Muthui v Katenge (Civil Appeal 075 of 2021)
[2023] KEHC 2162 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2162 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 075 OF 2021

FROO OLEL, J

MARCH 23, 2023

BETWEEN

DAMARIS MWIKALI MUTHUI ..... APPELLANT

AND

KELVIN WANJALA KATENGE ..... RESPONDENT

(An appeal against the decision/order of Hon Daffine Nyaboke Sure (SRM) in the Senior Principal Magistrate at Engineer SPMCC No.62 of 2019)

JUDGMENT

1. This appeal arises out of a decision/order of Hon Daffine Nyaboke Sure (SRM) in the Senior Principal Magistrate at Engineer SPMCC No.62 of 2019 where she dismissed the Appellants application dated 8th September 2021 seeking to set aside judgment entered on 24th February 2020 and a decree issued on 13th May 2021.

2. The Respondent had filed a suit at the magistrate's court on 26/6/2019 claiming damages for injuries sustained in a Road Traffic Accident. The appellant did not enter appearance and consequently interlocutory judgment was entered as against her. The matter proceeded for formal proof and judgment was thereafter delivered on 24th February 2020. On 8th September 2021, the appellant filed an application seeking to set aside the judgment which was argued on merit and dismissed giving rise to this appeal.

3. The Appellant being aggrieved to dissatisfied by the said ruing filed their memorandum of appeal dated 14th December 2021 and raised five (5) grounds of Appeal namely;

    a. That the learned trial magistrate erred in law and in fact in disallowing the application dated 8th September 2021.

b. That the learned trial magistrate erred in law and in fact in failing to appreciate and consider that the appellant was not served with summons to enter appearance in SPMCC no.62 of 2011 – Engineer.

c. That the learned trial magistrate erred in law and in fact in failing to consider that the Appellant had a tenable defence that raised triable issues.

d. That the learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions and authorities attached thereto in order to avoid injustice.

e. That the learned trial magistrate's ruling was an erroneous decision as the learned magistrate did not consider that the appellant has a right to fair hearing.

The appellant, therefore prayed that this appeal be allowed and the lower court ruling dated 24th November 2021 be set aside and she be allowed to defend herself in Engineer SPMCC no.62 of 2019.

Appellant Submissions

4. The appellant submitted that the trial court fell in error in dismissing her application by failing to consider the filed submissions and made a finding that she poorly handled their matter through the 2nd defendant, legal officer yet that was not the case given the facts herein. This clearly shows that the application was not considered on merits, but dismissed by inferring that there was poor handling of this matter which finding was erroneous.

5. The appellant also submitted that she was not served with summons to enter appearance. Summons were served on the 1st defendant who accepted service on behalf of the 2nd defendant. she stated that the trial magistrate failed to consider that she was not personally served as is required in law and therefore is being locked out of the seat of justice given that she had pleaded that the 1st defendant is unknown to her.

6. The appellant further submitted that the trial magistrate also fell in error by failing to consider that the draft defence raised triable issues and put's the Respondent to strict proof on the allegations made. In particular she stated that she had also pleaded contributory negligence as against the Respondent and should have been a chance to canvass the same at trial. Finally the appellant stated that under Article 50(1) of *the constitution* of Kenya she had a right to be heard to enable court arrive at a just decision. She relied on the case of Phillip Kiptoo Chemwolo and Mumias Sugar Co. Ltd versus Augustine Kubede (1982 – 1988) KAR at page 1036 and the case of David Kiptanui Yego and 134 others versus Beryamin Rono and 3 others (2021)eKLR.

Respondent Submissions

7. The Respondent strenuously opposed this appeal and submitted that the Appellant were properly served with summons to enter appearance and did not challenge the content of the Affidavit of service of the process server who deponed that he called the appellant and she directed him to serve their summons to one Benedict Kutu Meta. That the Appellant did not challenge the fact that her phone number was 0724055918 and that it was the appellant who was driving the accident motor vehicle KCL 2002L which was registered in the name of the person who received the summons. They relied on the case of Hellen Makone versus Brenda Michieka (2015)eKLR and Ecobank Kenya Limited versus Minolta Limited and 2 others (2018) eKLR.

8. The Respondent also submitted that the defence strategy was a delaying tactic by the insurance company to defeat the declaratory suit filed (Engineer PMCC no. E074 of 2021) and that the appellant application dated 8th September 2021 was filed to circumvent hearing of the said declaratory suit. The said application was made in bad faith and was rightly dismissed. They relied on Charles Mwavita Mwangome versus Grace Anyango (2014) eKLR and Francis Kimani Kariuki versus Hudson Wamambiri Kamulamba (2005)eKLR.

9. The Respondents did finally submit that the Appellant having been served with summons to enter appearance, the trial court finding was correct and she exercised her discretion judicially. This appeal should thus be dismissed.

Analysis and Determination

10. The only issue in this appeal is whether the trial court ought to have set aside the exparte judgement or not and I will merge all the grounds of appeal and analyse them jointly.

11. The first appellant court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent conclusion on whether or not to allow the appeal. The first appellant court is empowered to subject the whole of the evidence to a fresh and exhaustive evaluation/ scrutiny and make conclusion about it, bearing in mind that it did not have the opportunity of seeing or hearing the witness (see Selle and Another versus Associated motorboat Co. ltd and others). It was so held by the court of appeal of East Africa in Peters versus Sunday Post Ltd.

12. In Coghlan V Cumberland (1898) 1 Ch, 704 , the court of appeal of England stated as follows;

> " Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.

13. The courts in these kinds of application, are guided by the provisions of Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act* in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases.Order10, of the Civil Procedure Rules, 2010, addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. Order 10, rule 4 empowers Courts to enter interlocutory judgment in cases 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. On the other hand, rule 9 gives the Plaintiff the leeway to set down a suit for hearing where no appearance is entered for other suits not provided for by this Order. Order 10, rule 10 provides that in cases where a defendant has failed to file a defence, rules 4 to 9 shall apply with any necessary modification. While Rule 11 empowers the court to set a side or vary a judgment that has been entered under Order 10.

14. Courts have the discretionary power to set aside ex parte judgment with the main aim being that justice should prevail. The Courts are not required to consider the merits of a defence in an application of this nature, the courts ought to look at the draft defence to the plaint and accompanying witness statements before proceeding to give its ruling as to whether the applicant's defence raises triable issues. In Patel -v- E.A. Handling Services Ltd (1974) EZ 75 and Tree Shade Motor Ltd -v- D.T. Dobie Co. Ltd CA 38 of 1998 and Mania -v-Muriuki (1984) KLR 407 the courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error. The Court set out the tenets which should be consider while entertaining such applications, these include include:

    i) Whether there is a regular judgment;

    ii) Whether there is a defence on merit;

    iii) Whether there is a reasonable explanation for any delay;

    iv) Whether there would be any prejudice.

15. In the cases of Patel -v- E.A. Handling Services Ltd (1974) EZ 75 and Tree Shade Motor Ltd -v- D.T. Dobie Co. Ltd CA 38 of 1998 and Thayu Kamau Mukigi -v- Francis Kibaru Karanja (2013) eKLR, the court stated as follows:

> " on the second prayer of the defendant that he be granted leave to file his defence and counter claim, I will be guided by the principles elucidated in the case of Tree Shade Limited -v- DT Dobie Co. Ltd. CA 38/98 where the court held that when an ex-parte judgment was lawfully entered the court should look at the draft defence to see if it contained a valid or reasonable defence."

16. The Court's power to set aside a judgment is exercised with a view of doing justice between the parties. Reliance is placed on the case of, Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede (1982-1988) KAR, where the Court held:

> " The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties"

17. In the case of, Kimani -v- MC Conmell (1966) EA 545, the Court held that where a regular judgment has been entered the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues. Further in Jomo Kenyatta University of Agriculture and Technology -v- Musa Ezekiel Oebal (2014) e KLR, the Court stated that the purpose of clothing the court with discretion to set aside ex-parte judgment is:

> " To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice..."

18. In the case of Patel -v- EA Cargo Handling Services Ltd (1974) EA, the Court stated that the main concern of the court is to do justice to the parties, and it will not impose conditions on itself to fetter the wide discretion given to it by the Rules.

19. I have considered the Application and the submissions of the parties in total and I find that the relevant law that will govern this court in coming up with its judgment is found under the provisions of Order 10 Rule 4 (1) and (2) of the Civil Procedure Rules, 2010 which provide as follows:

> " 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.
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> (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.

However, Order 10, rule 11 of the Civil Procedure Rules, provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside, it reads as follows:

> " 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."

From the reading of this provisions, a court has the discretion to set aside a default judgment. In the case of, Patel -v- EA Cargo Handling Services Ltd (1974) EA 75, the Court held that:

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."
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> In the case of, Kenya Commercial Bank Ltd -v- Nyantange &Another (1990) KLR 443 Bosire J, (as he then was) held that:
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> "Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just."

20. The discretion of a court to set aside or vary ex-parte judgment entered in default of appearance or defence is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. This was the position in Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd [2018] eKLR. In the exercise of this discretion the Court will consider inter alia if:

i. The defendant has a real prospect of successfully defending the claim; or

ii. It appears to the court that there is some other good reason why;

iii. The judgment should be set aside or varied; or

iv. The defendant should be allowed to defend the claim

Similarly, in the case of, Thorn PLC -v- Macdonald [1999] CPLR 660, the Court of Appeal stipulated the following guiding principles:

i. While the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;

ii. Any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;

iii. The primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and

iv. Prejudice (or the absence of it) to the claimant also has to be taken into account.

21. The Court in the case of Rahman -v- Rahman (1999) LTL 26/11/9, considered the nature of the discretion to set aside a default judgment and concluded that the elements the judge had to consider were: the nature of the defence, the period of delay (i.e., why the application to set aside had not been made before), any prejudice the claimant was likely to suffer if the default judgment was set aside, and the overriding objective.

22. The final key factor to consider when setting aside an ex-parte judgment is whether the defendant has a defence on merit. In the case of, Sebei District Administration -v- Gasyali & others (1968) EA 300 Sheridan J. observed that:

> " The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court"

23. In the case of, Tree Shade Motor Limited -v- DT Dobie Co Ltd CA 38/98, the Court held that even when ex-parte judgment was lawfully entered, the court should look at the draft defence to see if it contained a valid or reasonable defence.

In International Finance Corporation -v- Utexafrica sprl [2001] CLC 1361, it was stated that the test of a defence having a real prospect of success means that the prospects must be better than merely arguable.

24. In the instant case, the appellant stated that she was not served and that the 1st defendant served in the primary suit is a person unknown to her and did not have her consent to receive summons on her behalf. The respondent on the other hand relied on the affidavit of service of Stephen Kinuthia dated 20th November 2019 where he explained at length on how he served the 1st defendant at centro house , Ground floor and the said 1st defendant informed the process server that the appellant was his wife and was the one driving the accident motor vehicle. He (the 1st defendant called the 2nd defendant) and after engaging in a discussion, he accepted service on their behalf and signed the summons.

25. The said process server also deponed that prior to service, he had contacted the appellant on her cell phone Number 0724-055-918 and it is the appellant who directed her where to find the 1st defendant. The respondent did urge me to find that this is good service and also to note that the appellant did

not deny being call or deny that the said phone number 0724055-918 is indeed her phone number. It was thus her duty to establish that she was not served. They relied on Abdalla Mohammed & another Versus Mbaraka Shoka (1990) eKLR.

26. Service on several Defendants (Order 5 rule 7 of the civil procedure rules) provides that;

> " save as otherwise prescribed, where there are more defendants than one, service of summons shall be made on each defendant."

Service to the defendant in person or on his agent (order 5 rule 8) provides that;

a. Whenever 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.

Service on agent or adult (order 5 rule 12)

> " where in any suit, after a reasonable number of attempts have been made to serve the defendant, and the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him."

27. The above provision's as relates to service must all be read jointly. The plaintiff should first make every effort to serve the defendant in person However, where a defendant empowers an agent, service of summons can be effected on the said agent. Further before service is made on an agent or an adult member of the defendant's family, the process serve must show that he/she has made reasonable attempt's to serve the said defendant and has not succeeded and thus opted to serve the defendants agent and/or an adult member of the defendants family.

28. While the appellant vehemently denies that the 1st defendant his her husband, the respondent's allege that he is. This fact thus remain unproved and the evidentiary burden remains with respondent, as they are the party which will lose should no further evidence be tendered.

29. In Mbuthia Macharia versus Annah Mutua and another 2017eKLR, it was stated that;

> " The legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebutted. This constitutes of evidential burden. Therefore, while both the legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As the weight of evidence given by either side during the trial varies so will the evidential burden shift to the party who would fail without further evidence" in this case, the incidence of both the legal and evidential burden was with the appellant".

30. Secondly before serving a family member or an agent several attempts must have been made to try and serve the defendant, which attempts if unfruitful, then the process server can then serve the said agent and/or adult member of the defendant's family. The affidavit of service of Stephen Kinuthia dated 20th November 2020 does state the several attempts made in serving the plaintiff and therefor, even if the 1st defendant was a family member of the plaintiff (which was not sufficiently proved) such service would have been in breach of Order 5 rule 12 of the civil procedure rules. Having found as a fact that service of summons was not properly effected this court has no option but to set aside the judgment entered on 24th February 2020 and decree issued on 13th May 2021.

31. The other matter to consider is if setting aside should be done on terms. The respondent had to pay further court fee of Ksh.59,466/= to enable them get warrants of execution and filed the declaratory suit. It is obvious they will be prejudiced to that extent and also by having to prosecute the primary suit again.

32. In the case of Rayat Trading Co. Limited -v- Bank of Baroda & Tetezi House Ltd [2018] eKLR the Court held that:

> " If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant's costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim."
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> In deciding whether to impose such a condition, the court will consider factors such as whether there was any delay in applying to set aside, doubts about the strength of the defence on the merits, and conduct of the defendant indicating a risk of dissipation of assets see, Creasey -v- Breachwood Motors Ltd [1993] BCLC 480). As to the amount, this is in the court's discretion, which should be exercised by applying the overriding objective. However, a condition requiring payment into Court of a sum that the defendant will find impossible to pay ought not to be ordered, as that would be tantamount to refusing to set aside see, M. V. Yorke Motors v Edwards [1982] 1 WLR 444 and Training in Compliance Ltd v Dewse (2000) LTL 2/10/2000).

33. The respondent has incurred cost to execute and defend its judgment in the lower court and in this appeal and thus it will be only be just and fair to penalize the appellant to pay all costs attendant to the said execution.

Conclusion

1. For the reasons stated above I do therefore find that this appeal is merited the interlocutory judgment and all subsequent proceedings in Engineer CMCC NO E62 of 2019 is set aside exdibito justicea.

2. The appellant is grant leave to file its statement of defence within 14 days from the date of this judgment.

3. The appellant to pay the respondent all execution costs, which include further court fee, auctioneers costs and costs of defending the application in the lower court assessed at 25,000/= within 30 days from the date of this judgment failure of which the respondent will be at liberty to execute for the same.

4. Engineer CMCC 62 OF 2019 to proceed afresh before a different magistrate with jurisdiction to handle the same.

5. Each party to bear their costs in this Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF MARCH 2023.

FRANCIS RAYOLA

JUDGE

In the presence of;

Miss Kimechil for Appellant

Mr. Githae for Respondent