



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 143 OF 2011

DANIEL NAMAYI AMBUNYAAPPELLANT

VERSUS

JUMA IDDI HAMISIRESPONDENT

JUDGMENT

1. The appeal herein arose from the dismissal of the Appellant's Notice of Motion dated and eventually filed in court on 05/08/2011. The said application sought the following orders:

- 1. This application be certified urgent for the reasons set out in the certificate filed herewith.***
- 2. There be an order of stay of execution or further execution herein and/or stay of enforcement of the judgment and decree herein while pending the hearing and determination of this application inter-parties.***
- 3. The interim order of stay in terms of prayers 2 above do issue in the first instance.***
- 4. The ex-parte judgment entered herein against the 3rd Defendant/Applicant in default of appearance and defence and all consequential proceedings be set aside unconditionally.***
- 5. Upon the grant of prayers 4 foregoing, leave be granted to the 3rd Defendant's to file its defence and the annexed draft defence deemed duly filed subject only to the payment of the court filling fees.***
- 6. That the attachment of the 3rd Defendant's/Applicant's property be raised and/or waived and the attached property be released to the 3rd Defendant'/Applicant***
- 7. Costs of this application be provided for."***

2. As the said application was mainly based on alleged non-service of the Summons to enter appearance, Plaintiff and Verifying Affidavit upon the Appellant herein, the Respondent herein in opposition to the same filed a Replying Affidavit which he swore on 10/08/2011.

3. The application was orally heard and by a ruling delivered on 02/09/2011, the same was dismissed hence this appeal.

4. From the record, the Appellant was granted an unconditional stay pending the determination of this

appeal.

5. The events leading to the appeal in this matter are fairly straight forward. Upon instituting **Kakamega Chief Magistrate's Court Civil Suit No. 316 of 2009** (hereinafter referred to as "***the suit***") on 25/09/2009, the Appellant through his then Advocates requested for an interlocutory judgment on 22/06/2010 which request was on the strength of the Affidavit of Service sworn by one ROBERT OUMA MBEJA, a private process server on 29/03/2010.

6. An interlocutory judgment was entered on 01/07/2010 followed by formal proof hearing which culminated with a judgment against the Appellant herein on 27/05/2011 in which the Appellant was found wholly liable and a total of Kshs. 565,425/= awarded on damages.

7. As execution proceedings ensued against the Appellant herein, the application dated 05/08/2011 was filed which eventually led to this appeal.

8. The appellant raised five grounds of appeal which he tailored as under:-

“1. THAT the Learned Magistrate erred in law in treating the Appellant's application as though it was conclusive rebuttal of the Plaintiff's claim. When the same consisted of mere denial and thereby reached erroneous conclusion in law.

2. THAT the learned Trial Magistrate erred in law and fact in failing to consider the Appellant's evidence in it's entirety.

3. THAT the learned Trial Magistrate erred in law and fact when he did not consider that the Appellant had proved his case on a balance of probability.

4. THAT the learned Magistrate erred in law by failing to decide on all the issues that had been raised in the matter and his failure to do so has led to miscarriage of justice.

5. THAT the learned Trial Magistrate erred in law by failing to observe that the Appellant had a strong case with trible issues which could only be proved by way of adducing evidence, which the appellant was not given the opportunity.”

9. The Appellant then went ahead and prayed for two orders as follows:-

“(a) That the ruling dated 2nd September, 2011 be set aside and the suit be reinstated back.

(b) That the appeal be allowed with costs to the appellant.”

10. When the appeal came up for directions upon admission, parties agreed to and filed written submissions thereby giving way to this judgment.

11. As this is an appellate court of first instance, the role of the Court is well settled. This Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni -versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga -versus- Kiruga & Another (1988) KLR 348.**

12. It is therefore upon this Court on being guided by the record and the law to ascertain in the first instance, if at all the exparte judgment on record was regular an account of proper service of the pleadings. If this court comes to the finding that the said exparte judgment on record is irregular, then it will have to set it aside *ex debito justitiae* that is as of right. Lord Diplock of the Privy Council on an appeal in **Grafton Isaacs -vs- Robertson (1985) 1 AC 97** had the following to say on the issue of setting

aside orders *ex debito justitiae*:-

“There is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside *ex-debito justitiae* in the exercise of inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with the proceedings to set aside orders for irregularity and give to the judge a discretion as to this order he will make. The judges that have made distinction between the two types of order have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex-debito justitiae* the right to have it set aside, SAVE THAT SPECIFICALLY IT INCLUDES ORDERS THAT HAVE BEEN OBTAINED in breach of RULES OF NATURAL JUSTICE.”

13. In the event this court finds that the Appellant was properly served with the Court process and that the judgment was properly entered, then the discretion of this court will hence come to play as so provided for in **Order 10 Rule 11 of the Civil Procedure Rules 2010** which state as follows:-

“11. 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.”

14. In exercising the said discretion, this Court ought to endeavour and ultimately do justice to the parties depending on the particular circumstances of this case. In the event a Court comes to the considered opinion that exercising its discretion in favour of the Applicant will not serve any meaningful purpose in the matter, then justice demands that the regular judgment be allowed to stand.

15. Way back in 1974, Duffus, P in the case of **Patel-vs- E. A. Cargo Handling Services Ltd (1974) EA 75** at page 76 authoritatively stated as follows:-

“... I also agree with this broad statement of the principles to be followed. The main concern of court is to do justice to the parties; and the court will not impose conditions on itself to fetter the wide discretion given it by this rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as SHERIDAN, J put it “ has a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

16. In therefore examining whether or not the judgment in issue was regularly entered, we need to interrogate the said Affidavit of Service of one ROBERT OUMA MBEJA sworn on 29/03/2010. To that end, I will reproduce the same as under:-

“I, ROBERT OUMA MBEJA of P. O. Box 340, Kakamega do hereby make oath and state as follows:-

1. THAT I am a private process server of this Honourable Court thus authorized to serve court civil processes.

2. THAT on the 5th day of November, 2009 I received copies of summons to enter appearance, plaint and verifying affidavit in duplicate from the firm of M/S Fwaya, Nandwa & Company Advocates with instructions to effect service upon Daniel Namayi Ambunya the 3rd defendant herein.

3. THAT on the same day, I proceeded to Butere Boys High School, where the 3rd defendant herein works as a bursar and upon finding him in person and explaining to him the purposes of my visit I served him with a copy of each of the said documents.

4. **THAT he accepted service but declined to sign.**

5. **THAT I return the said original copies as duly served.**

6. **THAT all the above stated facts are true to the best of my knowledge, information and belief.** (emphasis added).

17. The service of the court process is generally guided by **Order 5 of the Civil Procedure Rules. Rule 8** thereof states as follows;-

“8(1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.

(2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.”

18. Upon such service, the officer so serving is required to prepare an Affidavit of Service pursuant to **Order 5 Rule 15 of the Civil Procedure Rules, 2010.** The said rule states as follows:-

“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.

(2) Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month's imprisonment or both.”

19. **Form 4 in Appendix A** of the Civil Procedure Rules, 2010 is a sample of an Affidavit of Service which the serving officer ought to generally prepare upon service. It is partly tailored as follows

‘(1) On, 20 at(time)

I served the summons in this case on at (place) by tendering a copy thereof to him/her and requiring a signature on the original. He/She signed/refused to sign the summons. He/she was personally known to me/was identified to me by ---- and admitted that he was the defendant.’ (emphasis added).

20. Back to this Affidavit of Service, the same reveals that the process server indeed received the court process from the firm of M/s Fwaya, Nandwa & Company Advocates on 05/11/2009 with instructions to effect service upon Daniel Namayi Ambunya, the then said third Defendant. He then proceeded to so effect service on him at Butere Boys High School where the said third Defendant worked as a Bursar **“upon finding him in person and explaining to him the purposes of his visit.”**

21. The said affidavit does not disclose if the process server knew the said Daniel Namayi Ambunya prior to the service. As the instructions given to the process server did not disclose where the party to be served was (paragraph 2 thereof), this Court remains in a dilemma as to how the process server knew that the said third defendant worked at Butere Boys High School and as a Bursar.

22. The affidavit further falls short of disclosing how the process server identified the person who was to be served and if that alleged person admitted that he was the defendant. Could the court process have been served upon another person than Daniel Namayi Ambunya? Such a possibility cannot be said to be

far-fetched.

23. On the examination of the said affidavit of service, this court is of the considered view that the same falls short of confirming with certainty that indeed Daniel Namayi Ambunya was properly served with the court process as so required in law. That then adds credence to the Appellant's contention that he only came to know of the matter when his property was proclaimed and attached by the Auctioneers.

The foregone anomalies were even replicated by one ATHANAS ARTHUR MUSAMBAI in the Affidavit of Service he swore on 23/07/2011 wherein it is alleged that a notice of entry of judgment was served upon the said Daniel Namayi Ambunya.

24. It was also submitted that the *ex parte* judgment ought not to be set aside since the Appellant did not call the process server for examination in court. This court differs with the Respondent on that submission since under Order 5 Rule 16 of the Civil Procedure Rules 2010 that requirement is not mandatory. To me, if the Affidavit of Service has such glaring discrepancies so as for the court to be doubtful as to whether appropriate service was effected upon the defendant like in this case, the requirement to examine the process server may not be of any essence since the process server is to satisfy the court, before the entry of the *ex parte* judgment that proper service was effected. The need to examine the process server may arise where the Affidavit of service discloses proper service on one hand and the Defendant denies such averments on the other hand. That is not the case in this matter.

25. This court therefore finds that the *ex parte* judgment was irregular and that it ought to be set aside *ex debito justitiae* and that the Learned Magistrate came to an erroneous finding in concluding that the Appellant was properly served with the court process. I therefore set-aside the ruling made on 02/09/2011.

26. In the end the following orders do hereby issue:-

a) The appeal be and is hereby allowed;

b) The Ruling delivered on 02/09/2011 in Kakamega CMCC No. 316 of 2009 is hereby set-aside as well as the interlocutory judgment entered against the Appellant herein on 01/07/2010 and the ex parte judgment delivered on 27/05/2011.

c) The Appellant shall file and serve his Statement of Defence within 10 days of today and in view of the age of the suit, the same shall be heard on priority basis.

d) Costs of this appeal shall be borne by the Respondent.

DATED and SIGNED at MIGORI this 30th day of October, 2015.

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at KAKAMEGA this 30th day of November, 2015

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JUDGE