



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 10 OF 2009

PETER CHEGE KIIRU..... APPELLANT

VERSUS

CHARLES MULANDA.....RESPONDENT

*(An appeal from the Ruling and/or Order of Honourable Mr. Baraza Resident Magistrate's
Nakuru CMCC No. 1413 delivered on the 13th January 2009)*

JUDGEMENT

Introduction

1. The Plaintiff in the lower court and now the appellant sued the Respondent as the driver of motor vehicle Registration Number KAH 453L and Daniel K. Muthee, now deceased, as the owner, following a Traffic Road Accident where the Respondent, a pedestrian was knocked down and sustained injuries.

Interlocutory judgment against the Defendants was entered by the trial court upon an affidavit of service sworn and filed on the 13th July 2006 by one Martin, a court process server; that the 1st Defendant, Daniel K. Muthee was served with the summons to enter Appearance on the 27th June 2006 who accepted the same on his behalf and of his driver the 2nd Defendant but declined to sign.

2. The court heard the plaintiff's case and an Exparte Judgment was entered against the Defendants jointly and severally in the sum of KShs.60,000/= in general damages and KShs.2,500/= in special damages on the 2nd October 2007. The Respondent in execution of the decree attached goods the property of one Jane Njeri Mwangi, the wife of the 1st defendant who filed objection proceedings claiming that she was not a party to the suit hence the attachment was unlawful.

3. By a Chambers Summons dated 31st March 2008 the Respondent together with the Objector urged the court to set aside the Exparte judgment and stay the execution proceedings. The application was supported by the affidavit of Jane Njeri Mwangi, who essentially was not a party to the case. The Appellant objected to the application citing the fact that the deponent of the supporting affidavit Jane Njeri Mwangi was not a party to the case hence none suited. However, before the application could be heard, the applicants sought leave of court to file a supplementary affidavit. This time round, the supplementary affidavit was sworn by the 2nd Defendant(now the Appellant) on the 22nd April 2008. In the affidavit, he deponed that the 1st Defendant, Daniel K. Muthee, the owner of the Motor vehicle alleged to have caused the accident died on the 22nd November 2005, long before the date he was alleged to have been served with the summons to enter appearance as appears in the affidavit of service, the basis on which the interlocutory judgment was entered. The death certificate was exhibited as evidence of

death.

4. The trial Magistrate on the 13th January 2009 delivered his ruling, and dismissed the Application on the grounds that:

1. The said Jane Njeri Mwangi, wife of the 1st defendant, deceased, who swore the Supporting Affidavit to the application for orders of stay of execution and setting aside the Exparte Judgment was non suited as she had not been substituted as a defendant to replace the 1st defendant even though she was the Administrator of his estate.

2. That the court declined to set aside the Exparte Judgment, but recalled the Warrants of Attachment and Sale against the 1st defendant acknowledging that the 1st defendant had died before the alleged service of summons to enter appearance.

The Appellant was dissatisfied with the court's ruling and lodged this appeal and preferred seven grounds, that can be summarised into three:

Ground of Appeal(reformulated)

(1) The learned Magistrate erred in fact and law by holding that the appellant ought to have substituted the 1st defendant before embarking on the application to set aside.

(2) The learned Magistrate erred in law and fact in failing to consider the supplementary affidavit sworn by the appellant.

(3) The learned trial Magistrate erred by law in fact in failing to find that the case in the lower court abated as against the 1st Defendant who died on the 22nd December 2007.

This court is urged to set aside the trial **court's ruling, dated 13th January 2009** and further set aside the Exparte Judgment and all consequential orders.

Issues for determination

5. This court has considered submissions by counsel and authorities tendered. The issues that are for determination, in my view are three:

1. Whether the Defendants, now the Appellants were properly served with the summons to enter appearance and the plaint as alleged.

2. Whether the suit against the 1st Defendant abated on the 22nd November 2006.

3. Whether the Exparte judgment entered against the Defendants on the 13th January 2009 and all consequential orders ought to be set aside.

Appellant's case and submissions

6. The Appellant's case is that summons to enter appearance were not served upon the defendants on the 27th June 2006 as alleged and stated in the Affidavit of Service filed on the 13th July 2006. That the interlocutory judgment entered on the strength of the said affidavit of service was irregular, in that the 1st Defendant who was said to have been served with the summons and accepted for himself and the 2nd Defendant had died on the 22nd November 2005, long before the alleged service upon him.

It was submitted that the 1st defendant's case abated 12 months from the date of his death and no substitution was ever made in the case and thus there is no case in force against the 1st defendant the same

having abated. The court has been urged that the supplementary affidavit sworn by the 2nd Defendant in his application in the lower court for stay of execution and setting aside of the Exparte Judgment was proper and that the trial court ought to have considered it to enable it set aside the Exparte judgment. For this proposition, he relied on the case of **Tatewa Road Contractors Ltd -vs- Kenya National Highways Authority (2014) KLR** where the court in allowing the application relied on a supplementary affidavit, the supporting affidavit having been found to have been irregular, and that as a party to the case it was proper for him to swear the supplementary affidavit.

Respondents case and submissions

7. The Respondent in opposing the appeal stated that there is no competent Appeal before the court, on the ground that the firm of E.M. Juma and company Advocates who appeared for the objector in the trial court are irregularly on record in the Appeal and for that reason, there is no competent appeal on record. That the objector was not a party in the lower court's case.

Analysis and findings

8. I have looked at the Notice of Appointment of Advocates by the Objector dated 11th June 2009.

E.M. Juma & Company Advocates were appointed by the Objector. The application for stay of execution against her (Objector) was allowed by the court, but the Exparte judgment was not set aside. The court did not address itself on the matter of the Exparte Judgment.

On the 31st March 2008, E.M. Juma & Company Advocates filed a Notice of Appointment of Advocates for the Defendants. From then, the said firm actively participated in the proceedings leading to the Ruling under attack in this Appeal.

The application dated 31st March 2008, was filed by E.M. Juma & Company Advocates for the 2nd Defendant and the Objector. On the same date, the said firm filed a Notice of Appointment of Advocates for the Defendants. They were properly on record for the 2nd Defendant and the objector.

I therefore fail to understand the logic of the Respondents submission on this aspect, unless we are reading from different scripts!

It is this court's finding that the two defendants and objector were properly represented by the firm of E.M Juma & Company Advocates.

9. In further objection to the Appeal, the Respondent submits there was undue delay in its prosecution, that the certified copy of the order appealed against was not filed, that directions were not taken nor appeal admitted for hearing as required under order 42 rule II of Civil Procedure Code hence the appeal ought to be summarily dismissed, and summarises by submitting that the decretal sum of **KShs.62,500/=** is not a huge sum so urges for the dismissal of the appeal with punitive costs. The court records show that the Appeal was admitted for hearing on the 19th April 2013, directions were taken by consent of the parties on the 6th March 2015. A copy of the certified order appealed from and dated 31st March 2008 is filed herewith.

The Appeal is therefore competently before the court.

10. I have considered the appeal and objections thereto. As found by the trial court, it is clear that summons to enter appearance in the suit were not served upon the Defendants. I however fail to understand why after the court found so, it did make a finding on the Exparte Judgment as it had been urged to set it aside. There was on record a Supplementary Affidavit by the 2nd Defendant that the trial Magistrate relied on to recall the Warrants of Attachment and Sale against the 1st defendant who he found was dead before the alleged service was effected.

The logical thing would have been for the trial court to set aside the entire proceedings and the Exparte judgment and allow the 1st defendant to defend the suit.

In the case **Lee Mwathi Kimani -vs- NSSF (2014) e KLR** and followed in **Grace Warimu Mungai -vs- Catherine N. Muya (2014) e KLR**

It was held:

“Service of summons in my view is a vital step in initiating litigation and thus until the summons are served upon the defendants there is no valid invitation to defend the suit.

Besides the plaintiff initiating and commencing the suit ought to be prepared and abide by the rules of engagement and the service of summons on the defendant is one of the primary requirements.”

11. The Respondent in his submissions did not address himself to that very obvious mischief and falsehoods by his process server that he served the summons to enter appearance upon the 1st Defendant.

In my view, and following in line with the court's findings in the above cases, the defendants were not invited to participate in the suit.

It follows that, the Exparte proceedings before the trial court were all irregular. The Exparte Judgment and the execution proceedings were irregular and unlawful and ought to be set aside.

12. The 1st defendant died on the 22nd November 2005. Under Order 24 rule 4(1), (2) of the Civil Procedure Rules the suit against the 1st Defendant abated one year after his death that is, on the 22nd November 2006. The Objector who is the legal administrator of the 1st defendant's estate was not substituted in his place. As such, there is no case against the 1st Defendant – and it was proper for the trial court to recall the warrants of attachment against the objector, who was admittedly not a party in the suit. I find nothing irregular about that as that was the right thing that the court ought to have done in the circumstances.

The plaintiff's case is still alive against the 2nd Defendant now the Appellant. The summons to enter appearance having not been served upon him, he was not accorded an opportunity to defend himself. As stated above, there being no reason at all to retain the Exparte judgment on record is set aside.

Conclusion

Consequently, the court makes the following orders:

1. That the Appeal is merited and is hereby allowed.
2. The trial court's Ruling dated on the 13th January 2009, and the Exparte Judgment delivered on 2nd October 2007 and all consequential orders are set aside.
3. The lower court case is remitted back to the trial court for hearing and determination on merit.
4. The Appellant is at liberty to file his statement of defence within 30 days of this judgment in the lower court case.
5. The Respondent shall bear costs of this appeal.

Dated, signed and delivered in open court this 23rd day of July 2015

JANET MULWA

JUDGE

In the presence of:

Ms Magan for Mr. Githiru for Respondent

Ms. Kenrugo for Juma for Appellant

Court clerk - Linah