Kaloki v Mohammed (Civil Suit E104 of 2021)
[2024] KEHC 197 (KLR) (Civ) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 197 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E104 OF 2021

CW MEOLI, J

JANUARY 19, 2024

BETWEEN

JAMES MUTISO KALOKI .... PLAINTIFF

AND

HUSSEIN ADAN MOHAMMED .... DEFENDANT

RULING

1. Hussein Adan Mohammed (hereafter the Applicant) took out the Notice of Motion dated 7th December, 2022 (the Motion) expressed to have been brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA) and Orders 5 and 10 of the Civil Procedure Rules (CPR) seeking to set aside the interlocutory judgment entered in the suit and all consequential orders, and further seeking leave to file his statement of defence out of time.

2. The Motion is anchored on the grounds laid out on its face and the supporting affidavit sworn by the Applicant, who averred that an interlocutory judgment was entered against him on 29th July, 2022 and the suit was set down for formal proof hearing on 30th January, 2023. The Applicant averred that he was never served with summons to enter appearance or the pleadings in the suit, and only came to learn of its existence on 30th November, 2022 upon being served with a copy of the default judgment and the notice of the formal proof hearing. It was his assertion that the interlocutory judgment is therefore irregular and that he stands to suffer substantial loss if the said judgment is not set aside. It was equally his assertion that he has a reasonable defence raising triable issues and that it would be in the interest and course of justice for the court to grant the orders sought in the Motion.

3. The Plaintiff herein, James Mutiso Kaloki (hereafter the Respondent) opposed the Motion through his replying affidavit sworn on 26th January, 2023. Therein, he stated that contrary to the averments of the Applicant, he had notice of the suit against him, having been served with the summons and plaint

on 28th April, 2022 at his place of work. The Respondent further stated that subsequent to failure by the Applicant to enter appearance and file his statement of defence, an interlocutory judgment was entered on 11th August, 2022 upon the request of the Respondent.

4. He further deposes that thereafter, the Applicant was served with a copy of the default judgment coupled with the notice of formal proof hearing while at his workplace situated in Export Processing Zone Authority, and via WhatsApp on his personal phone number. That this was followed by further service of the summons and pleadings via WhatsApp and email. That consequently, the Applicant has no basis for setting aside the interlocutory judgment and that his draft defence does not contain any triable issues.

5. In rejoinder, the Applicant by way of his further affidavit sworn on 2nd March, 2023 reiterated his earlier averments, save to add that on the alleged date of service of the summons and pleadings, namely, 28th April, 2022 he was away from office and hence the averments made in the affidavit of service alleging service, are false.

6. The Motion was canvassed through written submissions. Counsel for the Applicant anchored his submissions on the decision in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR on the distinction between regular and irregular default judgments. Counsel contended that in the present instance, no proper service of the summons and pleadings was effected on the Applicant. Hence the interlocutory judgment entered herein was irregular, and ought to be automatically set aside by the court.

7. Counsel further relied on the decision in Shadrack Arap Baiywo v Bodi Bach [1987] eKLR to contend that in instances where service is denied, the process server ought to be cross-examined on the facts contained in his or her affidavit of service. Counsel further questioned the regularity of an interlocutory judgment on the basis of the Respondent's claim which fell outside the categories contemplated in Order 10, Rules 4 and 6 of the CPR, also citing the decision in David George Bell & Another v Ashutosh Bhasin Giro & Another [2007] eKLR in that regard. On those grounds, counsel for the Applicant urged the court to grant the Motion.

8. The Respondent through his counsel anchored his submissions on the decisions in Mohamed & Another v Shoka (1990) KLR 463 and Shah v Mbogo [1969] EA 116,123 on the discretionary power of the court in considering whether to set aside an interlocutory/default judgment. Counsel maintained that the interlocutory judgment entered in the suit is regular, having arisen from proper service of the summons and pleadings upon the Applicant, as deposed in the affidavit of the process server sworn on 16th June, 2022, which is on record.

9. Citing the decisions in Philip Keiptoo Chemwolo & Another v Augustine Kubende, Civil Appeal No. 103 of 1984 and Continental Butchery Limited v Nthiwa [1978] KLR counsel argued that in view of service, the Applicant was obligated to demonstrate that his defence raises triable issues. However, that a perusal of the draft defence annexed to the Motion discloses no facts that may require further investigation in respect of the Respondent's claim. For these reasons, the inordinate delay on the part of the Applicant in bringing the instant Motion and absence of a demonstration of imminent prejudice, counsel for the Respondent urged the court to dismiss the Motion and pave way for the formal proof hearing to proceed.

10. The court has considered the parties' rival affidavit material and submissions. The two prayers in the Motion seek the setting aside of the interlocutory judgment and for leave to defend the suit. Order

10, Rule 11 of the CPR being the applicable provision regarding the setting aside of interlocutory judgments, states that:

> "Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

11. The power of the court to grant or refuse an application to set aside or vary such judgment or any consequential decree or order, is discretionary and which discretion is wide and unfettered. Nonetheless, judicial discretion ought to be exercised judicially and justly. The objective of the discretion conferred upon the court was spelt out in the case of Shah v Mbogo & Another [1967] EA 116 as hereunder:

> "The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

12. The principles in Shah v Mbogo (supra) were amplified further in the judgment of Platt JA (as he then was) in Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193, cited with approval by the same Court in Miarage Co Ltd v Mwichuiri Co Ltd [2016] eKLR as follows:

> "The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justiciae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure...The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction."

13. Flowing from the above, the first question arising for determination is whether the Applicant was duly served with summons to enter appearance, and whether the interlocutory judgment entered is regular. As earlier mentioned, the Applicant on the one hand vehemently denied service of summons

and termed the affidavit of service on record as containing falsehoods. The Applicant further submitted through his counsel that the claim in the plaint did not fall within the purview of Order 10, Rules 4 and 6 of the CPR regarding entry of interlocutory judgment. That consequently, the interlocutory judgment is irregular.

14. On the other hand, the Respondent averred and submitted that service was duly effected upon the Applicant at his place of work (Export processing Zone Authority) and later through his WhatsApp number and email address, but that he neglected to enter appearance and/of file his statement of defence, thereby resulting in entry of a regular interlocutory judgment.

15. The purpose of the requirement for effective service of summons cannot be disputed. As stated by the Court of Appeal in Giro Commercial Bank Ltd v Ali Swaleh Mwangula [2016] eKLR:

> " Summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to, first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence. Entry of appearance by a party therefore signifies the party's intention to defend. Under order 10 Rules 4, 5, 6 & 7, where a party fails to enter appearance after being served with summons, an interlocutory judgment may be entered against the party, provided the claim is for pecuniary damages or for detention of goods. In all other instances, where there is default of appearance, the plaintiff, is under Order 10 Rule 9 required to set the suit down for hearing by formal proof of the plaintiff's claim."

See also Gemstaviv Limited v Kamakei Ole Karia & 5 others [2015] eKLR.

16. Upon perusal of the record, the court noted that the Respondent's request for judgment dated 14th May, 2022 was based on the affidavit of service sworn by process server Moses Ambaka on 28th April, 2022 stating that upon receiving the summons and pleadings on the said date, the said process server proceeded to the Applicant's work place address in Export Processing Zone Authority situated in Amboseli Avenue, Athi River. That upon arrival, he was directed to the offices of the Applicant and that service was effected but that the Applicant declined to sign his copies.

17. The Applicant did not deny working at the stated place. Moreover, while the Applicant averred that he was away on official duties on the material date of service, he did not tender any credible evidence to support this averment. Nor did he seek to cross-examine the process server during the hearing of his application to test the veracity of the process server's depositions. There exists a rebuttable presumption that the contents of an affidavit of service are factual and truthful as to the circumstances of service.

18. The Court of Appeal in Shadrack Arap Baiywo v Bodi Bach [1987] eKLR stated in that regard that:

> " There is a qualified presumption in favour of the process server recognized in M B Automobile v Kampala Bus Service, [1966] EA 480 at page 484 as having been the view taken by the Indian Courts in construing similar legislation. In Chitaley and Annaji Rao; The Code of Civil Procedure Volume II page 1670, the learned commentators say:
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> > " 3. Presumption as to service – 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."

19. Regarding the applicability of Order 10, Rules 4 and 6 of the CPR to the claim presented in the plaint, it is useful first to set out the said provisions. The Rules provide that:

Rule 4:

(1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs. (2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

...

Rule 6:

Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

20. A cursory review of the plaint herein dated 29th April, 2021, reveals a claim based on defamation and that the reliefs sought therein include general, exemplary and aggravated damages. Thus, a claim for pecuniary damages upon which an interlocutory judgment could be properly entered under Order 10, Rule 6 (supra).

21. In view of the foregoing circumstances, the court is satisfied that the interlocutory judgment entered on 11th August, 2022 is regular.

22. That said, in determining whether to set aside an interlocutory/default judgment, a court is additionally required to consider whether a party has demonstrated a defence which raises triable issues, even where service of summons is deemed to have been proper. The court in the case of Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) 1 EA 324 reasoned that:

" Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."

23. The term 'triable issue' was defined by the Court of Appeal in the case of Ternic Enterprises Limited v Waterfront Outlets Limited [2018] eKLR thus:

> " ... a triable issue" is an issue which raises a prima facie defence and which should go to trial for adjudication ...
>
> The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend."

24. As observed, the Respondent's suit is grounded on the tort of defamation. The Applicant's draft statement of defence annexed to the Motion, contains denials of the averments in the plaint, the Applicant further pleading the defences of fair comment and privilege. Consequently, the court is satisfied that the Applicant's statement of defence raises triable issues which to be ventilated at the hearing of the suit.

25. On the question of likely prejudice to the Respondent, stands to be prejudiced, there is no indication from the material before the court, and the Respondent did not demonstrate that, if the interlocutory judgment were set aside he would be prejudiced in a manner that cannot be adequately compensated by way of costs.

26. In the circumstances, the court is persuaded that this is a proper case for the exercise of its discretion in favour of the Applicant. Accordingly, the Notice of Motion dated 7th December, 2022 is hereby allowed with the effect that:

    a) The interlocutory judgment entered on 11th August, 2022 and all consequential orders/ proceedings are hereby set aside.

    b) The Defendant/Applicant is hereby granted leave to file and serve his statement of defence within 14 days of today's date.

    c) Thrown away costs and the costs of the Motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF JANUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Odhiambo h/b for Mr. Bake

For the Respondent: Mr. Gachuba Mwaniki

C/A: Carol