of the appeal, the submissions by counsel, the legal provisions governing the issue of service upon a corporation, the facts and all attending circumstances, I am

convinced beyond any reasonable doubt, that indeed the appellant was properly served with the summons to enter appearance and a copy of the plaint and was given an opportunity to defend the claim but failed to do so.

14. Having pronounced myself as above, the logical and legal thing to do would be to dismiss the appeal as meritless. I will not do so. I will go back to the affidavit of service by the process server namely James Gitau sworn on the 20th January 2006 and filed on the 19th October 2012. It is deponed that he served the summons to enter appearance on the 17th January 2006 – upon one Rose Nyawira at the offices of the Respondent, who accepted service, signed and stamped at the back of the original summons.

15. I have looked at the returned copy of the summons also filed on the 19th October 2012. At the back thereof, it is clearly shown, **“Received on 18th January 2006 by Rose Nyawira”**. As indicated before, there lies the problem. The summons and other documents were received and acknowledged on the 18th January 2006. The process server deponed in his affidavit of service that he effected service on the 17th January 2006 a day before the summons were served! I cannot ignore this *“technicality”*. Though Article 159 (2) of the Constitution demands that justice be dispensed and administered without undue technicalities, the issue of service of summons is core to all court process. The affidavit of service as filed is therefore defective and to be allowed to form the basis of the proceedings hereof would in effect allow an illegality to override the legal and constitutional provisions of the law in regard to dispensation of justice to all in equal measure. That answers ground 2 of the grounds of appeal as I framed them, whether the trial court erred in law and fact in dismissing the appellants application to set aside the exparte judgment.

16 Having pronounced myself as above the appeal is allowed in the following terms:

- (a) The ruling issued on the 15th October 2005 by the SRM T. Matheka in Nakuru SRM case No. 2071 of 2005 is hereby set aside and the appellant is allowed to file its defence within 30 days in the said suit, and the same shall proceed for trial in the Principal Magistrate's Court at Nakuru.
- (b) The decretal sum of Kshs. 179,000/= deposited in an interest earning account in the joint names of the parties' advocates shall remain so deposited pending the hearing and determination of the case.
- (c) Each party shall bear its own costs of the appeal.

Orders accordingly.

Dated, signed and delivered at Nakuru this 21st day of May 2015.

JANET MULWA

JUDGE

In the presence of:

Katithi holding brief for the Appellant

Karanja for Kisila - for Respondent

Court clerk - Lina