REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 272 OF 1999

JOHNSON MBUGUA ……..……. APPELLANT

VERSUS

ELIZABETH RUGURU & 5 OTHERS ….....…….. RESPONDENTS

J U D G E M E N T

On 9th June, 1999 the appellant filed an application in the Principal Magistrates Court Nairobi to apply, amongst others, for the setting aside of a Judgement entered in default of appearance in Civil Case No.2688 of 1999.

The suit related to a verbal contract of employment between the appellant and the respondents on various dates between 1st March, 1990 to 15th February, 1999, termination of such employment and underpayment of terminal benefits.

The exparte judgement was entered on 7th May, 1999 and the basis of the application for setting aside was that the appellant applicant had not been served with summons to enter appearance.

That he had only been informed by his son on 10th May, 1999 that some court documents had been at his hotel on 4th May, 1999 and that he requested him to take those documents to his advocate to deal.

But that when the advocate went to file a defence on 3rd June, 1999 she learned that judgement had been entered on 7th May, 1999, after summons had been served on 20th April, 1999.

That this is why the application was made on 9th June, 1999 for setting aside the exparte judgement.

The replying affidavits stated that since the applicant was served with summons for entry of appearance and defence and failed to act the ex parte judgement should be upheld.

The application was placed before a Senior Principal Magistrate (J.M. Karanja) for hearing on 6th July, 1999 when counsel for the applicant and the respondents in person appeared for submissions thereon.

The applicants' counsel denied that summons were served upon the applicants' son on 20th April, 1999 urging that if this was the applicant himself who was at his hotel on that date would have received them.

According to her, the summons were left at the hotel on 20.4.99, no proper judgement could have been entered on 7th May, 1999.

She said that the defence which was annexed to the application had raised triable issues as there was a dispute over the amount for which the exparte judgement had been entered for the respondents and that there was a meritorious counter claim against the said respondents.

The respondents opposed the application and relied on the averments in the replying affidavits.

The learned Magistrate wrote and delivered his ruling on 8th July, 1999 dismissing the application on grounds that the service of summons upon the applicant's son was not improper, that there was no evidence to rebuild that of the process server that these summons were served on 20th April, 1999 that the applicant failed or neglected to file appearance and/or defence as required by law and that the respondents had any right to apply for an ex parte judgement.

According to the Magistrate the defence annexed to the affidavit was incapable of raising serious triable issues.

This is why this appeal was filed in this court on 9th July, 1999 in a memorandum of appeal which listed thirteen (13) grounds of appeal.

These grounds dwelt mainly on wrong exercise of the discretion by the Magistrate in refusing to set aside the exparte judgement when the draft defence raised triable issues.

The appeal file was placed before this court on 24th June, 2002 for submissions when counsel for both parties appeared and in deed submitted.

According to counsel for the appellant, since dates of service were disputed by the appellant and the process server, the latter should have been summoned for cross examination.

In her submission if service was effected on 4.5.99, then entry of exparte judgement on 7.5.99 was premature.

And that since amount claimed was in the nature of special damages, there was need for evidence to strictly prove this damage and that this was a case where evidence formed proof should have been called.

She prayed for the appeal to be allowed and the lower court judgement set aside so as to have the case heard on merit.

Counsel for the respondents opposed the appeal. She stated that as at the time of submitting on the appeal there was no defence on record, hence there was no denial or reply to the respondents' claim.

According to counsel, the appeal court can only interfere with the exercise of discretion of the lower court if it considered a matter which it ought not to have considered or arrived at a wrong decision or was clearly wrong in the exercise of its discretion.

This counsel talked of the order of Judge Amin made on 23.6.00 releasing some money amounting to Kshs.90,000/= to the respondents leaving only Kshs.120,000/= with account and that this court should not sit as an appellate court over Judge Amin's order and so forth. She prayed for the dismissal of this appeal.

I have heard and recorded all these submissions and also perused through the record of proceedings and the ruling.

In matters relating to service of summons to a litigant, the rules insist the litigant should be served personally and it is only after attempts to find him/her for personal service fails that the process server should resort to serving them on an adult member of his family who resides with him.

In the application subject to this appeal, there are on averments of the process servers attempt to find and serve the appellant personally before resorting to saving his son.

There is even no averment that this son resides with the appellant.

In fact it was on the first visit to the hotel by the process server that he found and served the appellants' son, and it appears he did not even bother finding out from the said son where his father could be found for personal service of these summons.

In my view this was clearly against the rules and was an improper service.

In any event, I have always held the view that a defence which raises a counter claim should be looked at critically and that it should not be ignored as the counter claim itself is a triable issue.

At that stage one cannot tell if it is or not alieu to the claim. Then there are issues raised about the claim being in the nature of special damages which requires specific pleading and specific pleadings and specific proof or whether judgement should have been entered therein as a liquidated damage without holding or conducting formal proof.

All these issues were raised in the defence and were quite substantial and not to be rejected at face value.

If the learned Magistrate went deeper into these matters he would not have taken them as simple as he did.

They required a little bit of scrutiny and should have necessitated the appellant being given an opportunity to be heard fully in the case.

I allow this appeal, set aside the lower court order and direct that the appellant be given 14 days from to day to formally file his draft defence in the lower court and that the case be heard in the Magistrates court on merit.

Costs of this appeal and the lower court, either agreed or taxed shall be paid to the respondent in any event.

Delivered this 10th day of July, 2002.

D.K.S AGANYANYA

JUDGE