



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 23 OF 2014

(An appeal from the Ruling of the Senior Principal Magistrate, Embu in CMCC No. 191 of 2013 dated 26/5/2014)

ALEX MUTURI MURIITHI.....APPELLANT

VERSUS

STANLEY MUROGI 1ST RESPONDENT

STANLEY BAIMPUI.....2ND RESPONDENT

MARTIN KAMBUTHU THURANIRA.....3RD RESPONDENT

J U D G M E N T

This is an appeal against the ruling of by Embu Senior Principal Magistrate delivered on 26/5/2014 for the application dated 5/2/2014 seeking to set aside ex parte judgment entered on 5/12/2013. The application was allowed on the grounds that the respondents were not properly served with summons to enter appearance. The respondents were allowed to defend the suit.

The appellant was dissatisfied with the ruling thereby lodging this appeal which is supported by the following grounds:-

1. *That the magistrate erred in failing to acknowledge that allegations of non service by the respondents was not proved.*
2. *The magistrate erred in failing to consider the detailed submissions of the appellant which proved that the respondents had been served.*
3. *The magistrate failed to consider that there were two affidavits by the 1st and 2nd respondents sworn on 19/8/2013 and 11/2/2014 that the 1st and 2nd respondents were one and the same person and could therefore not deny service.*
4. *That the respondents failed to prove on a balance of probability that they had not been served with summons to enter appearance.*
5. *That the magistrate misdirected himself by failing to appreciate that only the 2nd respondent had not been served and as a result failed to uphold the ex parte judgment against the 1st and 3rd respondents.*
6. *That magistrate failed to consider that the appellant had complied with all the provisions of the law and that the respondents submissions on non-service were flimsy and insufficient for basis for the court to exercise its discretion.*
7. *The defence was a mere denial of undisputed facts such as ownership of the motor vehicle and negligence on the part of the 3rd respondent.*
8. *The magistrate failed to give reasons for his decision for favour of the respondent in the*

application dated 5/2/2014.

9. *That the magistrate failed to give throw away costs to the appellant.*

This application was disposed of by way of written submissions filed by the counsels on record for the parties. Messrs J.K.N. Kamunyori & Company represented the appellant while Messrs Kairo & McCourt appeared for the respondents.

The appellant submits that the application for setting aside judgment was supported by two affidavits of the process server. The appellant filed his replying affidavit opposing the application. However, it was argued that the respondents did not file a reply to the said affidavit meaning that they admitted the contents.

The salient features in the replying affidavit were that the insurance company was served with a statutory notice while the 2nd respondent was served with summons to enter appearance. The appellant clarified that the reputed owner of the motor vehicle was Stanly Murogi while the copy of records indicated that the registered owner was Baimpul Stanley. The deponent of the 2nd affidavit did not deny that he was known as Stanley Baimpui. It is only the 2nd respondent who alleges not to have been served in his own affidavit. The other 3 respondents sued together with him did not deny service.

The appellant further submitted that the magistrate failed to consider that he had fully complied with the requirements of the law as to service. The draft defence was a mere denial as was admitted by the magistrate in his ruling. It was wrong for the magistrate to deny the appellant throw away costs.

Appellant cited the following cases to support his argument:-

1. ***DOLPINE PALS LIMITED VS NASHIBH TRADING COMPANY LTD & OTHERS (Civil Application No. Nairobi 141 of 2001)*** where it was held that it was upon the applicant to explain to satisfaction of the court that discretion should be exercised in his favour.
2. ***ARUN BHATT VS PRAMILA AGRAWAL & ANOTHER (Civil Application No. Nairobi 251 of 2011)*** where the court held that a party who seeks to have discretion exercised in his favour must show some basis upon which the court is to exercise the discretion.

It was the respondents submission that the main issue in this appeal is whether an appellate court can interfere with the discretion of the lower court in setting aside judgment and allowing the respondents to file defence. For the court to interfere with the discretion, it must be satisfied that the lower court misdirected itself in some matter thereby arriving at a wrong conclusion. The respondents relied on the case of ***MBOGO & ANOTHER VS SHAH [1968] EA 93.***

The respondents argue that in this case the magistrate exercised his discretion judiciously and the same should not be interfered with. The 2nd respondent denied that he was ever served with summons to enter appearance. The appellant did not substantiate the allegations that he served the respondents. The process server who allegedly effected service was not cross examined. It was further argued that there is no evidence that the 1st and 2nd respondents are one and the same person. It is not in dispute when the respondent learnt of the judgment; they moved swiftly to have it set aside and presented their defence. Although the court noted that the defence was flimsy, it raised triable issues.

The duty of the first appellate court was explained in the case of ***MWASOKONI VS KENYA BUS SERVICE LIMITED [1985] KLR 931*** where the court held that the appellate court has power to examine and re-evaluate the evidence on a first appeal where it becomes necessary.

It is important that this court examines the relevant provisions regarding this subject. The law applicable in setting aside judgment is contained in Order 10 Rule 11 of the Civil Procedure Rules which provide:-

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just”.

The principles of setting aside judgment were explained in the Court of Appeal case of **MAINA VS MUGIRIA [1983] KLR 78** where it was held that:-

1. *There is no limit or restriction of the judge's discretion except that it should be based on such terms that may be just because the main concern of the court is to do justice to the parties.*
2. *This discretion is intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake, but is not meant to assist someone who has deliberately sought to obstruct justice.*
3. *The power to set aside does not cease to apply because a decree has been extracted.*
4. *Some of the factors to consider in an application to set aside are facts and circumstances both prior and subsequent and all the respective merits of the parties together with any other material factor which would or might have not have been presented had the judgment not been ex parte and whether or not it is reasonable to set aside the judgment.*

Order 5 of the Civil Procedure Rules lace down the requirement of serving summons as follows:-

7. *Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.*

13. *Where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgement of service on the original summons.*

15. (1) *The serving officer in all cases in which summons has been served under any of the foregoing rules of this order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No. 4 of Appendix A with such variations as circumstances may require.*

The respondents in their application before the magistrate dated 5/2/2014, sought for orders to set aside judgment entered on 5/12/2013 on grounds that they were not served with summons to enter appearance and pleadings until after the judgment was delivered. The applicants also argued that they had good defence which raised triable issues. The application was supported by the affidavit of one Olive Njuguna the legal officer at Directline Assurance Company Limited. She acknowledged receipt of a letter from a 3rd party claiming that judgment had been entered against the respondents where upon the company instructed its advocates to pursue the matter. The 2nd respondent also swore an affidavit denying service of summons to enter appearance. He also stated that he was never served with notice for entry of judgment.

The appellant opposed the application relying on grounds of opposition filed on 12/2/2014 and on a replying affidavit sworn by the appellant. It was deponed that the respondents were served with summons to enter appearance on 5/8/2013 but failed to respond to the suit. The appellant challenged the draft defence on grounds that it contained denials of un rebuttable facts. It was further stated that the insurance company was notified of the suit and served with the statutory notice to sue. The company replied the letter of the appellants advocate and requested for further information which was provided. It was stated that the allegation that the insurance was unaware of the matter was untrue.

It was the appellant's contention that there was evidence that Stanley Murogi whose name appeared in the police abstract and Stanley Baimpui who appeared as the registered owner of the vehicle in the copy of records was one and the same person. He was served with summons which he accepted and was served on behalf of his driver the 3rd respondent and an affidavit of service of the process server filed. The appellant argues that he had no obligation to serve the respondents with notices of the proceedings of the suit from inception to conclusion.

The process server filed two affidavits sworn on the 19/8/2013 and on 11/2/2014 in which he explained

how he traced the 1st/2nd respondent at Kangeta market in Maua area of Meru County. He said that he was assisted by one Titus Mugendi to trace the 1st/2nd respondent whom he confirmed was known as Stanly Murogi alias Stanley Baimpui.

It is a requirement of Order 5(7) that where there are more than one defendants, the service of summons shall be made on each defendant. In this case the process server admits that he served only one defendant namely Stanley Murogi alias Stanley Baimpui whom he said was one and the same person. It is not in dispute that the 3rd respondent who was the driver of motor vehicle Registration No. KBL 580 N was not served. Order 5 Rule 13 requires that summons be served personally to an agent or other person on his behalf. The agent or other person shall be required to endorse an acknowledgment of service. In the case of the 3rd respondent the process server did not procure the required acknowledgement.

It is a requirement under Rule 15(1) that the name and address of the person identifying the person served and witnessing the delivery or tender of summons be included in the affidavit of the process server. Neither of the two affidavits sworn by the process server gave the name and address of Titus Mugendi who he said assisted him to trace the 1st/2nd respondent.

The identity of the person who informed the process server that Stanley Murogi and Stanley Baimpui was one and the same person. This clarification was necessary for identification of the persons being served. It was also important to give the registration number of the saloon car in which the 1st/2nd respondent was seated at the time of service.

It is not in dispute that the 1st/2nd respondent did not sign the summons after being served. The failure to procure the signature of the person being served and the lack of important details in the mode and manner of service in the affidavit raised doubts as to whether service was effected.

The defence of the 1st/2nd respondent may not have been good or may not have raised triable issues as noted by the magistrate. The magistrate referred to the defence as flimsy in his ruling but noted that it was still a defence. Although the court did not dwell on the submissions of the parties in detail, it noted that the respondent should be given a chance to be heard. This was a recognition that it is a rule of natural justice that no one should be condemned unheard. It was held in the case of **MAINA MUGIRIA (supra)** that there are no limits or restrictions on the judge's discretion to set aside judgment except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

The discretion of the court is designed to avoid injustice and hardship resulting from inadvertence or excusable mistakes but not to assist a person who has deliberately sought to obstruct justice or cause delay. I find that the magistrate's discretion to set aside *ex parte* judgment was exercised judicially. The appellant has not satisfied the court that the magistrate misdirected himself in some matters and arrived at a wrong decision, or was clearly wrong in exercise of his discretion.

However, the appellant was entitled to throw away costs having obtained the judgment. For this reason, this court awards the appellant KShs.20,000/= as throw away costs.

I find no basis to interfere with the decision of the magistrate to set aside judgment.

Each party shall meet their costs of this application.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF SEPTEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr Kamunyori for Appellant