REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 122 of 2003

KENYA NATIONAL UNIONS OF TEACHERS, MERU BRANCH…..…..APPELLANT

V E R S U S

MICHAEL KUNGU KIGIA…….……RESPONDENT

JUDGMENT

1. The Appeal herein is from the Ruling of Hon. N.B.K.W. Nyamategandah, S.R.M. delivered on 14.10.2003 in which the learned magistrate declined to set aside ex-parte judgment entered against the Appellant in CMCC No. 153/97 (Meru) The grounds of Appeal are that;

i) The learned Magistrate erred in law and fact in failing to find that the appellant had not been served with summons to enter appearance.

ii) The learned Magistrate erred in finding that the appellant was not entitled to leave to file a defence to the plaintiff's claim.

iii) The learned Magistrate erred in failing to find that the application to set aside the ex-parte judgment was properly lodged.

iv) The learned Magistrate erred in disregarding the affidavits filed in support of the application to set aside the ex-parte judgment.

2. What happened in the lower court is that when the suit was instituted by the Respondent, he named Meru Teachers House Ltd as the Defendant. Later by leave of court, the plaint was amended and one Moses Waromowele was named as the Defendant and as trustee of "**Kenya National Union of Teachers Meru Branch"** The address for service was given (for the Defendant) as:

1. C/O Gatari Ringera Company

Advocates

P.O. Box 2915

MERU.

2. Mukira Mbaya & Company

Advocates

P.O. Box 1873

MERU.

3. The Dispute was one of alleged breach of a tenancy agreement by the Respondent which led the Appellant to close the rented premises and the Respondent then filed the suit seeking inter-alia an order for reopening of the rented premises and damages.

4. The dispute itself is not very relevant to the matters at hand but that background is nonetheless still important. The summons to enter appearance were issued in any event and on 8.4.2002, Joash Ondieki Ontita Advocate swore an Affidavit that he sent the same together with the plaint to the "**Managing Director, Kenya National Union of Teachers House Meru through Post Office number 1980 Meru by means of registered post**".

5. On 24.7.2002 M/s Gatari Ringera and Co. Advocates filed a Notice of Appointment of Advocate stating that the firm had been appointed "**by the defendant to act for them in the suit."** This Notice of Appointment was in any event filed out of time as on 5.7.2002, the Deputy Registrar had entered interlocutory judgment in default of "**appearance**" "**and or defence"** and ordered that the matter should proceed by way of formal proof.

6. On 4.7.2002, the case was fixed for formal proof on 17.7.2002 and was partly heard on that day. It was then fixed for hearing on 24.7.2002 and as shown above, it was on that day that M/S Gatari Ringera and Co Advocates entered appearance. It is also shown on record that on that day Mr. Ringera was in court and stated as follows:-

"**I apply for adjournment to enable me apply for judgment to be set aside. I and my client became aware of this matter today and I filed my notice of appointment"**

7. Interestingly another advocate, Mr. Seneti also addressed the court and said:

"**I am for the defendant."**

8. To explain the appearance of the two advocates, Mr. Ondieki for the plaintiff said;

"The position was that the counsel Mr. Ringera and Mukira Mbaya were acting for the Meru Teachers House. When we applied to have the same moved to K.N.U.T…. they then filed a bill of costs then. Unless they are saying that we have been appointed by K.N.U.T so they should tell us if they have been appointed and if they are not on record then we proceed."

9. Mr. Ringera replied that he had been instructed to "act for the current defendant" and he was given 7 days to file an Application to set aside the interlocutory judgment. He did not do so and on 1.8.2002 the plaintiff fixed the case for further hearing on 15.8.2002. On that day the matter did not proceed to hearing and was finally heard on 11.2.2003 when the plaintiff gave his evidence. In the meantime Mr. Ringera Advocate was pursuing his Bill of Costs filed on 24.9.1998 as his clerk, one Nkatha appeared in the registry on 20.3.2003 and fixed the same for hearing on 7.5.2003. On that day, Mr. Ringera appeared to tax his Bill of costs and said nothing of the events of 24.7.2002 nor the fact that judgment had been entered against his client on 28.2.2003.

10. Similarly Mr. Ringera appeared on 14.5.2003 to tax his 1998 bill of costs but only filed his clients Application for setting aside interlocutory judgment on 23.5.2003 and Ruling on it delivered on 14.10.2003.

11. Why have I taken time to detail out these events that took place before the lower court? Because in the Appeal now before me, Ground 4 thereof is a complaint that the learned trial magistrate failed to take into account affidavits filed in support of the Application filed on 23.5.2003 and the Ruling which led to the appeal. In an affidavit sworn on 20.5.2003 Cyrus Muriuki Executive Secretary of the Defendant

Union deponed at paragraphs 3, 4, and 5 thereof that the Defendant Union had never been served with Summons to enter appearance or any other court process relating to the suit.

12. To address this complaint it must be remembered that when Mr. Gatari Ringera appeared in court on 24.7.2002 having properly filed his Notice of Appointment, he categorically stated that he was acting for Kenya National Union of Teachers (K.N.U.T) the "current defendant" as opposed to Meru Teachers House, the former defendant since removed from the suit and on whose behalf he was spiritedly pursuing costs arising out of that fact. Between 24.7.2002 and 23.5.2003 although given a week to file an Application to set aside Interlocutory Judgment the said advocate did nothing to comply with that order but instead pursued costs! There is however, a letter dated 21.5.2006 addressed to the said advocate by the Appellant, K.N.U.T instructing him to appear in court the next day and represent the Union in the case and to "enter appearance" on its behalf. The import of this letter is that Mr.Ringera had not entered appearance on behalf of K.N.U.T. which cannot be true and that K.N.U.T. was not aware of the suit prior to that date. Mr. Ringera on this point said this when arguing the Appeal;

" I appeared in court on 24.7.2002 but the record would show that I appeared on being appointed on the same day. I only appeared for Meru Teachers House Ltd and not the Appellant in this case."

13. The learned advocate went on to state that;

"I was only instructed to appear for the Appellant on 21.5.2003 and that is when I was properly on record for the Appellant. Prior to that I had no instructions."

14. Obviously Mr. Ringera is being less than candid. I have reproduced what is on record as having transpired on 24.7.2002 and clearly he entered appearance for and on behalf of K.N.U.T and he cannot be heard to say otherwise. KNUT was the "current defendant "as opposed to Meru House Ltd, "the former defendant".

15. Having so said, the only other matter left to address in the Appeal is the question of service of the Original Summons to enter appearance. I have reproduced the manner of service by Mr.Ondieki. Mr.Ringera now argues that such service was irregular and outside the idea of proper service as envisaged by Orders IV and V of the Civil Procedure Rules. That in any event the summons had expired at the time of service and no extension of validity was made under Order V Rule 32 of the Civil Procedure Rules.

16. In any event, that the service ought to have made personally to an officer of the Union and since the whole process of service was irregular, then judgment ought to be set aside as a matter of right. He relied on the decision in Gandhi Brothers vs. H.K. Njage T/A H.K. Enterprises HCCC 1330/2001 (Milimani Commercial Courts) to support his submissions on this point.

17. Under Order V Rule 2 of the Civil Procedure Rules, service on a body corporate or a corporation may be made by tendering the summons;

"(a) On the secretary, director or other principal officer of he 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.

18. I understand the Appellant to be a body corporate and is therefore such an entity as has legal personality i.e. a juristic person. If it be so, then service at the first instance ought to have been by service its secretary or other principal officer. It is not denied that service was in fact effected under Order V Rule 2(b) i.e. by prepaid registered post without any attempt being made at personal service. Mr. Ringera says that for that reason alone, the ex-parte judgment later entered ought to be set aside ex debito Justifiae. I quite agree with that submission and I understand that to be the law (see Yalwala Indumuli

and another (1989) KLR 374) where it was held that all proceedings subsequent to irregular service are rendered null and void ab initio). I also understand the argument that proceedings therefore must be set aside ex debito justitiae and I agree with Ringera J. when he explained that a Judgment consequent upon irregular service must be set aside not in exercise of Judicial discretion "but as a matter of judicial duty in order to uphold the integrity of the Judicial Process itself" [(Gandhi Brothers (supra)]

19. Having so said however, I have taken pains to show that Mr. Ringera for whatever reason behaved on 24.7.2002 as if he had instruction to appear and that he had instructions. He has since changed tune but I have seen nothing on the part of the Appellant as Defendant that summons were properly served on it. It may well be that it received the summons and instructed Mr. Ringera to appear its behalf but who by subsequent proceedings completely bungled in his representation and is now trying to put his ills to his clients right. I do not know but clearly I cannot without more being shown to me and having explained the law as I understand it, comfortably and by the actions of Mr. Ringera alone find that the Appellant was truly aware of the suit.

20. When setting aside an ex-parte judgment I understand the exercise of that power to be one to be so exercised so that every party has the right to be heard and to have its day in court. I also understand that it should not be exercised to assist a party bent on delay or evasion of clear responsibility, or a party acting to obstruct the cause of justice. Mr. Ringera Advocate may be guilty of certain acts which do not necessarily translate into omissions by his clients. As Apaloo J.A. said in Philip Chemorolo and Another vs Augustine Kubende [1982 –1988] I KAR 1036, "blunders will continue to be made…and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits". I agree completely and I have as I said earlier seen that the dispute in the earlier case involves rent. Let each party have his day in court but there is the question of inconvenience caused to the Respondent who has over the years struggled to enforce a judgment he considers properly obtained. As Apaloo J.A. again said in the Phillip Chemwolo Case,

" I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline"

21. I shall take the same approach and with all the misgivings I have expressed in this judgment, I still see good sense in letting the doors of justice remain open for each of the parties to this suit.

22. In the event, I shall allow the Appeal, set aside all proceedings and consequential judgment in the suit before the lower court and grant leave to the Appellant to file its Defence to the suit within 21 days of this judgment.

23. To whom should the burden of costs be directed? Clearly the Appellant has not been shown to have acted in bad faith, indolently or otherwise. Mr. Ringera Advocate has been. I see no reason to visit his inactions on his client. Just as he chased costs instead of his clients interests, time for him to pay the costs of those actions has come.

24. The costs of this Appeal which I assess at 25,000/- based on his bill of costs dated 24.9.1998 shall be paid by Mr. Ringera personally to the Respondent.

25. Orders accordingly.

Dated read and delivered at Meru this 2nd day August 2006

ISAAC LENAOLA

JUDGE

In the presence of

Mr. Ringera Advocate for the Appellant

Mr. Gichunge Advocate for the Respondent

ISAAC LENAOLA

JUDGE