Cefa Enterprises v Kimiyu & 3 others (Civil Appeal 150 of 2018)
[2025] KEHC 5039 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5039 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 150 OF 2018

TW OUYA, J

APRIL 24, 2025

BETWEEN

CEFA ENTERPRISES ..... APPELLANT

AND

BENEDICT KYALO KIMIYU ..... 1ST RESPONDENT

BMG HOLDINGS LIMITED ..... 2ND RESPONDENT

MULATI SABABI ..... 3RD RESPONDENT

BENEDICT MBALU ..... 4TH RESPONDENT

(Being an appeal from the order, Ruling and decision of Hon. Ocharo PM delivered on 24th November 2016, 25th May 2018, 20th November 2018 and 9th January 2018 in Machakos CC No. 534 of 2015)

JUDGMENT

Background

1. This matter emanates from the order, ruling and decisions of Hon. Ocharo PM delivered on 24th November 2016, 25th May 2018, 20th November 2018 and 9th January 2018 in Machakos HCC No. 534 of 2015. The suit was initiated in the lower court by Benedict Kyalo Kimuyu(4th respondent herein) against BMG Holdings, Mulati Sababi and Benedict Mbalu(1st, 2nd and 3rd Respondents, respectively herein) and CEFA Enterprises (the Appellant herein).

2. The matter arose from an accident on or about 8th November 2014 at College Road Way off Machakos Teachers Training College involving the 1st Respondent (Pedestrian) and motor cycle registration no. KMCZ 543J owned by the 3rd respondent and controlled and/or managed by the 4th respondent, his

employee and agent. It was pleaded that as a result of the said accident, the 1st Respondent sustained severe injuries and incurred loss and damage.

3. On 24th November 2016 an ex-parte interlocutory judgement was entered against the appellant herein and a finding of liability and quantum of damages and costs in excess of Kshs. 1,115,000 was made. The Appellant learnt of the ex-parte interlocutory judgement on 25th May 2018 and filed a notice of motion dated 17th August 2018 seeking for orders that:

    a. That this application be certified as urgent and be heard ex-parte in the first instance and determined and/or dispensed with on a priority basis.

    b. That this Honourable Court be pleased to grant a stay of execution of the Judgement, decree and orders issued on the 25th day of May 2028 pending the hearing and determination of this Application.

    c. That this Honourable Court be pleased to grant an order for the 1st Defendant/Respondent to call avail the process server, who allegedly served the 3rd Party Notice upon the 3rd Party/ Applicant for cross-examination by counsel for the 3rd Party/Applicant.

    d. That this Honourable Court be pleased to grant an order of temporary injunction barring the Plaintiff/Respondent wither by himself, his servants, agents and/or assigns from selling, alienating, attaching and disposing of the 3rd Party/Applicant's property in any manner whatsoever pending the hearing and determination of this application

4. The Application was canvassed by way of written submissions and on 6th November 2018 the trial court made a ruling that:

    " The affidavit sworn by one Mr. Kelvin Balongo on 8th August 2016 is very clear as to how service upon the 3rd party was effected". The appellant contends that the trial court did not deal substantively with the issue of service by cross examining the process server

5. The Appellant then filed a notice of motion application dated 7th November 2018 anchored on Order 5 of the Civil Procedure Rules that as a 3rd party he had a good defence which raised weighty issues for determination by the court and should be granted an opportunity to be heard. He sought for orders that:

    a. That due to the urgency of this application, service thereof in the first instance be dispensed with.

    b. That pending the hearing and determination of this application there be a stay of execution and/or further execution and/or proceedings

    c. That the Ruling and Order of the Learned Magistrate's of 20th November, 2018 be set aside and in place thereof a stay of execution be entered pending the hearing and determination of the Application dated 7th November,2018 before the Chief Magistrates Court at Machakos.

    d. That costs for this application be provided for.

    e. That the Court grants such other orders as it may deem fit in the circumstances.

6. On 9th January, 2019 the court ruled that the issue of service was exhaustively dealt with in court's ruling on 6th November 2018 so that any prayers on this would be res judicata. It is the appellant's position that the court did not even peruse his defence and consequently disallowed the application.

7. The instant appeal/application has raised a number of issues for this court's consideration. Notably, Counsel for the respondent did not file submissions.

Whether the Appellant (3rd Party) was properly served with Third Party Notice.

8. The Appellant contends that the summons to enter appearance were not properly served on him as the 3rd Party. He invokes articles 25(c), 50(1) of *the constitution* and order 5 Rule 1.6 of the Civil Procedure and argues that the very fact that he was not properly served with 3rd Party notice and that he was unaware of the proceedings gives him a right to be heard on appeal.

9. He re-asserts that in a situation of a disputed service, the civil procedure requires that the process server ought to have been summoned for cross examination and that the trial court's ruling dated 6th November 2018 confirms that the trial court did not have the said process server examined either by himself or another court but solely based its ruling on the process server's affidavit even though the appellant invoked Order 5 rule 16 of the Civil Procedure Rules. He submits that the issue of service ought to have been dealt with by the trial court in the interest of natural justice.

10. To buttress his argument, counsel has quoted and relied on several authorities such as Shadrack Arap Baiywo v Bodi Bach (1987)eklr where the court of appeal held inter alia that where the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service. He quoted also Benjamin Musau v Magdalene Wanjiku Thumbi (2008) eKLR, Stanlely Mangeli v Phoenix of E. A. Assurance Co Ltd (2020)eklr, INM V JMN (2022)eklr supporting the same argument.

Whether it is just to set aside the ex-parte interlocutory judgement, proceedings and final judgement to allow the defendant to file his defence and counterclaim.

11. Counsel submits that this court has discretion to set aside or vary the ex-parte judgement entered against him in the interest of substantive justice. He relies on the principle of natural justice enshrined in article 25(c) of *the Constitution* envisaging that every person is accorded the right to be heard and; article 50(1) on the right to a fair and public hearing before an impartial court, tribunal or body: section 3A of the *civil Procedure Act* on the inherent powers of the court to make such orders as are necessary to meet the ends of justice or to prevent an abuse of the process of the court; Orders 1 Rule 19 and Order 10 Rule 11 that court may vary or set aside any judgement upon such terms as are just; among others.

12. Counsel argues that the appellant has a valid defence raising triable issues and points out that there is an obvious contest as to which party was the owner of the subject motor vehicle as at the time of the accident and that the appellant was an agent of the 2nd respondent herein. He cites among others, the authority of Justice R. Nyakundi in Stefano Ucceli v Hans Jurgen Langer & Another (2021)eklr where it was held that:

> " There are ample authorities to the effect that, notwithstanding regularity of it, a court may set aside an ex-parte judgement if a defendant shows that that he has a reasonable defence on merits...."

Whether the appellant's application dated 7th November 2018 was res judicata

13. The Appellant argues that contrary to the trial court finding that the issue of service was exhaustively dealt with, the issue of service was not substantively interrogated by the trial court as the process server was not present in court for cross examination as was prayed for by the appellant in his application dated 17th August 2018. That the purpose of summoning the process server to appear in court for cross

examination was to ascertain the veracity of his averment on his affidavit as per order 5 rule 16. He argues that non-compliance with this provision left the issue of service still pending.

Whether the relief sought by the appellant should be granted in the interest of substantive justice

14. The appellant contends that the trial court having failed to comply with order 5 rule 16 of the Civil procedure rules did not act in the interest of substantive justice and that his draft defence and counterclaim raising triable issues, he should be accorded a right to be heard as per articles 25(c) , 50(1) if *the Constitution* and orders 10 rule 11 and12 Rule 7of the Civil Procedure Rules. He relies on among others, the case of Shah Mbogo & Another (1967)6. A U7 where the Court of Appeal in east Africa held that:

> " Applying the principle that courts discretion to set aside an ex-parte judgement is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error"

Analysis

15. The court has perused and considered the original record, the record of appeal and the material canvassed in respect of the appeal alongside the submissions by the appellant. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See Kenya Ports Authority v Kusthon (Kenya) Limited (2000) 2EA 212.

16. From the record, the point of contention revolves around the interlocutory judgement of the trial court delivered on 25th May 2018. The Appellant made an application dated 17th August 2018 for stay of execution premised on the grounds inter- alia that as a third party, he was unaware of the proceedings until he was served with notice of entry of judgement dated 18th June 2018. This application was dismissed vide ruling dated 6th November 2018 on the basis that the Applicant(appellant herein) had failed to demonstrate satisfactorily that it was not served with third party notice. On 7th November 2018, the Appellant filed another notice of motion application for orders inter-alia, stay of execution, setting aside of interlocutory judgement and leave to file its defence. This application failed as the court declined to grant the orders citing that the court had pronounced itself on the matter on 6th November 2018 and that the applicant ought to have sought a review of the court's orders under order 45 instead of order 40 of the civil procedure rules which deals with injunctions and was not relevant in this case. The court also pointed out that the appellant did not raise the issue that he had a defence which raised triable issues and sought setting aside of the judgement as a major ground in the first application but raised it in the latter application which is tantamount to an abuse of the process of the court.

17. From the above, this court has identified as issues for determination; Whether the trial court dealt exhaustively with the issue of service of third-party notice, whether the appeal and orders sought for are merited and who should bear the costs of this appeal.

18. The appellant's argument in the first notice of motion was that he was not served with the third-party notice and was therefore not aware of the proceedings. The trial, court in the first application held that:

> " On the third issue as to whether the 3rd party was served. The affidavit of service sworn by one Kelvin Balongo on 8/8/2016 is very clear as to how service upon the 3rd party was effected. There is no fact on the said affidavit that is vague. In any event, the facts deposed in the 1st defendants replying affidavit was not rebutted by the 3rd party so that it remains that service was effected.

Secondly, the 3rd party could have raised this as a preliminary point before having the application heard.

This is normally done by way of a notice of intention to cross examined which shall be served upon the process server.

The 3rd party appears to have overlooked this process which this court cannot deal with at this stage. In any event, I am satisfied that the 3rd party was properly notified of these proceedings.

Finally, the applicant seeks stay of execution of this court's judgement pending the hearing and determination of the application. What then after the application is determined and the court finds that it is proper to stay the execution of judgement. Stay of execution of a regularly obtained judgment is not a matter of course. Particularly in a case where a defendant is alleging non liability, there ought to be a draft defence to persuade this court that should the court stay execution leave to file or defend suit should be granted on triable issues."

19. The Appellant has submitted heavily on the need for the trial court to have summoned the process server for cross-examination. In Manair Limited V. Fleet Logistics Limited & 3 others (Environment & Land case 34 of 2018) [2024] KEELC 6226 (KLR) (Ruling) Angote J stated:

> " The law provides for the cross-examination of a process server where service of summons is disputed. Order 5, rule 16 of the Civil Procedure Rules provides thus:
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> > "On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."

20. It is my observation that this requirement is not clothed in mandatory terms. In any case, the Appellant has not laid any basis for such a dispute. The Appellant only expressed shock about the notice of entry of judgement dated 18th June 2018 but did not state any aspect of the process server's affidavit that was vague or any factual aspect that was to be challenged. In effect, the process server's averments that the appellant was duly served with the third-party notice remain unchallenged. Further, this court had the occasion to peruse the affidavit by Geoffrey Kamau, the accountant for the Ist Defendant, sworn on 27th August 2018 alongside the two affidavits by Kelvin Balongo, the process server dated 27th June 2016 and 8th August 2018 serving the 3rd party with Chamber summons application and 3rd Party Notice respectively. I find them specific, reliable and clear about the service upon the 3rd Party regarding the manner, address and time of the service. The same were not controverted in any way by the Appellant. I have noted further that the Notice of Entry of Judgment was served upon the Appellant in the same manner and address and that the same was received and acted upon by the appellant.

21. In my view, the Appellant has not raised any factual dispute to warrant the summoning of the process server for cross examination. Further, the Court of Appeal in Shadrack Arap Baiywo v Bodi Bach KSM CA Civil Appeal No. 122 of 1986 [1987] eKLR, quoting Chitaley and Annaji Rao; The Code of Civil Procedure Volume II page 1670 stated that:

> " There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the

process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

In the circumstances, there is no factual dispute on service necessitating the process server being summoned. What is in issue is the legal propriety of service upon the 1st Defendant's legal clerk which the Court can determine without the need to summon the process server. This plea fails."

22. Flowing from the above, this court holds the view that the need to summon a process server for cross examination is desirable but not mandatory. The discretion to summon the process server for cross examination should be exercised judiciously so as not to occasion an abuse of the process of the court. In the instant appeal there is no factual basis laid down by the contesting party to challenge the affidavit of service other than expressing shock at the Notice of Entry of Judgement. In any case litigation must be brought to an end.

23. The second application dated 7th November 2018 sought to set aside the ruling and orders issued on 6th November 2018 dismissing the first application. It was at this juncture that the applicant introduced the issue of a plausible draft defence raising triable issues, a ground which was not available in the initial application and which cannot be cured at this stage. In any case the trial court rightly pointed out that the appellant failed raise a preliminary point by the way of notice to cross examine the process server which could have been addressed before the hearing of the first application. The trial court found that it could not entertain this application as it (court) had already pronounced itself on the issues raised.

24. This brings us to the point as to whether the appeal and orders sought are merited and whether there is a basis for this court to interfere with the trial court finding. In Attorney General of Kenya V Anyang' Nyong'o & 10 others (2010) RC 1 (KLR), the court enunciated on principles under which an appellate court can interfere with the exercise of a discretion by a trial court. That the presiding judge:

    i. Took into accounts some irrelevant factor(s)

    ii. Failed to take into account some irrelevant factor(s)

    iii. Did not apply a correct principle to the issue (such as misdirection on a point of law, or misappropriation of facts)

    iv. Taking into account all the circumstances of the case, the judge's decision is plainly wrong.

25. So far, the appellant has not demonstrated any error of commission or omission; or misapprehension of the law or facts to warrant interference by this court. This court is therefore inclined to uphold the finding of the trial court in the judgement delivered on 24th November 2016 and subsequent Rulings and orders.

26. For the above stated reasons, this appeal fails and is hereby dismissed. Interlocutory judgement entered on 25th May 2016 and rulings entered on 6th November 2018 and 9th January 2018 respectively are upheld. Costs of this appeal to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF APRIL, 2025.

HON. T. W. OUYA

JUDGE

For Appellant/Applicant.....Omondi Hb for Ochanda

For Respondents.....No Appearance

Court Assistant...Doreen Njue