Omwega v Kendagor & another (Civil Appeal E1375 of 2023)
[2025] KEHC 4455 (KLR) (Civ) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4455 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1375 OF 2023

TW OUYA, J

APRIL 8, 2025

BETWEEN

DUNCAN NYACHOTI OMWEGA ..... APPELLANT

AND

WILLIAM KEMBOI KENDAGOR ..... 1ST RESPONDENT

LINUS KIPROP ..... 2ND RESPONDENT

(Being an appeal from the ruling by Hon. C.K Cheptoo, P.M, in Milimani CMCC no. E7988 of 2021 delivered on the 8th of December, 2023)

RULING

1. The present appeal challenges the ruling delivered by the trial court on the 8th of December 2023, setting aside the interlocutory judgement that was entered against the 1st respondent on the 29th of July, 2022.

2. The background to the appeal, is that the appellant instituted a suit at the lower court against the respondents, claiming general damages for pain, suffering and loss of amenities, special damages together with costs of the suit; for the injuries that he sustained following an accident that occurred on the 2nd of December, 2020, involving him as a pedestrian walking along Mfangano Street and Motor Vehicle registration no. KCV 708 B (the suit vehicle), belonging to the 1st respondent.

3. In the plaint dated the 29th of April, 2021, it is alleged that on the 2nd of December,2020, at around 8:30PM, as the plaintiff was walking along Mfangano Street, the respondents, their driver and/or agent so negligently controlled Motor Vehicle registration no. KCV 708 B, causing it to lose control, veer off the road and hit the plaintiff; as a result, he sustained serious bodily injuries.

4. It is alleged that the respondents failed to enter appearance in the said suit, within the prescribed time despite being duly served with summons to enter appearance; and the appellant made a formal request for judgement to be entered against the respondents.

5. The appellant alleges that upon proving to the trial court that service on the respondents was duly effected, interlocutory judgement was entered and on the 10th of May 2022, the matter proceeded for formal proof hearing; after which judgement was delivered in favour of the appellant as against the respondents for a total sum of Kshs. 312, 050, being general damages for pain, suffering and loss of amenities together with special damages, costs of the suit and interest.

6. Subsequently, the appellant enlisted the services of an Auctioneer who proclaimed and attached the suit vehicle; and it is this action that prompted the respondents to move the lower court vide a Notice of Motion dated the 19th of September, 2023, on grounds that the said proclamation was irregular and unprocedural. These allegations were vehemently denied by the appellant vide a replying affidavit sworn on the 11th of October, 2023, by Ms. Gloria Oluoch Owino, the appellant's learned counsel.

7. After considering the evidence placed before the court, the learned trial magistrate made a finding that there was no evidence to confirm that the 1st respondent was duly served with the summons and the suit papers as alleged; as such, the learned trial magistrate found that the interlocutory judgment was irregular, and proceeded to set it aside.

8. Aggrieved by the trial court's decision, the appellant filed the instant appeal vide a Memorandum of Appeal dated the 11th of December, 2023, citing six (6) grounds of appeal which can be summarised as follows; that the learned trial magistrate erred in fact and in law: in allowing the 1st respondent's application dated the 19th of September, 2023; in setting aside the judgement duly entered against the 1st respondent on the 29th of July, 2022; in failing to consider the 1st respondent's blatant acts of evasion and refusal to participate in the trial proceedings at the lower court which led to the interlocutory judgement being entered against him; by failing to consider and properly evaluate the appellant's submissions thereby arriving at a wrong conclusion; in failing to properly evaluate the evidence on record and applying wrong principles of law, thereby arriving at a wrong conclusion; and that the ruling by the learned trial magistrate was not only unjust against the weight of evidence, but that it was based on misguided points of fact and wrong principles of law, thereby occasioning a miscarriage of justice.

9. On the above grounds, the appellant prayed that the ruling delivered by the lower court on the 8th of December, 2023, be set aside and annulled.

10. The appeal was prosecuted by way of written submissions following the direction issued on the 13th of June, 2024. I have duly considered the appellant's submissions dated the 24th of June, 2024, filed on his behalf by his learned counsel Owino K'Ojwando & Co. Advocates. The respondents did not file their written submissions.

11. I have also carefully considered the grounds of appeal together with the appellant's written submissions as well as the evidence on record and the impugned ruling by the learned trial magistrate. Having done so, I find that the only issue for determination in this appeal is whether the trial court erred in setting aside the interlocutory judgement entered against the 1st respondent on the 29th of July, 2022.

12. As stated herein above, the learned trial magistrate set aside the interlocutory judgement entered against the 1st respondent on grounds that it was irregular, as there was no evidence on the court's record to show that the 1st defendant was duly served with summons to enter appearance and the suit documents.

13. It is well settled that the issue of service in litigation is crucial, as such, this court must satisfy itself that the 1st respondent was duly informed of the suit at the trial court but failed to enter appearance. Considering that service upon the 2nd respondent is not disputed; the appellant was required to demonstrate by way of evidence that the 1st respondent was either personally or through their authorized agents served with the summons to enter appearance, before he moved the court to enter an interlocutory judgement against him.

14. The guiding law on service of summons is found in Order 5 of the Civil Procedure Rules. Order 5 rule 7 makes it clear that where there are several defendants, service of summons must be effected on each defendant separately. The said provision of law stipulates thus: "Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant."

15. Order 5 Rule 8 (1), however allows a plaintiff in a suit to effect service of summons to an agent authorized to accept service on behalf of a defendant, where the plaintiff is unable to serve the summons personally upon a defendant. The said provision of law states thus: "Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient."

16. This rule was reiterated by the Court of Appeal, in the case of John Akasirwa versus Alfred Inai Kimuso (C.A. NO. 164 OF 1999) (UR); which was cited with approval by the High Court in National Bank of Kenya limited versus Puntland Agencies Limited & 2 others [2006] KEHC 2040 (KLR) as follows: " In the case of JOHN AKASIRWA – V – ALFRED INAI KIMUSO (C.A. NO. 164 OF 1999) (UR) the court of appeal indicated the proper mode of service on individual as follows: "Proper service of summons to enter appearance in litigation is a crucial matter in the process whereby the court satisfied itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not. Hence the need for strict compliance with order 5 Rule 9 [1]. The ideal form of service is personal service, it is only when the defendant cannot be found, that service on his agent empowered to accept service is acceptable."

17. Having stated that, I have thoroughly scrutinized the affidavit of service sworn by the process server on the 21st of January, 2022. In the said affidavit, the process server indicated in paragraph *4* that he was instructed by the 2nd respondent to call the 1st respondent to confirm his place of residence so as to be able to effect service on him. The process server then indicates that he proceeded to call the 1st respondent through his registered number and after introducing himself to him and his reason for calling, the 1st respondent instructed him to take the documents to the Eldoret Shuttle Sacco offices in Eldoret town so that he could pick them from there.

18. In paragraph 6 of the said affidavit, the process server indicates that he then boarded a matatu belonging to the Sacco from Nairobi heading to Eldoret; and upon his arrival, he was received by the manager of the Eldoret office who instructed him to leave the documents in the office for onward transmission to the 1st respondent.

19. One of the reasons advanced by the learned trial magistrate for finding that there was no evidence to demonstrate that the 1st respondent was served with the affidavit of service, was that the process server did not indicate in his affidavit of service, the name of the manager that he served the summons to.

20. Order 5 rule 15 of the Civil Procedure rules, which sets out what should be contained in an affidavit of service, states as follows: "The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or

tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require."

21. My interpretation of the wordings of the aforementioned provision of law, is that although it is crucial that the names and address identifying the person being served with the summons is indicated in the affidavit of service, the same is not mandatory but it is included where the said information is available; and that is why, in my view, the said provision of law indicates "if any".

22. The inclusion of the words "if any", to the said provision of law, is in my view, necessary because, there are instances where the person served with the summons to enter appearance or any court documents may refuse to sign the documents or even identify themselves to the process serves; and that is why in most cases the affidavit of a process server is admissible in evidence and where the same is uncontested it is considered sufficient evidence of service.

23. Furthermore, where service is denied by a defendant, Order 5 rule 16 of the Civil Procedure rules empowers the court to make an order for the process server to be cross examined to determine whether or not service was effected on a party denying service of any court documents.

24. This position was reiterated by the Court of appeal in the case of Shadrack Arap Baiywo versus Bodi Bach [1987] eKLR; as follows: "There is a presumption of services 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."

25. Again, the court in William K. Langat versus Joseph K. Sindai [2021] eKLR; stated thus: "Under Order 5 Rule 16 where there is allegation that a summons had not been properly served, the court may have the process server summoned to be cross examined on the service. A reading of this Rule suggests the court may at its own motion make an order for the process server to be examined. One would however expect that the applicant who disputes service to be on the frontline in seeking to have the process server summoned to be examined. The court it appears did not make any order for the examination of the process server and no request was made by the applicant to have the process server summoned for examination. The trial court however upheld the service as proper."

26. Based on the above, I am of the considered view that the learned trial magistrate was in error for concluding that the service of summons to enter appearance and other suit documents upon the 1st respondent was not effected simply because the process server did not indicate the name of the manager who he effected service on or that the summons did not indicate the name or signature of the person served. This is more so because, the learned trial magistrate had the option of ordering that the said process server be examined by the 1st respondent to determine whether or not service was effected on the said manager.

27. Being that as it may, whereas the process server indicated that he called the 1st respondent using his registered line; no evidence was tendered before the trial court demonstrating that the mobile number indicated in the process server's affidavit of service, and which he allegedly used to call the 1st respondent actually belongs to the 1st respondent.

28. Furthermore, in as much as Order 5 rule 8 (1) allows for service to be effected on an agent of a defendant; the said rule makes it clear that the said agent must be empowered or authorized to accept such service. This in my view means that summons to enter appearance can only be served on those

agents that have been confirmed to be agents of a defendant and those that have been authorized to accept service on behalf of the said defendant.

29. This position was restated by the court in the case of Kimeu versus Kasese (1970) KLR 32; as follows: "...It is not the relationship of the person served to the defendant but that he was in fact authorized to receive service. Also, that the affidavit of service should specifically state that that person was authorized to receive service"

30. In this case, although the process server indicated that the he served the summons together with the suit documents on the Manager of Eldoret Shuttle Sacco in Eldoret town offices, there was no evidence to show that the said manager was in fact employed by Eldoret shuttle Sacco or that he was an agent of the 1st respondent, or that he had been authorized by the 1st respondent to accept service of the said summons and other court documents on his behalf.

31. Considering that the manager introduced himself as the manager of Eldoret Shuttle Sacco, there was need to show by way of evidence that the said manager apart from working for Eldoret Shuttle Sacco, he was also an authorised agent of the 1st respondent for purposes of accepting service of court documents.

32. Based on the above, I am of the considered view that the manager who accepted the court documents on behalf of the 1st respondent was not an agent authorized to accept service of court documents on his behalf, as such, the purported service was not proper service. I am therefore of the considered view that the interlocutory judgement entered by the lower court against the 1st respondent was regular.

33. Flowing from the foregoing, I am of the considered view that the present appeal lacks in merit and the same is hereby dismissed. As regards costs, it is trite that costs follow the event and are awarded at the discretion of the court. In this case, considering that the respondents did not file their written submissions in regards to this appeal, each party should bear their own costs.

Determination

34. This appeal is hereby dismissed. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8th DAY OF APRIL, 2025.

HON. T. W. Ouya

JUDGE

For Appellant...Ms Owino

For Respondents.....No appearance

Court Assistant...Jackline