Mwawasi & another v Kigwe & another (Civil Appeal 46 of 2022)
[2023] KEHC 21159 (KLR) (Civ) (12 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21159 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 46 OF 2022

JN NJAGI, J

JULY 12, 2023

BETWEEN

SAMMY MWAWASI ..... 1ST APPELLANT

SKY BLUE TRAVEL BUREAU LIMITED ..... 2ND APPELLANT

AND

PAULINE MUTHONI KIGWE ..... 1ST RESPONDENT

GLADYS WAMBUI ..... 2ND RESPONDENT

(From the ruling and decree of Hon. L. L. Gicheha (Mrs.) in Nairobi CMC Civil Suit No 9703 of 2018 delivered on 28th January 2020)

JUDGMENT

1. The appellants had in the court below filed an application dated October 11, 2019 in which they were seeking that the court do set aside the ex parte judgment entered on the July 16, 2019 against the appellants and that the appellants be granted unconditional leave to oppose the respondents` application dated March 25, 2019 in which the respondents were seeking for striking out of the appellants` defence on the ground that it did not raise triable issues.

2. The application was dismissed by the trial court on the ground that the appellants through their advocates, Mwilu & Co Advocates, were served with a hearing notice and they failed to turn up in court. That service was confirmed by a process server who did the service and was cross-examined in court. The trial court held that there was proper service of the notice. The magistrate consequently struck out the appellants` defence and entered judgment for the respondents on the ground that their statement of defence did not raise triable issues.

3. The appellants were aggrieved by the dismissal of the application and filed this appeal. The grounds of appeal are the trial court erred:

   a. By dismissing the appellant's application dated October 11, 2019 and holding that the appellant's former advocate on record was properly served with the application dated March 25, 2019, together with hearing notices.

   b. By denying the appellant unconditional leave to defend the respondent's application dated March 25, 2019

   c. By holding that the appellant's statement of defence on record does not raise any triable issues.

   d. By failing to stay the execution of the judgement entered on July 16, 2019

   e. By holding that the agreement purportedly entered between the respondent and the 1st applicant herein is valid and that the same binds the 2nd applicant/appellant

4. The appeal was canvassed by way of written submissions. The appellants submitted that the process server who alleged to have served the notice was cross-examined by the appellants` advocates in respect of his affidavit of service sworn on May 9, 2019. That the process server said that he served the notice on Mwilu & Co. Advocates who were on record for the appellants. He however acknowledged that the same was received by Mwilu, Mwanzi & Company Advocates who were not on record for the appellants. That the process server acknowledged that what was served was a mention notice. That the advocates for the appellants were thus not served with the application and mention notice and the appellants were in the premises condemned unheard.

5. The appellants submitted that this court has unfettered discretion to set aside the judgment entered on July 16, 2019. That the concern of the court in doing so is to do justice to the parties as was held in the case of *Esther Wamaitha Njihia & 2 others v Safaricom Limited* (2014) eKLR where the court cited Stephen Ndichu v Monty's Wines and Spirits where it was held that:

> " The principles governing the exercise of judicial discretion to set aside ex-parte judgements are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See Patel –vs-E. A. Cargo Handling Services Ltd (1974) E. A. 75). The discretion is intended to be exercised to avoid injustice or 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 cause of justice (see Shah –vs- Mbogo (1969) E. A. 116). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration –vs- Gasyali (1968) E. Way. 300). It also goes without saying that the reason for failure to attend should be considered."

6. It was submitted that the judgment entered against the appellants was not a regular judgment and should be set aside. The appellants cited the case of Fidelity Commercial Bank Ltd v Owen Amos Ndung`u & another, HCCC No. 241 of 1988 (UR) where it was stated as follows:8

> " A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the exparte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all the summons to

enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right"

7. It was submitted that the appellants` defence raised triable issues as they in their defence denied any wrong doing and said that there was no option for refund.

8. The Respondents on the other hand submitted that the process server confirmed that he served the firm of Mwilu & Co. Advocates on the May 23, 2019 and the advocate affixed his stamp on the pleadings, Mwilu Mwanzi. That the address of the advocates Mwilu Mwanzi and Mwilu & Co. Advocates is the same, confirming that the advocate who received the pleadings practices in the name and style of Mwilu & Co. Advocates.

9. It was submitted that the appellants` defence did not raise any triable issues but was merely a smokescreen intended to divert the court`s attention to the real issues in evidence which is the fact that the appellants deny that service was properly effected on their then Advocate on record despite evidence of service in form of a stamp. The respondents urged this court to dismiss the appeal with costs.

10. I have considered the appeal and the submissions by counsels for the parties. This being a first appeal the duty of this court is to re-evaluate and reconsider afresh the evidence adduced at the lower court and draw its own independent conclusions. In *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, the Court of Appeal put this duty as follows;

> ..An appeal to this Court from a trial by the High 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 allowances in this respect.

11. The issues for determination are:

    (1) whether the appellants were served with the application dated March 25, 2019 and a mention notice.

    (2) Whether the defence of the appellants raised triable issues.

12. The appellants contend that the advocates who were on record for them at the time of alleged service were Mwilu & Co. Advocates. That the application was purportedly served on a firm known as Mwilu, Mwanzi Advocates who were unknown to them.

13. The trial magistrate in making a finding that the notice was served on Mwilu & Co Advocates held that:

> " Looking at the notice which was served upon Mwilu & Co Advocates there is no doubt that Mwilu Mwanzi is then probably a partner in the said firm. The address where it was served is the address in the memorandum of appearance. It cannot be said that there is no service because an advocate received a document using his own stamp instead of an official office stamp."

14. With all due respect to the honourable magistrate, there was no evidence placed before the court to show that Mwilu Mwanzi was a partner in the firm of Mwilu & Co. Advocates. There was no basis for the magistrate in reaching that conclusion and the same can only have been based on speculation. In

fact, the affidavit of service sworn by the process server on May 9, 2019 does not disclose who in the advocates` office signed and stamped the notice. The return of service only states that:

> " They accepted service of the mention notice, signed and stamped..."

15. In my considered view, there was no sufficient evidence of service on the advocates for the appellants, Mwilu & Co Advocates. It is also to be noted that what was purportedly served was a mention notice and not a hearing notice. The mention notice cannot have been the basis of entry of ex parte judgment. There was thus no proper service on the appellants. The ex parte judgment was therefore not a regular judgment. Such an irregular judgment calls to be set aside as a matter of right as was stated in the case of *Fidelity Commercial Bank Ltd v Owen Amos Ndung`u & another* (supra).

16. The respondents in the case sued the appellants to recover a sum of Ksh.54,550/- which the respondents had paid the appellants for them to process an air ticket for the 2nd appellant to travel to Dubai which the appellants failed to do. The appellants in their statement of defence contended that they had no obligation to refund the money as their duty ended with the making of the reservation of the air ticket. Therefore, that the respondents should have sued the airline for the refund of the money.

17. The trial magistrate in her judgment made a finding that the appellants` defence did not disclose a triable issue. She held that the contract to reserve the air ticket was between the plaintiffs and the 2nd defendant and as such the plaintiffs had nothing to do with the airline that made the reservation of the ticket. That it was the duty of the defendants to claim from the airline for the cancelled reservation.

18. A triable issue is not one that may necessarily succeed but one that requires further interrogation of the court. In Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76, Sir William Duffus P, described a 'triable issue' as follows:

> ..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 the 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.

19. The issue as to whether the respondents should have sued the airline and not the appellants for the refund of the money was in my view a triable issue. In the premises, the trial court erred in holding that the defence did not raise a triable issue.

20. The upshot is that the appellants have shown that their former advocates, Mwilu & CO Advocates were not served with the notice of motion dated March 25, 2019 before their defence was struck out and ex parte judgment entered against them. They have also shown that their defence raises triable issues. The trial magistrate wrongly entered judgment against the appellants. The only option is to set aside the judgment of the trial court entered on July 16, 2019 which I hereby do and order that the case proceeds to full hearing for determination on its own merit.

21. The appellants to have the costs of the appeal.

Orders accordingly.

Delivered, dated and signed at NAIROBI this 12th July 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Onsembe H/B Mr. Ongegu for Appellants

Mr. Okile H/B for Mr. Kabaiku for Respondents

Court Assistant- Amina

30 days R/A.