



REPUBLIC OF KENYA



KENYA LAW
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**Mwamba & 6 others v Makwolo & 3 others (Civil Appeal
119 of 2019) [2023] KEHC 4089 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4089 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 119 OF 2019**

PN GICHOHI, J

MAY 4, 2023

BETWEEN

TOM MOMANYI MWAMBA 1ST APPELLANT
SAMWEL BENJAMIN AOSA 2ND APPELLANT
MOGAKA AOSA 3RD APPELLANT
JACKSON M MAKWORA 4TH APPELLANT
STEPHENE AOSA 5TH APPELLANT
MOKAYA OBAGA 6TH APPELLANT
GEKONGE OBAGA 7TH APPELLANT

AND

JAMES NYANCHWAYA MAKWOLO 1ST RESPONDENT
MONICA BOSIBORI NYANCHWAYA 2ND RESPONDENT
JANET MOKE ANGIMA 3RD RESPONDENT
TIMOTHY ABUGA NYANCHWAYA 4TH RESPONDENT

*(An Appeal from the Ruling of Hon. N.S Lutta (CM)
delivered on 1/10/2019 in Kisii CMCC No. 679 of 2016)*

JUDGMENT

1. The subject of this appeal by the 1st - 7th appellants (the appellants) is the ruling of Hon NS Lutta (CM) dated and delivered on October 1, 2019 on the application dated March 28, 2019 in Kisii Chief Magistrate's Court Civil Case No 679 of 2016.



2. In the application, the appellants sought orders:
 1. That this application be heard *ex-parte* in the first instance due to its urgency.
 2. That the 1st to 7th Defendants be given a chance to heard pending the hearing and determination of this application.
 3. That there be a stay of execution of decree herein pending the hearing of this application and *ex-parte* proceedings be set aside and all consequential orders thereto.
 4. That the judgment and decree herein be set aside and all subsequent orders herein until the determination of this suit.
 5. That the 1st to 7th Applicants/Defendants be granted leave to file their defence.
 6. That the process server be summoned to court for cross examination of the affidavit of service.
3. The main grounds were that the 1st to 7th Appellants were never served with the summons to enter appearance at all and that they had annexed a draft defence which raised triable issues. In support was an affidavit sworn jointly by the 1st to 7th Appellants on May 28, 2019.
4. The application was opposed by the Respondents through a replying affidavit sworn on May 28, 2019 by Timothy Abuga Nyanchwaya on behalf of the 1st, 2nd and 3rd Respondents. In addition, the process server one David Nyang'au was summoned for cross - examination on August 6, 2019.
5. Upon hearing the parties , the learned Magistrate rendered his ruling on October 1, 2019 dismissing the appellants' application dated March 28, 2019 with costs to the Respondents. The impugned ruling gave rise to this appeal on the following grounds:
 - a. The learned trial Magistrate erred in law and fact in dismissing the application without considering other factors in setting aside the *ex-parte* judgement.
 - b. That the learned trial Magistrate misdirected himself and believing that all the Appellants were served once and at the same place and time.
 - c. That the learned trial Magistrate erred in law in exercising his judicial discretion wrongly and arriving at the wrong decision.
6. The Appellants asked this court to allow the appeal , set aside the ruling of the lower court dated October 1, 2019 and substitute it with the orders that the Appellants be allowed to defend themselves and the lower court orders be quashed and/or set aside and the suit be heard on merit.
7. The appeal was canvassed by way of written submissions. The Appellants submissions are dated March 31, 2022 while the Respondents' submissions are dated January 17, 2023.
8. The Appellants contended that they were not served with the summons to enter appearance; that as per Davis Nyang'au's affidavit of service dated January 17, 2017, he deponed that he served the Appellants but did not state the time of service and the manner of service if at all he served the 2nd Appellant at all.
9. The Appellants further submitted that the process server did not mention the name of the person who identified the Appellants at the time of service yet it is mandatorily provided for under Order 5 Rule 15(1) of the *Civil Procedure Rules*. The Appellants faulted the trial court for failing to satisfy itself that the Appellants were properly served and especially the 2nd Appellant yet it is on that basis that affidavit the trial court entered interlocutory judgement.



10. The Appellants further submitted the plaint which was amended on January 30, 2018 was not served upon them. That the amendment sought for compensatory, exemplary and punitive damages which amendment changed the cause of action and hence the Appellants ought to have been served on the changes made; that the hearing proceeded in their absence and therefore the judgement entered on January 28, 2019 was unlawful, irregular, null and void as a result of want of service.
11. The Appellants further contended that notice of entry of *ex-parte* ought to have been served upon the Appellants as per the provisions of Order 22 Rule 6 but there was no proper service.
12. On execution proceedings commenced on December 9, 2021, the Appellants contend that there was no proclamation and that in any event, no further fees was paid. The Appellants therefore urged this Court to order for the restitution of all the properties allegedly irregularly attached. While submitting that the appeal is highly merited and that it should be allowed with cost to them, the Appellants placed reliance on the Environment and Land Court case of *Benson W Kaosa & 72 others vs Hon AG & 80 others* [2022] eKLR and the case of *Gulf Fabricators vs County Government of Siaya* [2020] eKLR on factors to be considered in setting aside default/ *ex-parte* judgement.
13. On their part, the Respondents submitted that although the Appellants state that they were not served, the process server's testimony was unshaken and judgement was entered on the basis of an affidavit of service which showed on its face that the service had been effected. The Respondents submitted that the process server had effected service in accordance with the *Civil Procedure Rules*.
14. The Respondents submitted that it would be wrong for this Court to interfere with the trial magistrate's discretion, and on this issue, they cited the holding in the case of *Mbogo vs Shah* (1968) EA and further relied on Order 10 Rule 11 of the *Civil Procedure Rules* and urged this Court to find that the trial court exercised its discretion judiciously and was justified in dismissing the Appellants' application.
15. The Respondents further cited the case of *James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another* (2016) eKLR where the court discussed the principles of setting aside a default judgement and further cited the case of *K-Rep Bank Limited v Segment Distributors Limited* [2017]eKLR and submitted that the process server had demonstrated in cross examination that the Appellants were indeed duly served with summons to enter appearance as well as hearing and mention notices in the matter before the trial magistrate but they deliberately failed to enter appearance or file defence or even attend court without any reasonable cause. The Respondents therefore urged the Court to find that the default judgment was regularly entered.
16. While citing the case of *Patel vs East Africa Cargo Handling Services* (1974) EA 75 where the court stated that the court would not set aside a regular judgement unless its defence is on merits, the Respondents submitted that the annexed draft statement of defence was full of denials. They submitted that there was no list of witnesses and documents annexed together with the draft statement of defence to show that the defence has merits as it was stated in the case of *Mose Onchwati vs Kenya Oil Company Ltd & Another* (2017) eKLR.
17. The Respondents reiterated that the Appellants were served with the pleadings and hearing notices but chose not to participate in the proceedings and that no reasonable grounds have been advanced by the Appellants to warrant the orders sought.
18. Further, they urged the Court to note that the 8th and 9th Defendants who appeared and who are not party to this appeal have already satisfied prayer (a), (b) and (c) of the judgment leaving the relief that was given against the 1st to 7th Appellants herein.



Determination

19. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusion but bearing in mind that it neither saw nor heard the witnesses testify as stated in *Selle & Another v Associated Motor Boat Co. LTD & Others* (1968) EA 123. The Court has to establish whether the decision of the lower court was well founded.
20. Further, as was held by the Court of Appeal in Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* (1988) eKLR, it is settled law that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law.
21. Having considered the appeal, the proceedings in the trial court and the submissions by both parties the issues regarding whether there was proclamation or not or whether further fees was paid are not issues for consideration and which are raised by appellants in their submissions are main issues for consideration in this application. The main issues are :
 - a. Whether the appellants were duly served.
 - b. Whether the *ex-parte* judgement ought to be set aside.
22. In the suit before the trial court were Nine (9) Defendants, that is the 1st to 7th Defendants now the Appellants this appeal and the 8th and 9th Defendants being the Inspector General of Police and the Attorney General respectively. The Plaintiffs therein (Respondents) prayed for general damages for unlawful arrest, false detention, unlawful defamation and malicious prosecution. They also prayed for special, compensatory, exemplary and punitive damages and costs of the suit.
23. Once a suit is instituted, the Defendants have to be served with summons to enter appearance together with the plaint so as to know of existence of the claim against them. That service is provided for under Order 5 of the *Civil Procedure Rules* and in this case where there were 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 the summons shall be made on each defendant.”
24. If service is not proper or was not done at all, then any expert judgment entered for none appearance of the Defendant becomes irregular and fit for setting aside upon application by the Defendant and the Defendant is granted unconditional leave to defend the suit.
25. There is no issue in regard to the 8th and 9th Defendants in the suit as the lower court record shows that upon service, they did enter appearance through the Attorney General and it is further shown that they are not party to this appeal.
26. The lower court record further shows that on January 17, 2017, the process server David Nyang’au swore an affidavit dated 26/7/2017 detailing the service upon each of the 1st - 7th Appellants herein and upon request by the counsel for the Respondent, an interlocutory judgement was entered on January 19, 2017 against the Appellants in default of appearance and filing of defence.
27. Contrary to arguments by the Appellants in their dispute on service, that affidavit is detailed and shows that the indeed each of the Appellants was properly identified and served. The cross- examination of the process server upon the application by the Appellants in the application for setting aside the judgment shows that service was proper and the interlocutory judgment regular.



28. The proceedings before the trial court indicate that the hearing notices were duly served and there was a return of service but the Appellants did not attend court. Order 12 Rule 2 provides that on the date of the hearing, if the court is satisfied that the hearing notice was duly served, it may proceed for hearing. The case then proceeded and final judgment entered therein and again that judgment is regular.
29. Despite that judgment, the Courts still have unfettered discretion to set aside or vary such judgment. Order 12 Rule 7 provides upon application, the court may set aside or vary an *ex-parte* judgement upon such terms which may be just. As regards setting aside a judgment, the Court of Appeal in *James Kanyita Nderitu & another v Marios Philotas Gbikas & another* [2016] eKLR had this to say:
- “We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the *Civil Procedure Rules*, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.”
30. Having found that this is a regular judgment, the next issue is to consider if the Appellants have a defence that raises a triable issue. The Court of Appeal has settled as law that a triable issue may not be one that will succeed. In *Toshike Construction Company Limited v Harambee Co-operative Savings & another* [2019] eKLR case, the Court had this to say regarding a triable issue:
- “The defence need only raise a bona fide triable issue, which is 'any matter that would require further interrogation by the court during a full trial'. The Black's Law Dictionary defines the term 'triable' as, 'subject or liable to judicial examination and trial'. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”
31. The Respondent's claim was heavy and weighty raising serious issues against the Appellants. A look at the annexed Draft Defence filed by the Appellants on March 28, 2019 reveals just denials on various paragraphs of the plaint. It has no single issue that is liable for judicial examination and trial. Mere denials are not reasonable defence to the Respondent's claim.
32. In the upshot:-
1. The appeal is devoid of merit and the same is hereby dismissed.
 2. The ruling and order of Hon SN Lutta (CM) dated and delivered on 1/10/2019 is hereby upheld.
 3. Costs of this appeal are awarded to the Respondents.

DATED, DELIVERED AND SIGNED AT KISII THIS 4TH DAY OF MAY 2023.



P. GICHOCHI

JUDGE

In the presence of:

N/A for Appellants

N/A for Respondents

Kevin Isindu, Court Assistant

