



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 124 of 2004

KENYA LITERATURE BUREAU.....APPELLANT

VERSUS

LIVINGSTONE W. JOEL.....RESPONDENT

J U D G M E N T

Kenya Literature Bureau hereinafter referred to as the Appellant is dissatisfied with the ruling of the Principal Magistrate delivered in Nairobi CMCC. No. 5767 of 2003 in which the trial magistrate dismissed the appellant's application seeking inter alia to set aside the judgment which had been entered against the appellant.

By a plaint filed on 16th June, 2003, Livingston W. Joel hereinafter referred to as the respondent had filed a suit against the appellant seeking general damages for wrongful termination of employment and breach of contract.

On the 23rd July, 2003 the respondent applied for interlocutory judgment against the appellant in default of filing a defence. In support of the request for judgment, the respondent filed an affidavit of service sworn by a process server Bernard Mubinja Wamalwa on the 16th July, 2003. According to the affidavit of service, the appellant was served on the 17th June, 2003 with summons to enter appearance and plaint. The documents were left at the appellant's premises with one Anne Mwanzia a personal assistant to the managing director of the appellant to whom, the process server had been referred.

On the 25th July, 2003 interlocutory judgment was entered in favour of the respondent. Subsequently the suit proceeded to formal proof on the 26th August, 2003. In his evidence the respondent who was the only witness explained that he was employed by the appellant in 1988 and worked for 14 years and 3 months. On 1st March, 2001 he was arrested following allegations of theft. He was subsequently charged and tried before the Chief Magistrate's court at Makadara with the offence of stealing by servant contrary to section 281 of the Penal Code it being alleged that he stole Ksh. 278,685/- the property of the appellant which came to his possession by virtue of his employment.

The trial ended in the respondent's favour as he was acquitted of the charge. Notwithstanding the acquittal of the respondent, the appellant terminated the respondent's employment. The respondent maintained that his termination was wrongful as the proper procedure was not followed. For instance he was not summoned before the board nor was there any recommendation from his Department for such termination.

In her judgment, the trial magistrate found that the respondent was entitled to general damages for breach of contract. The trial magistrate taking into account the circumstances in which the respondent lost his employment, the respondent's age, salary at the time of employment, and the anxiety caused to him, awarded the respondent Ksh.740,000/- as general damages for breach of contract.

Subsequently, by application dated 2nd October, 2003 the appellant sought orders under Order 1XA rules 10 and 11, Order XX1 rule 22 of the Civil procedure rules and section 3A of the Civil Procedure Act for setting aside of the interlocutory judgment as well as the final judgment entered on 4th September 2003.

The appellant also sought to be allowed to defend the suit. The application was supported by grounds stated on the body of the applications and the affidavit of Mathews Adams Karauri the appellant's then managing director. It was contended that the plaint and summons to enter appearance were not served properly on the appellant as required under Order V Rule 2 of the Civil Procedure Rules. It was maintained that Anne Mwanzia upon whom service was allegedly effected is not a personal assistant to the appellant's managing director but is a secretary in the office. It was maintained that the plaint and the summons to enter appearance were never brought to the managing director's attention.

Further, it was contended that the appellant had a good defence to the respondent's claim as the respondent's services were lawfully terminated and he was paid all his dues in accordance with the terms and conditions of his employment.

In her ruling delivered on 20th February 2004, the trial magistrate found that the appellant was properly served through its authorised officers, and that it failed to enter appearance or file any defence and therefore the *ex-parte* judgment entered against it was lawfully and regularly entered.

The trial magistrate further found the defence did not disclose triable issues and was nothing more than a mere denial. She therefore dismissed the appellant's application.

Being aggrieved the appellant brought this appeal raising 6 issues in its memorandum of appeal as follows:

- 1) THAT the learned trial magistrate erred and misdirected herself in not considering that the mode of service of summons was not proper service as per the provisions of the law.
- 2) THAT the learned trial Magistrate erred and misdirected herself in not considering that the Appellant had a good defence that raised triable issues.
- 3) THAT the learned trial Magistrate erred and misdirected herself in failing to give due weight to the appellant's submissions.
- 4) THAT the learned trial Magistrate erred and misdirected herself in failing to exercise her discretion in favour of the Appellant when the circumstances so dictated.
- 5) THAT the learned trial Magistrate erred in law and in fact in failing to set aside the Judgment entered in default of appearance and defence.
- 6) THAT the learned trial Magistrate erred in law and in fact in failing to consider the rules of natural justice and fairness and consequently grant the orders sought.

In support of the appeal, counsel for the appellant submitted that Anne Mwanzia upon whom service of the plaint and summons was effected was not one of the officers identified under Order V Rule 2 of the Civil Procedure Rules as a person upon whom service could be effected on behalf of a company. It was therefore maintained that the interlocutory judgment entered against the appellant on the basis of that service was improper.

It was further maintained that the trial magistrate failed to consider the appellants line of defence and the

annexures which were availed in support thereof. It was contended that the appellant had a good defence which the trial magistrate ought to have given the appellant an opportunity to ventilate. Referring to *Republic vs. the Attorney General & Another Civil Appeal No. 8 of 2002* wherein the Court of Appeal opined that a prima facie case does not and cannot mean a case that will in the end succeed, and *HCCC.157 of 2004 (Nakuru) Isaac Moracha Ogwacho vs. Dennis Willy Michuki and another*. It was submitted, that the appellants proposed defence disclosed some triable issues and raised a prima facie defence.

Finally it was submitted that no formula was used to arrive at the award of Ksh. 740,000/- made by the trial magistrate as general damages.

For the respondent it was maintained that service of summons was properly effected upon the appellant as the managing directors' personal assistant is a principal officer of the company. It was maintained that the defence put forward by the appellant did not raise any triable issue. Relying on *Alice Karuga Wanyoike vs. British American Insurance Co.* It was submitted that a mere denial is not sufficient to show that there is a good defence. It was maintained that contrary to the appellant's denials, the respondent had proved that his services were unlawfully terminated and that he was not paid his dues. The court was urged not to interfere with the exercise of the trial magistrate's discretion as the same was exercised judiciously.

I have carefully reconsidered the pleadings and the record of the proceedings in the lower court, as well as the rival submissions made before me.

Order V Rule 2 states as follows:

“Subject to any other written law, where the suit is against a corporation the summons may be served-

- a) On the secretary, director or other principal officer of the corporation; or
- b) If the process server is unable to find any of the officers of the corporation mentioned in rule 2 (a) by leaving it at the registered office of the corporation or sending it by prepaid registered post to the registered postal address of the corporation, or if there is no registered office and no registered postal address of the corporation by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation.”

In this case, it is evident from the affidavit of service sworn by Bernard Mbinja Wamalwa that although service of summons is purported to have been effected on the appellant's managing director, service was not effected upon him directly but through one Anne Mwanzia. However, the process server has clearly explained the circumstances in which he left the documents with Anne Mwanzia. The Process Server has identified one Halima Mugani a receptionist who referred her to Anne Mwanzia and introduced her as the personal assistant to the managing director authorised to receive documents on the managing director's behalf. Although it is not denied that both Halima Mugani and Anne Mwanzia are officers of the appellant, neither Halima Mugani nor Anne Mwanzia has sworn any affidavit disputing the averments of the Process Server.

I am satisfied and do find that service of summons and plaint was properly effected on the appellant through the managing director who accepted the documents through Anne Mwanzia. Neither a memorandum of appearance nor a defence having been filed, the *ex parte* Judgment entered against the appellant was regular and proper.

However, in considering the application to set aside the *ex parte* judgment the trial magistrate did not exercise her discretion judiciously as she misdirected herself in considering the draft defence availed by the appellant contending that it was a mere denial not raising any triable issues. However, the draft statement of defence shows that the appellant did not merely deny the respondent's claim but maintained that the respondent's services were lawfully terminated in accordance with terms and conditions of service on account of misconduct. The appellant also maintained in the defence that the respondent's claim for breach of contract was baseless as he was paid his terminal benefits. Contrary to the trial

magistrate's finding the defence was not a mere denial but was a plausible defence which raised triable issues. Notwithstanding the default by the appellant to file a defence within time, the trial magistrate was wrong to deny the appellant an opportunity to ventilate that defence so that it could be adjudicated upon on merit. I find that this is an appropriate case in which this court should interfere with the exercise of the trial magistrate discretion. Accordingly, I set aside the ruling of the trial magistrate made on the 20th February 2004, and allow the appellants chamber summons dated 2nd October 2003. I set aside the interlocutory judgment entered against the appellant on 29th July, 2003 as well as the judgment entered on 4th September, 2003. I order that the appellant shall file and serve its defence in the lower court within 15 days from the date hereof. The appellant shall further pay the costs of this appeal and all thrown away costs to the respondent. Those shall be the orders of this court.

Dated and delivered this 14th day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Miss Omwakwe for the respondent