REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC APPEAL NO. 40 OF 2019

PAUL ODIDO.....APPEALLANT

-VERSUS-

ABDUL HAKIM ABEID.....1ST RESPONDENT

JAMAL ABEID.....2ND RESPONDENT

MOHAMMED ABEID.....3RD RESPONDENT

(Appeal from the Ruling of the Senior Principal Magistrate Hon. C.N. Ndegwa at the Chief Magistrates Court at Mombasa CMCC ELC No. 43 of 2018, delivered on 11 June 2019.)

JUDGMENT

(Appeal on refusal by the trial Magistrate to allow an application to set aside an ex parte judgment; appellant claiming that he was never served with summons and further that he has raised a defence with triable issues; there being an affidavit of service demonstrating that the appellant was served; no material presented that would cast doubt on the said affidavit; no application to cross-examine process server; presumption on the correctness of an affidavit of service not dispelled; triable issues; whether defence raised triable issues; defence being a bare denial and only matter raised was that the case was sub judice; Magistrate correctly finding that res sub judice could not apply as the other case cited, which was filed by the appellant, had been dismissed for want of prosecution; Magistrate cannot be faulted for the manner in which he exercised his discretion; appeal dismissed)

1. The brief background to this appeal is that the respondents in this matter were plaintiffs in the suit Mombasa Chief Magistrate's Court E&L No. 43 of 2018 through which they sued the appellant as 2nd defendant and one Julius Ojwang Obonde as the 1st defendant. In that said suit, the respondents wished to inter alia have the two defendants evicted from the land parcel No 1836/VI/MN- Magongo. The matter proceeded for hearing ex parte as the appellant and 1st defendant had not entered appearance and judgment was delivered in favour of the respondents on 4 February 2019. The appellant and his co-defendant subsequently filed an application dated 19 February 2019 to set aside the judgment. That application was heard and ruling delivered on 11 June 2019 vide which the said application was dismissed. Aggrieved, the appellant preferred this appeal against the said ruling. No appeal appears to have been preferred by the 1st defendant in the suit and I have indeed seen evidence that he is now deceased.

2. The following grounds of appeal have been cited in the Amended Memorandum of Appeal :-

> (a) *That the learned trial Magistrate erred in law and in fact that the appellant never requested for the cross examination of the process server.*
>
> (b) *That the learned Magistrate misdirected himself in law and in fact that the appellant never informed the court of his intention to cross examine the process server.*
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> (c) *That the learned Magistrate misdirected himself in law and in fact by relying on evidence from the bar by the respondent (sic) Advocate and to a defective affidavit filed by the Respondent.*
>
> (d) *That the learned Magistrate misdirected himself in law and in fact by dismissing the Application by the Appellant.*

For the above reasons, the appellant wants the appeal allowed, the decision of the Magistrate to be set aside and his defence be deemed as duly filed, and alternatively the court to make such orders as it deems fit.

3. This being a first appeal, this court is obliged to reassess, reevaluate and reexamine the evidence and extracts adduced before the trial court and arrive at its own independent conclusion as expounded in the *Selle vs Associated Motor Boat Company Ltd [1968] E.A 123*. Additionally, since this appeal arises from the ruling of the trial court on an application to set aside *ex-parte* judgment, I will need to go through and examine the entire trial court record, from the time of institution of suit until the impugned ruling was rendered, in order to determine whether the judgment was entered into regularly or irregularly. The chronology of events is laid down below.

4. The plaint against the appellant and the 1st defendant (now deceased) was filed on 7 September 2018. I have already mentioned that it was the case of the respondents that they are the registered owners of the land known as parcel no. 1836/VI/MN-Magongo (suit property) which they claimed to have acquired vide a transmission from one Obeid Khamis Lamar, who had purchased it from one Rukiya Soud Ali Bashiri. The respondents pleaded that the 1st defendant, Mr. Obonde, had been employed as a security guard by Rukiya Soud. It was further pleaded that the 1st defendant occupied a portion of the suit property as a tenant, and he paid rent to Rukiya Soud. The respondents averred that the 1st defendant begun to hold himself as the owner of the portion he had been occupying, which led to the case *Mombasa CMCC No. 2497 of 2002, Julius Ojwang vs. Mary Ngami Joseph*. The respondents claimed that the 1st defendant continued paying rent while the matter was pending in court. The respondents further pleaded that in the year 2014, the 1st defendant and his son (the 2nd defendant/appellant) started putting up illegal structures in the suit property. The respondents claimed that on 28 July 2015, the appellant and 1st defendant were charged in a criminal case for unlawfully damaging the perimeter wall built by the respondents. The respondents contended that the appellant and 1st defendant had no proprietary rights to the suit property in any manner whatsoever. They pleaded that the acts of the appellant and his co-defendant amounted to trespass conversion of private property, and constituted wanton breach of their rights. They averred that the appellant and his co-defendant had sued them in Mombasa ELC Suit No. 189 of 2015 but the same was dismissed for want of prosecution. It was for these reasons that the respondents prayed for judgment against the appellant and his co-defendant for a permanent injunction, an order of eviction, and an order for demolition of the illegal structures put up by the appellant and his co-defendant.

5. Alongside the plaint, the plaintiffs filed a notice of motion application where they sought orders of temporary injunction against the appellant and his co-defendant. That application went before Hon. Kiage, Resident Magistrate, ex parte and he directed that the application be served for inter partes hearing on 25 September 2018.

6. On 24 September 2018, two affidavits of service were filed. They are both sworn by Paul Odhiambo Outah, a court process server. The first affidavit is in respect of service to the appellant whereas the second affidavit is in respect of service upon the 1st defendant. They are more or less a replica of each other. In the said affidavits, he deposes that on 19 September 2018, he received from counsel for the plaintiffs, a court order dated 11 September 2018, a Notice of Motion dated 7 September 2018, Summons to Enter Appearance dated 10 September 2018, Plaint together with Verifying Affidavit, List of Witnesses, Statement and Copies of Documents all dated 7 September 2019, with instructions to serve the defendants. In his own words he deposed as follows :-

> *"That on the same 19th September 2018 at around 3.50pm in the company of the plaintiffs' agent, Mr. Murithi, I personally served the Court Order, Notice of Motion under Certificate of Urgency, Summons to Enter Appearance, Plaint together with Verifying Affidavit, List of Witnesses, Statement and copies of Documents on the 2nd defendant herein, Paul Odindo at his house on the suit property, Magongo mainland Mombasa and which service he accepted but refused to sign at the copy returned herewith"*

The above affidavit is replicated in respect of service upon the 1st defendant, with only his name being inserted instead of the name of the appellant.

7. The matter did come up in court on 25 September for the inter partes hearing of the application as scheduled, this time before Hon. J. Kasam, Senior Resident Magistrate. It however did not proceed as the trial court (presumably Hon. Ndegwa) was not sitting and the date of 8 November 2018 was given for inter partes hearing. Affidavits of service demonstrating service for the date of 8 November 2018 were filed. They are a replica of each other in respect of service upon the appellant and his co-defendant. In respect of service upon the appellant, it provides as follows in paragraphs 3 and 4 thereof :-

> (*iii) That on the 24th October 2018 at around 3.50 pm, I personally served the Hearing Notice on the 2nd defendant herein, Paul Odindo at his house on the suit property, Magongo mainland Mombasa and which service he accepted but refused to sign at the copy returned herewith.*
>
> *(iv) That the 2nd defendant is known to me.*

8. On 8th November 2018, the case was placed before Hon. Ndegwa Principal Magistrate for the hearing of the application for injunction. The court must have been satisfied with service for the matter proceeded for the hearing of the application and a brief ruling issued on the spot confirming the interim orders first issued by Kiage RM.

9. What followed was an application filed on 9 November 2018 and dated 8 November 2018, for interlocutory judgment to be entered because of failure by the defendants to enter appearance or file defence. I have seen an endorsement that interlocutory judgment was entered on 12 November 2018, though signed, probably erroneously, as 12/9/2018. The matter subsequently proceeded for formal proof hearing on 31 January 2019, with the 1st respondent giving evidence and closing the case of the plaintiffs. Judgment was then reserved for delivery on 4 February 2018. On that day judgment was delivered in favour of the plaintiffs as they had sought in the plaint. The decree was extracted and served and it is then that the appellant and his co-defendant appointed the law firm of Oduor Henry John Advocates to act for them in the matter, and subsequently, the application dated 19 February 2019, seeking to set aside the ex parte judgment, was filed.

10. The said application was based on the grounds that the plaintiffs were in the process of executing the *ex-parte* judgment which entailed evicting the defendants from the suit property. The appellant and his co-defendant further claimed that allowing the execution of the *ex-parte* judgment would be condemning them unheard. It was the contention of the appellant and his co-defendant that the judgment and decree were obtained irregularly, as the defendants were never served with a demand letter, summons to enter appearance or plaint.

11. The affidavit in support of the application was filed by the appellant, Paul Odido. He deposed inter alia that on 15 February 2019, he received a copy of the decree but was hitherto not aware of the suit. He deposed that he was not served with the plaint or summons to enter appearance and contended that the affidavit of service of Mr. Outah was littered with untruths and falsehoods. He deposed that due to the lack of knowledge of the suit, it was not possible for him to have instructed counsel to enter appearance and file defence. He deposed that he has a good defence and annexed a draft defence to his affidavit. He also raised issue that there is a related suit being Mombasa ELC No. 189 of 2015 in the Environment and Land Court which had been dismissed but he had a pending application for reinstatement.

12. The respondents opposed the application vide an affidavit of Abdulakim Abeid, the 1st respondent. He deposed that the appellant and his co-defendant were served and he referred to the affidavit of service of Mr. Outah. He did not see anything irregular in the judgment. He further deposed in his affidavit that the applicants have shied away from applying to cross-examine the process server on the contents of his affidavit of service. He further pointed out that the applicants had not disclosed any right to the disputed property in their draft defence. On the existence of Mombasa ELC No. 189 of 2015, he deposed that the said case was dismissed for want of prosecution and is "dead and buried."

13. The appellant swore a supplementary affidavit. In it, he reiterated that he had not been served with the pleadings nor a Notice of Entry of Judgment. He also made a deposition that at the hearing of the application, they would like to cross-examine the court process server. He stated that if they had been served, they would have appeared, just as they did in the suit Mombasa ELC No 189 of 2015.

14. Counsel for the appellant and his co-defendant took the date of 25 February 2019 for the hearing of the application. However, on that date, there was no appearance on the part of their counsel. Only Mr. Mokaya, holding brief for Mr. Malombo for the respondents was present. Mr. Mokaya proposed that the application be canvassed by way of written submissions and the court acceded to this request. Both counsel proceeded to file written submissions. I do note that, Mr. Oduor, learned counsel for the applicants, did make the following submissions on the issue of cross-examination of the process server, that :-

> "*the plaintiffs/applicants have sought the discretion of this Honourable court that if need be for cross-examination of the process server then the Honourable court can order for the same for the interest of justice."*

Despite the above submissions, there was no attempt to move the court to order the attendance of the process server for purposes of cross-examination pursuant to the provisions of Order 19 Rule 2 of the Civil Procedure Rules.

15. The main theme of Mr. Oduor's submissions was that there was non-service of the summons, and further, that no Notice of Entry of Judgment was ever issued. He also submitted that his clients had raised triable issues in their draft defence. He relied on the cases of *Shaffique Allibahi vs. William Ochanda Onduru t/a Ochanda Onguru & Company Advocates & Another Commercial Civil Case No. 51 of 2014* at Nairobi High Court and the case of *Multiscope Consulting Engineers vs. University of Nairobi & Another, Civil case No. 47 of 2013.*

16. For the respondents, counsel submitted that the contents of the affidavit of service have not been challenged and that the applicants have no indicated any wish to cross examine the process server on the contents of his affidavit. He submitted that service has not been challenged. He further submitted that the applicants have no registrable interest over the disputed property and thus no viable defence can be mounted.

17. The Honourable Magistrate considered the application and in his ruling of 11 June 2019, held as follows :-

> " *I have considered the application as well as the submissions on record. One of the issues that arises is whether Environment and Land Case No. 189 of 2015 is still pending. It is however admitted by the defendants that the suit was dismissed and what is pending is an application for reinstatement. It cannot therefore be true that the suit is pending. The question of sub-judice does not therefore arise.*
>
> *The 2nd issue that arises is whether the defendants were served with summons to enter appearance. The affidavit of service sworn by PAUL ODHIAMBO OUTA (the process server) on 24th September 2018 indicates that the process server served the following documents on the 1st defendant JULIUS OJWANG OBONDE on 19th September 2018 (various documents listed)…*
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> *There is also another Affidavit of service sworn by the same process server on the same date indicating that the 2nd defendant, PAUL ODINDO was served with the same documents on the same day.*
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> *Counsel for the Plaintiff has argued in his submissions that the affidavit of service should be taken as conclusive proof of service because the Defendants have not indicated any wish to cross-examine the process server on the contents of the affidavit of service.*
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> ***…****In this case, no indication was given that the Defendants intended to cross-examine the process server on the contents of the affidavit, and no cross-examination of the process server has been carried out. As was held by the learned judge (in reference to case law provided), it must be presumed that the process server's averments in the affidavit of service are correct. The resulting judgment which was delivered on 4th February 2019 is therefore regular.*
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> *A regular judgment can however be set aside if the draft defence raises triable issues. The draft defence consists of mere denials and has not identified any legalyl enforceable interests of the defendants in the suit property. I have perused the entire defence and the only issue it raises is that the previous suit, that is, the Environment and Land Case No. 189 of 2015 is still pending. As I have indicated earlier, that case was dismissed for want of prosecution. The draft defence does not therefore, raise any triable issue.*
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> *In the premises, it is my considered finding that since service was duly effected and the default judgment was regularly entered; and no explanation was proffered as to why the defendants did not file a defence in time and the draft defence raises no triable issues, no*

useful purpose would be served by setting aside an otherwise regular judgement. In the result, I dismiss the Notice of Motion dated 19th February 2019 with costs."

18. I already pointed out the grounds upon which this appeal is premised. I gave directions that the appeal be disposed of by way of written submissions and both counsel for the appellant and counsel for the respondents filed their submissions.

19. Mr. Oduor, learned counsel for the appellant, submitted inter that the appellant had indicated in his supplementary affidavit that he intended to cross-examine the process server and therefore the Magistrate was wrong in his ruling that cross-examination was never requested. He further contended that the respondents filed an affidavit that was neither dated nor commissioned and the Magistrate was thus wrong in admitting that affidavit. He relied on the cases inter alia of *Bashir Haji Abdullahi vs Adan Mohammed Nooru & 3 Others (2014) Eklr;* and *Andrew Ochieng & Another (Suing as Legal Representatives of the Estate of George Otieno Ochieng) vs Rongai Workshop & Transport & Another.*

20. On the part of the respondents, Mr. Malombo, learned counsel, inter alia submitted that the trial court prior to hearing, inspected the affidavit of service, and the court was satisfied that the appellant herein was served with the summons to enter appearance and the plaint. He further submitted that the contents of the said affidavit of service were not challenged, and the appellant never made any application for the process server to appear in court for cross examination. Counsel submitted that the court therefore correctly held that the appellant was served with summons. He submitted that the discretion of the court to set aside judgment could be circumscribed only if the appellant had disclosed a draft defence with bona fide issues fit for trial. He submitted that the honorable trial court correctly exercised its discretion to reject reopening of the case by setting aside the judgment as the draft defence did not raise any triable issue. He referred me to the case of *James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another (2016) eKLR.*

21. Before delving into the merits or demerits of the appeal, the appellant's counsel in his submissions raised a preliminary issue that needs to be addressed first. Counsel claimed that the trial magistrate in his ruling relied on the affidavit of the 1st respondent, which was neither dated nor commissioned. I have gone through the original court record but what I see is a signed, dated and commissioned copy, though the jurat extends to another page. The affidavit is certainly dated 22 February 2019. I do not see why counsel has thought of raising this issue, which in any event, was never raised when the application was argued before the trial court. I see no issue with the affidavit, but as I am saying, if at all there was an issue, then the appellant ought to have raised it before the trial court. As far as I can see, there is no problem with the replying affidavit that was filed to oppose the application save that it was titled "supporting affidavit" rather than "replying affidavit" which does not prejudice anyone in the matter.

22. In my view, three issues arise for my consideration in this appeal. First and most importantly is the issue of service of summons; second, is whether the learned magistrate erred in exercising his discretion; and thirdly, whether there is any other matter that would make me set aside the judgment.

23. On the issue of service, if it will be the position that service was not properly effected, then the judgment will have to be set aside as a matter of right, ex *debito justitiae*. The respondents did file affidavits of service to demonstrate that the appellant and his co-defendant were duly served with the plaint and summons to enter appearance. I have already set out the contents of the said affidavits. The trial Magistrate saw no problem with them and on my part I also see no issue. The process server has outlined how he went to the premises of the appellant and his co-defendant, how they were pointed out to him, and how he served them. The starting point for the court is to presume that the affidavit of service outlines the factual position of what transpired. This was indeed affirmed in the case of *Shadrack Arap Baiywo vs Bodi Back (1987) eKLR*, where the Court of Appeal stated as follows :-

> "*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. On* Chitaley and Annaji Rao; The Code of Civil Procedure Volume II page 1670, *the learned commentators say:*
>
> "*3. Presumption as to service – 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."*

24. I am in full agreement with the above dictum. If there was a serious contest on the issue of service, it would have been prudent for the appellant to point out what the issue was with the service, or provide evidence to cast doubt as to whether the service was proper, or alternatively, apply for the process server to be cross-examined on his affidavit. The appellant did not produce any evidence to contradict the facts deposed by the process server, say for example, that he could not have been served because he was out of jurisdiction. No evidence was presented to inspire doubt in the mind of the court that service was not proper.

25. There is debate before me as to whether or not an application was made to cross-examine the process server, and I indeed note that this is one of the prominent grounds of appeal. In his first affidavit in support of his application to set aside the judgment, no mention was made of any intention to cross-examine the process server. In fact, it is the respondents, who, in their reply, pointed out that the appellant had not applied to cross-examine the process server. Probably because of this, the appellant in his supplementary affidavit deposed that at the hearing of the application they would like to cross-examine the court process server. But despite this deposition, no application was made to cross-examine following the provisions of Order 19 Rule 2 which is drawn as follows :-

> *(1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.*
>
> *(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise*

directs.

26. Order 19 Rule 9 provides for the procedure and it states as follows :-

Applications under this Order may be by chamber summons or orally in court.

27. The appellant does not pretend to have filed any chamber summons application for purposes of having the process server cross-examined. Neither was there any application made orally in court. The mere claim in the affidavit, that the appellant wished to have the process server examined, cannot be equated to be the same as an application to cross-examine. What counsel needed to do was follow the provisions of Order 19 Rule 9 and apply, either by chamber summons, or orally in court, that he wished to cross-examine the process server. This was not done, and I am unable to hold that the Magistrate was wrong in finding that the appellant failed to apply to cross-examine the process server.

28. On my part, I cannot fault the trial Magistrate for finding that service was properly effected. The appellant did not present any sufficient material that would have made the trial Court doubt what the process server had deposed. There was no error therefore in the Magistrate's finding that the appellant and his co-defendant had been properly served.

29. The second issue is whether the trial Magistrate was wrong in failing to exercise his discretion in favour of the appellant and set aside the judgment despite the fact that service was proper. The exercise of a court's discretion is unfettered and the court has wide latitude. Among the matters that the court ordinarily considers is whether the applicant has presented a defence that raises triable issues to justify the applicant being accorded a hearing on the merits of the case. In the case of *Patel v East Africa Cargo Handling Services Ltd [1974] E.A. 75,* the Court of Appeal, Duffus J, put the point succinctly as follows at page 76:-

> *"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan, J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"*

30. Did the appellant raise any triable issues in his draft defence? The draft defence presented by the appellant did not claim the disputed land. All that the appellant stated was that there was a pending case before the Environment and Land Court (ELC) and therefore the suit by the respondents was *sub judice*. On interrogation of this argument, the trial Magistrate found, correctly, that there was no such pending case, because the same had been dismissed for want of prosecution. It was mentioned that there was a pending application for reinstatement of that case. That may be so, but even now, that is water under the bridge, for I have called for the said file and it has revealed to me that the application for reinstatement of the dismissed suit was heard and disallowed through a ruling delivered on 25 July 2019 by Yano J. That was a suit filed by the appellant and his co-defendant partly claiming the suit land. If the appellant and his co-defendant were so keen to assert ownership of the disputed land, then they ought to have vigorously prosecuted their suit, but they did not do so, and the same, as I have mentioned was dismissed for want of prosecution. Given that the application to reinstate that suit was also dismissed, I do not see how the appellant can argue that on the basis of the suit before the ELC, his application for setting aside the judgment ought to have been allowed. I cannot see how the trial Magistrate can be faulted in the exercise of his discretion. He found, correctly that no claim over the land was being raised by the appellant and his co-defendant, and also found, correctly, that the allegation that there was a subsisting suit was false since the case had already been dismissed. In essence, the appellant and his co-defendant did not raise any triable issue in their draft defence. Where was the error by the Magistrate? I can see none.

31. I am aware that the appellant has contended that that there was not first served a Notice of Entry of Judgment before execution. He may have a point, but that would be an issue over the manner of execution, and would not be a ground to set aside the judgment.

32. The final issue is whether there is any other material before me that can persuade me to exercise my discretion in favour of the appellant. Nothing else was raised by the appellant and I am not going to fish for any, given the circumstances herein.

33. It will be seen that I see no merit in this appeal and it is hereby dismissed with costs.

34. Judgment accordingly.

DATED AND DELIVERED THIS 22 DAY OF SEPTEMBER 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

In the presence of:

Mr Odour for the appellant

Ms. Sidinyu holding brief for Mr Malombo for the respondents.

Court Assistant; Wilson Rabong’o