REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO. 51 OF 1998

(FROM THE ORIGINAL CIVIL SUIT NO.578 OF 1998)

ZEDEKIAH KHATE SILENGE…….....…….APPELLANT

-VERSUS

SIMON BIKETI WEKESA……..RESPONDENT

JUDGEMENT

This is an appeal against an order of the Chief Magistrate, Bungoma, dated 14th August, 1998 dismissing an application to set aside an ex parte judgement and decree under O.IXA Rules 10 and 11 of the Civil Procedure Rules.

By a plaint filed on 21st August, 1996 the respondent sued the appellant and 2 others for refund of dowry under customary law said to consist 4 head of cattle, 1 goat and shs.1,600/- all assessed in the plaint to be worth shs.50,800/- as the appellants daughter or sister had deserted the respondents home and/or divorced him. On 30th August, 1996, a process server received summons predated 19th August, 1996 for service on the appellant and the co-defendants. On 2nd September, 1996, the process server went to a place called Kibingei Daniel Market along Kimilili Bungoma road. He turned left upto the appellants home which he alleged to be ½ Kilometre behind the shops. He met an old man who introduced himself as Zedekia Silenge and served him with the summons at 8.30 a.m. The appellant is said to have complained that it was the co-defendants who were required to pay the suit amounts and admitted the claim. He also promised to have a discussion with the co-defendants to file a defence or admission. The person also accepted service by signing on the original summons. However on looking at the returned copy, there was no signature save an impression of a print to which letter “T.P” are added which could have been made by anybody else.

No appearance or defence was filed to the suit. Consequently, purporting to act on the above information contained in affidavit of service filed on 28th October, 1996 and request for judgement filed on the same date, the court entered an ex parte judgement for the respondent against the appellant and the co-defendants as prayed in the plaint. On 8th January 1997, the respondent moved to execute the decree by sale of movable properties. The warrant of attachment was however returned unexecuted on 21st October, 1997 as the appellant and 2 others allegedly had no sufficient attachable moveable goods. On 22nd April 1998, the respondent then moved to execute the decree by sale of the appellants land. Consequently, the auctioneer published hand bills advertising the sale of the appellants land, which bills are said to have come to the appellants notice on 17th June, 1998 leading to the present application which was filed on 30th June, 1998, in which he states that he never received summons and that he had been bed ridden since 1984 and has hearing problems. He also admitted that he took no action after the first attachment as he

was bed ridden and his adult children were away in Nairobi and came to assist him on reading he advertisement for sale of his land. He further stated that the subject of the suit was the daughter of his brother and was not as such liable for the refund of dowry as he was not the one who received the dowry. As such he had a defence to the respondents suit. All these contentions were not rebutted by the respondent by an affidavit or otherwise.

In reply to the appellants' affidavit in the lower court, the respondent filed grounds of opposition. The respondents counsel, inter alia, contended that the summons were duly served and that the appellant did not take any step on same since the date of service in October, 1996 until 30th June, 1998, a period of nearly 2 years the application was therefore intended, only to delay the ends of justice.

At the hearing of this appeal as during the hearing of the application in the lower court, the counsel for the appellant, contended that the process server had served the appellant at his home at Daniel's Market, while his home is at Namawanga Market and was sickly, deaf and blind. Consequently he could not have met the process server on the way. He also submitted that the appellant had a good defence to the suit as he was not the father of the respondent's wife nor was dowry paid to him. The lower court should have therefore exercised its discretion in favour of the appellant as the claim was for refund dowry which is unliquidated sum and should have been formally proved.

On the other hand, the respondents counsel submitted that the amount was liquidated as a specific amount was claimed by the respondent.

Hence, therefore, there was no need for a formal proof and the judgement was therefore regular. He also submitted that the appellant had been properly served and as no appearance or defence had been entered or filed by the appellant, the judgement entered against him was regular. As the application for setting aside had been made 2 years later, the delay was not excusable and as such the lower court was entitled to refuse the application as the delay was intended to defeat the course of justice.

The questions for serious consideration and decision herein are whether the summons herein were served and/or whether the claim was liquidated so as to enable the court to enter an ex parte judgement against the appellant and his co-defendants without a formal proof. If the answer to the above is affirmative, then the final issue to be determined is whether the lower court rightly applied its discretion.

On the first issue by O. V Rules 8 and 15 (1) of the Civil Procedure Rules, where there are more than one defendants, service of summons shall be made on each defendant. After service, the serving officer shall complete and sign an affidavit of service and return in court together with the original summons in form 8 of Appendix A with such variations, as circumstances may require. In form 8, of Appendix A, the process server is required to disclose if the party served was personally known to him and if not so, should give the name of the person who identified him to him and whether or not the person admitted to be the defendant.

In the instant case, the affidavit of service does not say how he came to know the home of the defendant. Indeed he refers to the place of service as being Daniels' Market, while the plaint and the applicant state that his residence is at a place called Namawanga Market, which is different from Daniel's Market. As if that is not enough, he also does not append the identification mark of the appellant to the affidavit of service. In view of the fact that the appellant's deposition that he was bed ridden at the time of the alleged service, it is doubtful if the process server ever served the right person. The court was therefore in error in acting on such defective affidavit of service.

On the second issue namely whether the judgement was regularly entered against the defendants without a formal proof, O.IX Rules 3 and 5 of the Civil Procedure Rules allows entry of judgement where the claim is for a liquidated amount. If the claim is for the value of goods, only interlocutory judgement can be entered followed by assessment by the court of the value. As the claim herein was for return of goods only an interlocutory judgment should hae been entered against the appellant followed by a formal proof. No final judgement should have been entered against him and co-defendants who had not even been served. The judgement therein was therefore irregularly entered against the appellant and the co-

defendants.

In considering applications to set aside ex parte orders it is now settled law that if it is irregularly entered then it has to be set aside unconditionally ex debito justitae. However, if the judgement is regularly obtained, then the circumstances before and after the entry of judgment have to be considered in addition to whether or not there is a triable defence put forward by the applicant.

Instantly, it is stated that the appellant was bed ridden and could not have been served on the way as alleged by the process server. The subject of the suit was not his daughter nor was he the recipient of the dowry and may not therefore be liable under customary law to refund the dowry demanded by the respondent. If the ex parte judgment is therefore set aside, the court would be able to determine the triable issues raised by the appellant as the respondent did not show any prejudice which could not be compensated by an award of costs. Mere delay cannot in my view defeat the course of justice as there was no evidence of intention to obstruct the course of justice.

In view of the above, I find that in refusing the application to set aside the ex-parte judgement, the learned Chief Magistrate concentrated solely upon the poverty of the appellant excuse to the exclusion of the real issue which he should have had regard to, namely whether the judgement was regular and if the setting aside would serve any useful purpose. As I have found that the judgement was irregular and that the setting aside would enable the court to do justice to the warring parties, I allow this appeal and set aside the Learned Magistrate's order refusing to set aside the ex parte judgment and decree against the appellant and the co-accused. I remit the suit to the court for retrial. The appellant and the codefendants to be reserved with the summons and to have 15 days to enter appearances and file their defences from the dates of service and entry of appearance.

The costs of the application to set aside and the costs of this appeal shall be costs in the cause. Orders accordingly.

Dated at Bungoma this12th day of March, 2002.

G.P. Mbito

JUDGE