Gikundi & another v Munyithya (Suing as the legal representative of the Estate of Mutinda Makuthu – Deceased) (Civil Appeal E028 of 2022) [2023] KEHC 20878 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20878 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E028 OF 2022

LW GITARI, J

JULY 6, 2023

BETWEEN

ELIAS GIKUNDI ..... 1ST APPELLANT

FELIX NTWIGA KUIGA ..... 2ND APPELLANT

AND

MAKUTHU MUNYITHYA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MUTINDA MAKUTHU – DECEASED) ..... RESPONDENT

JUDGMENT

1. This is an appeal against the ruling dated November 3, 2022 of the Hon. Mbayaki Wafula (Senior Resident Magistrate) in Marimanti SPMCC No. E019 of 2019; Japheth Makuthu Munyithya v. Elias Gikundi & Felix Ntwiga. The grounds of appeal as listed in the Memorandum of Appeal dated November 7, 2022 are follows:-

    a. That the learned trial magistrate erred in law and in fact in failing to exercise his discretion in setting aside the ex-parte/default judgment delivered on August 27, 2020 thus closing the appellants from access to natural justice.

    b. That the learned trial magistrate erred in law and in fact in failing to consider relevant and pertinent issues in respect of setting aside the ex-parte judgment.

    c. That the learned trial magistrate erred in law and in fact in acting in a biased manner without considering that the ex-parte judgment rendered the appellant remediless.

    d. That the learned magistrate erred in law and in fact when he only chose to address himself to the issue of service and failed and/or refused to address himself to the draft defence filed with the application which defence raised real triable issues which should go to trial for adjudication.

e. That the learned magistrate erred in law and in fact when he failed to consider the merited submissions by the appellants in making his ruling on the said application dated April 5, 2022.

f. That the learned magistrate erred in law and in fact by failing to consider the nature of the action and whether as the last resort the respondent could have been compensated by way of costs for any delay occasioned by the appellants for not filing a defence in good time.

g. That the learned magistrate erred in law and in fact by failing to appreciate that the appellant had met the requisite test for setting aside any court order obtained ex-parte.

2. The Appellants thus prayed that:

a. This court be pleased to allow this appeal;

b. This court be pleased to set aside the trial court's ruling delivered on November 3, 2022 dismissing the Appellants' application and substitute it with an order allowing the Appellants' application dated April 5, 2022;

c. This honourable court be pleased to set aside both the interlocutory and the ex-parte/default judgment entered against the Appellants on August 27, 2020 and all consequential orders/ proceedings;

d. This honourable court be pleased to grant the Appellants leave to file their defence out of time;

e. This honourable court be pleased to make an order that the suit be heard afresh before a different court;

f. The costs of the appeal be awarded to the Appellant.

3. At the hearing of this appeal, directions were taken to have both counsel for the parties file their respective submissions which I have summarized below.

Appellant's Submissions

4. It was the Appellants' submission that this appeal seeks no more than a fair chance to the Appellant to be heard on merits which was taken away by the trial court by misapprehension of the facts and the applicable law in setting aside default judgments.

5. It was further the Appellants submission that they were never served with the summons, notice of intention to sue and pleading in the suit filed by the Respondent against the Appellants vide a Plaint filed on July 10, 2019. It is the Appellants contention that they were completely unaware of the existence of the said suit until March 31, 2022 when the 1st Appellant was served with a 7 days proclamation notice and warrant of attachment by Jocet Auctioneeers. That the trial court proceeded exparte and a default judgment in the sum of Kshs. 1,169,956/= was entered in favour of the Respondent on August 27, 2022.

6. The Appellants contend that upon receiving of the proclamation notice, they engaged their advocates who filed an application dated 5th April, 2022 seeking orders to set aside the default judgment. The trial court consequently dismissed the application on the ground that there was an affidavit of service on record which had not been impugned.

7. The Appellants contend that the affidavit of service on record only proves service on the 2nd Appellant who was the driver at the time of the accident and that the registered owner of the subject motor vehicle was never served. It is thus the Appellants' submission that the trial court overlooked the issue on

whether there had been proper service on the Appellants and also ignored the issue on whether the defence raised any triable issues. That the Appellants' invitation for this Court to interfere with the exercise of discretion by the learned trial magistrate is merited and inevitable as the trial magistrate misdirected himself and failed to take into consideration relevant matters and thus arrived at a wrong decision.

Respondent's Submissions

8. On the part of the Respondent, it was submitted that the ex-parte judgment dated August 27, 2020 was regular. That the trial court considered the aspect of service prior to entry of the interlocutory judgment and held that:

> " The return of services have not been impugned. There is no reason given to challenge the fact of service. In the absence of any rebuttal, the substratum upon which the ex-parte proceedings is founded remains solid, notwithstanding the willingness on the part of the [Appellants] to defend the case."

9. The Respondent thus maintains that service of summons to enter appearance and service of the plaint in Marimanti SPMCC No. E019 of 2019 was regular and effective. That it was the Appellants who sat on their right to defend the case and were there not deserving of the exercise of this Court's discretion to set aside the ruling of the trial court. In concluding his submissions, the Respondent prayed that the appeal be dismissed with costs in favour of the Appellants.

Analysis

10. This being the first appeal, this Court is obligated to consider the evidence adduced, evaluate it and draw its own conclusions, bearing in mind that it did not hear and see the witnesses who testified [See: Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123].

11. With this in mind, I have analyzed the evidence as this court is obliged to do so as to draw my own inferences and conclusions on the matter. The main issues that arises for determination by this Court are:

    a. Whether there was proper service of the summons, plaint of verifying affidavit, list of witnesses, case summary and a list of issues for determination.

    b. Whether the trial court erred in failing to set aside the ex-parte judgment.

On whether there was proper service

12. Order 5, Rule 8 of the Civil Procedure Rules provides that:

    (1) Wherever 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." [Emphasis added]

13. In Shadrack arap Baiywo vs. Bodi Bach [1987] eKLR, the Court of Appeal quoting Chitaley and Annaji Rao; The Code of Civil Procedure Volume II page 1670 stated that:

> " 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."

14. In this case, it is the Appellants contention that they were never served with the pleadings or the summons to enter appearance in the case before the trial court. The Respondent, on the other hand, maintains that there was proper service of the pleadings and summons.

15. I have perused the proceedings of the trial court that are on record. On October 23, 2019, the court entered an interlocutory judgment against the 2nd Appellant herein after noting that there was an affidavit of service sworn and dated October 4, 2019. At this point, there was no proof of service against the 1st Appellant. Subsequently, on January 17, 2020, the trial magistrate entered an interlocutory judgment against the 1st Appellant herein after noting that there was an affidavit of service sworn and dated January 16, 2020.

16. In his Replying Affidavit sworn on May 6, 2022 in response to the Appellants' application dated April 5, 2022, the Respondent deposes at paragraph 5 of the said affidavit that: "....service was effected on the 2nd [Appellant] on September 21, 2019, and thereafter service was effected on both [Appellants] simultaneously on December 14, 2019."

17. As per the both the affidavits of service sworn on January 16, 2020 by Kaimba Peter and October 14, 2019, service of the pleadings and summons to enter appearance were effected on the 2nd Appellant herein. At no point does it indicate that the 1st Appellant received personal service of the pleadings and summons. In the circumstances, it is my view that there was no proper service on the 1st Appellant.

On whether the *ex-parte* judgment should have been set aside.

18. Under Order 10 Rule 11 of the Civil Procedure Rules, the court has unfettered discretion to set aside judgment on such terms as it deems fit and just. The said provision states:

> "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."

19. There is no doubt that the decision to set aside an ex-parte judgment is discretionary and that the discretion is intended to be so 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 v Mbogo and Another [1967] EA 116).

20. I have considered the grounds of appeal as well as the submissions by the parties. it is notable that the right to a fair hearing, which is guaranteed under Article 50(1) of *the Constitution*, encompasses several aspects. These include, a party being informed of the case against them; being given an opportunity to present their side of the story or challenge the case against them; and the party having the benefit of a public hearing before a court or other independent and impartial body.

Article 50 (1) of *the Constitution* states:-

> "1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

I am persuaded by holding by Justice Mativo, as he then was in Wachiira Karani-v- Bildad Wachira 2016 where he stated;

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

The applicant is inviting the court to interfere with the exercise of discretion by the trial magistrate. For the appellate court to interfere with that exercise it must be shown that the trial magistrate misdirected himself, acted on wrong principles and the exercise of discretion is wrong for failing to take into consideration relevant matters. See in Benja Properties Limited –v- Syedina Mohamed Burhannudin Sahed & 4 Others (2015) eKLR, the court stated that procedural lapses which do not go to the jurisdiction of the court or to the root of dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of criminal offence attracting very heavy punishment of the offending party. That instead the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out.

Article 159 of *the Constitution* has urged the courts to seek to do substantive justice other than lean on procedural technicalities. Section 1A & 1B of the *Civil Procedure Act* on the overriding objectives states that the objective of the Act is to facilitate the just, expeditious proportionate and affordable resolution of Civil Disputes governed by the Act. The Act also gives the court wide discretion to make orders as would be necessary for the ends of justice. Section 3A of the *Civil Procedure Act* provides:

> "Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

The trial magistrate ought to have learned towards doing substantive justice other than lean on procedural infractions which would not have caused any prejudice on the respondent. The trial magistrate leaned so much on the issue of service and failed to address his mind on the draft defence which raised triable issues. I find that the exercise of discretion by the trial court was not done fairly and judiciously as he had a duty to hear the defence on merits where it was clear that the respondent would not suffer prejudice and could be compensated by an award of costs.

21. In this case, it is clear that service of the pleadings and summons to enter appearance was only effected on the 2nd Appellant herein and not the 1st Appellant. In my view, therefore, it was a grave miscarriage of justice for the trial magistrate to hold in the impugned ruling that the Appellants, particularly the 1st Appellant, had proper notice of the matter herein. The ruling was based on some errors and cannot thee be allowed to stand.

Conclusion

22. From the foregoing analysis, I opine that this appeal is merited and should be allowed.

I therefore order as follows:

1. The appeal is allowed.
2. The ruling of the learned trial magistrate dated and delivered on November 3, 2022 is set aside.
3. It is substituted with an order allowing the notice motion dated April 5, 2022 to the effect that the exparte proceedings and the resultant Judgment are set aside.

4. The defendants be allowed to tender their defence and be heard on merits.

5. The defendants to provide security for costs as may be assessed by the trial court.

6. The costs of the appeal to the appellant.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 6TH DAY OF JULY 2023.

L.W. GITARI

JUDGE

6/7/2023

Mr. Bwire for Applicant

Mr. Kaiba for Respondent- Absent

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

6/7/2023