Kiprotich v Maata (Civil Appeal 35 of 2022)
[2024] KEHC 808 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEHC 808 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 35 OF 2022

JM CHIGITI, J

FEBRUARY 1, 2024

BETWEEN

WESLEY KIPROTICH ..... APPELLANT

AND

LYDIA OSEBE MAATA ..... RESPONDENT

(Being an Appeal from the Ruling and order of Honourable Gloria Nasimiyu Barasah (RM) in Ogembo SPMCC No. 269 of 2019 delivered on 7th June, 2022)

JUDGMENT

Brief background;

1. This appeal was precipitated by the ruling of the subordinate court that was rendered on the 7th of June, 2022 in respect to the appellant's application dated 4th May, 2022 that was seeking to have the interlocutory and final judgment of the trial court set aside; and leave to file a defense out of time and have the matter start de novo.

2. The trial court allowed the application conditionally.

3. The appellant being aggrieved with the said ruling, has lodged an appeal raising 5 grounds as contained in the Memorandum of Appeal. They are argued within the following issues:

    i. Whether the alleged service of summons upon the appellant was proper service within the law.

    ii. Whether the judgment as against the appellant was a regular judgment?

    iii. Whether the conditions imposed by the trial court in its ruling were fair and reasonable under the circumstances?

    iv. Whether the suit as against the appellant in the subordinate court is tenable in law.

Applicants case:

4. It is the Appellant's case that the process server did not prove that he served the summons. The Appellant's is concerned that the process server does not indicate how he obtained the Appellant's contacts and he doesn't disclose how he was able to identify the appellant.

5. The Appellant urges that the judgment is irregular because it was secured on the basis of an irregular service, and the same should be set aside.

6. The appellant is also of the view that the conditions laid by the court were stringent and excessive.

7. Finally, it is the Appellant's case that the summons expired given that the same were issued on 15th October, 2019 and that the same expired on 15th of November, 2020 under Order5 rule 2of the Civil Procedure Rules. No application has been made to extend them, and the same lapsed under sub roll to the Suit should be dismissed at the expiry of 24 months of the issue of the original summons. They feel that the suit should have been dismissed on 15th November, 2021 when the time is expired.

The Respondents Case

8. In opposing the appeal, the respondent argues that proper service was effected upon the appellants.

9. The Respondent relies on the affidavit of service sworn by one Elijah Gekonge on 22nd January, 2020 and dated 31st May 2023 which according to the respondent demonstrates that the Appellant was served in Nairobi County, having been reached vide his Mobile Phone Number 0721541xxx as captured in the police records.

10. According to the respondent, this fact remains undisputed and that the Affidavit of service is proof of proper service. Reliance is placed in Nairobi High Court Civil Appeal No. E021 of 2021. Inm Vs Ajmn.

11. According to the Respondent, the conditions imposed are not stringent and same ought to be complied with by the Appellant before the suit is set down for hearing. We urge this Honorable court to find that the Appeal is unmerited and dismiss it with costs.

Determination:

12. I have considered the foregoing, the submissions filed on behalf of the parties herein and the authorities relied upon in support thereof. In Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA. The court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

13. This principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

14. The decision whether or not to set aside ex parte judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and 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. See Shah vs. Mbogo & Another [1967] EA 116.

15. As was held by the Court of Appeal in CMC Holdings Ltd vs. Nzioki [2004] KLR 173:

> "In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously…In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the Ex-parte judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate…The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside ex parte judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard Ex parte and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input…. What the Trial Court should have done when hearing the application to set aside the ex parte judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same

way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed."

16. In Pindoria Construction Ltd vs. Ironmongers Sanytaryware Civil Appeal No. 16 of 1976 it was held that:

> "It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge's exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions."

17. The first question for determination is whether the judgement was procedurally entered.

18. I agree with the position holding of the Supreme Court of India which stated in Sangram Singh vs. Election Tribunal, Koteh, AIR 1955 SC 664, at 711 cited in the case of Gerita Nasipondi Bukunya & 2 others v Attorney General [2019] eKLR that:

> "[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

19. That was the position adopted by the Court of Appeal in Onjula Enterprises Ltd vs. Sumaria [1986] KLR 651, where it was held that:

> "The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See London Association for the Protection of Trade & Another vs. Greenlands Limited [1916] 2 AC 15 at 38."

20. In my view, this position is supported by the holding of Ojwang, J (as he then was) in Haile Selassie Avenue Development Co. Limited v Josephat Muriithi & 10 others [2004] eKLR where he held that:

> "The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure."

21. In Wachira Karani vs. Bildad Wachira (2016) eKLR as was quoted in the case of David Gicheru v Gicheha Farms Limited & another [2020] eKLR the Court held that: -

> "The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."

22. In considering whether or not to set aside a judgement, a judge has to consider 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 judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defense on the merits, namely a prima facie defense which should go to trial or adjudication.

23. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter parte hearing, than the judge who acts ex parte. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement. See Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647.

24. Even if the absence of the Appellants was to be blamed on their counsel, as was appreciated by Apalloo, J. A (as then was) in the case of Philip Chemowolo & Another –vs- Augustine Kubede [1982-88] KAR 103 at 1040:

> "Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

25. That mistakes do occur in the process of litigation was appreciated by the Court of Appeal in Murai vs. Wainaina (No. 4) [1982] KLR 38 where it was held that:

> "A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to us

erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

26. Order 5 Rule 15 of the Civil Procedure Rules stipulates that, 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.

27. I have perused the affidavit of service date of 22nd January, 2020. The process server does not give the telephone number that he alleges to have used to reach out to the defendants. The process server does not tell us how he got to know the defendants.

28. The affidavit of service does not state 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.

29. This, read alongside the fact that the process server is not registered, the replying affidavit sworn by the Respondents does not help the situation. At paragraph 3, she indicates that she knew of her own knowledge that the applicant was properly served with summons to enter appearance and plaint. She does not go beyond that. The court is left wondering how she could establish that in light off an affidavit of service which is defective.

30. I find that the trial court failed to appreciate the foregoing gaps.

Disposition:

31. The learned trial court did not sufficiently address its mind to the principles that govern the question of service of summons and consequently it fell into error while addressing the issue of the setting aside of judgement. This graduated into a wrong exercise of its discretion. It is this court's finding and I so hold that the service was defective.

32. I find the appeal merited.

Orders:

1. The Appeal is allowed.
2. The Ruling dated 7th June, 2022 is set aside.
3. The file is returned to the trial court for further directions.
4. Costs to the Applicant.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 1ST FEBRUARY, 2024

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J. CHIGITI (SC)

JUDGE