Juma v Kirangi (Civil Appeal E068 of 2021)
[2023] KEHC 22477 (KLR) (Civ) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22477 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E068 OF 2021

AA VISRAM, J

SEPTEMBER 21, 2023

BETWEEN

ZACHEAUS OMIA JUMA ..... APPELLANT

AND

NICHOLAS KIRANGI ..... RESPONDENT

(Being an appeal from the entire Ruling/decision and order of the Chief Magistrate's Court at Milimani Law Courts, Nairobi issued on the 22/05/2020 by the Honorable Magistrate Orenge K.I, SRM in Nairobi CMCC No. 594 of 2016)

JUDGMENT

Introduction

1. This is an appeal from the ruling of the trial court delivered on May 22, 2020 in respect of the application dated July 23, 2019. In the application, the Appellant (2nd defendant in the lower court) sought orders to set aside the ex-parte judgment of the lower court and sought leave to file his defence out of time.

2. The said application was primarily based on the ground that the Appellant had never been served with summons to enter appearance in the suit on April 14, 2016 as alleged by the process server in his affidavit of service sworn on April 15, 2016. Further, the Appellant contended that his defence discloses triable issues and that he ought not to be condemned unheard.

3. In its ruling dated May 22, 2020 ("the Ruling"), the lower court dismissed the above application for among other reasons, that the process server had never been called for cross examination, and there was therefore a presumption of evidence which had not been adequately rebutted by the Appellant.

4. The Appellant being dissatisfied with the Ruling has preferred this appeal. The Memorandum of Appeal raises eight grounds as follows: -

   a. The Learned Magistrate erred on fact in finding that the evidence of the process server was not challenged and that there was service of summons to enter appearance upon the Appellant.

   b. The Learned Magistrate erred on fact in failing to find that the Appellant had placed before the court sufficient material/evidence to demonstrate that he was not served with summons to enter appearance and that the judgment entered against him was an irregular judgment.

   c. The Learned Magistrate erred on fact in failing to find that the affidavit of service sworn by the process server contained absolutely false and untruthful depositions.

   d. The Learned Magistrate erred in law and on fact in failing to set aside judgment entered against the Appellant *ex debito justitiae*.

   e. The Learned Magistrate erred in law and on fact in failing to consider that the Appellant had a defence on merits which raised triable issues that appealed for consideration in a full trial.

   f. The Learned Magistrate erred in law and on fact in failing to exercise his discretion in favour of the Appellant and thereby dismissing the application.

   g. The Learned Magistrate erred in law in disregarding the submissions filed by the Appellant's counsel and the authorities cited therein.

   h. The Learned Magistrate's ruling was rendered/delivered per incuriam.

5. The appeal was disposed of by way of written submissions, which were duly filed by the Appellant only.

6. As stated above, the Appellant's primary argument was that he had not been served and that his defence raised triable issues. In respect of the same, he contended that he was not employed by Knight Support Limited in Karen at the time of the alleged service, and therefore could not have been served. The correct position was that he was employed by the County Government of Uasin Gishu and was living in Eldoret at that time.

7. He submitted that the evidence in relation to the above facts had been placed on record before the lower court, but the same had been disregarded. Further, the same had not been challenged by the Plaintiff in the lower court.

8. He relied on the decision of the High Court in *Kabutha v Mucheru* (2004) eKLR, where the court stated as follows:-

> " In *John Akasirwa Vs Alfred Inat Kimuso* Civil Appeal No 16 of 1999 the Court of Appeal stated that: -
>
> > "Proper service of summons to enter appearance in Litigation is a crucial matter in the process whereby the court satisfies itself that the other party to the litigation has notice of the same and therefore choose to enter appearance or not"...
> >
> > "If there is no proper service of summons to enter appearance, the court has no option but to set aside *ex debito justitiae* any default judgment on record, see *Gandhi Brothers Vs H K Njage T/a HK Enterprises Milimani* commercial Courts (Nairobi) Civil Suit No 1330 of 2001."

9. Additionally, he submitted that the lower court ought to have also considered whether or not his defence raised triable issues. He relied on the decisions of the High Court in *Peter Weyama v Emmanuel Odunga Orodi* (2015) eKLR and *AK Abdulgani v Geoffrey Nzioka Ndumbu* (2016) eKLR in support of the above argument and contended that his defence did indeed raise numerous triable issues which deserve consideration and a trial.

Analysis and Determination

10. I have considered the record in entirety, the grounds of appeal, submissions by the Appellant, and relevant law. The issue for determination is whether the lower court ought to have set aside the exparte judgment of the lower court and its consequential effects.

11. This being a first appeal, the court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co*. [1968] EA 123). In *Kiruga v Kiruga & Another* [1988] KLR 348, where the Court of Appeal stated the following:-

> " 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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."

12. Order 10 Rule 4 (1) and (2) of the *Civil Procedure Rules* is instructive. It stipulates as follows: -

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(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.

(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.

13. Order 10, rule 11 of the *Civil Procedure Rules*, on the other hand provides that *ex-parte* interlocutory judgment in default of appearance or defence may be set aside, it states 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."

14. I note that the seminal authority in respect of this area of law is *Mbogo & Another vs Shah* (1968) 1 EA 93, where the Court stated as follows:-

> " Applying the principle that the Courts discretion to set aside an *ex-parte* judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused."

15. The Court of Appeal further distilled the principles under which it would interfere with the exercised of discretion of the lower court in *Mugunga General Stores v Pepco Distributors Ltd* [1987] eKLR. The court stated as follows:-

> " the duty of this court on an appeal against the exercise of that discretion, is not to interfere unless the judge has exercised his discretion wrongly in principle or perversely on the facts of the case."

16. The law relating to disproving service was enunciated in Chitaley and Annaji Rao; The *Code of Civil Procedure* Volume II page 1670, in the following terms:-

> " There is a presumption of service 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." (emphasis mine)

17. The above stated principle was quoted with approval by the Court of Appeal in *Shadrack Arap Baiywo vs Bodi Bach* KSM CA Civil Appeal No 122 of 1986 [1987] eKLR where the Court of Appeal reiterated the same criteria.

18. Based on the above, it is clear to me that the onus lay on the Appellant to disprove service upon him in the lower court. Further, it would have been desirable for him to do so by way of cross-examination of the process server who deposed that he had served him.

19. Based on the record, no cross-examination took place, and this was the sole basis of the decision by the Magistrate to dismiss the Application. However, this is where the Magistrate misdirected himself. The fact that no cross- examination took place, ought not to have been the only criteria to be applied in determining the Application. The Magistrate ought to have considered the other evidence on the record. In particular, he ought to have considered that the Appellant had provided evidence annexed to his supporting affidavit sworn on June 23, 2019 marked as exhibits ZOJ4 which showed that he was employed by the County Government of Uasin Gishu during the periods of 2015 and 2016 when service was allegedly effected upon the Appellant.

20. Had the Magistrate considered the above evidence, he may have reached a different conclusion. By failing to take this evidence into consideration, to my mind, he failed to take into account relevant factors.

21. In any event, as stated above, the question of service was not the sole criteria to be applied. In addition, the Magistrate should have also considered the question of whether or not the Appellant's defence

raised triable issues. Such an enquiry is in accordance with the pronouncement of the Court of Appeal in *Jamnadas V Sodha v Gordandas Hemraj* (1952) ULR 7, where Ainley, J said as follows:-

> " 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."(emphasis mine)

22. No such enquiry as stated above was carried out, and the total failure to consider whether or not the Appellant's defence raised triable issues was, to my mind, a serious oversight on the part of the Magistrate.

23. Based on the reasons above, I am satisfied that the lower court failed to exercise its discretion in accordance with the principles set out above. I find that this court is justified in interfering with the orders of the lower court to rectify injustice occasioned on the part of the Appellant.

24. Accordingly, I find that the appeal is with merit and the same is allowed. The orders of the court are as follows:-

    I. The ruling of the Hon Orenge K I (SRM) dated May 22, 2020 in Mililani Chief Magistrates Court Civil Case number 594 of 2016 is hereby set aside.

    II. The Appellant's Application dated July 23, 2019 in Mililani Chief Magistrates Court Civil Case number 594 of 2016 is allowed as prayed.

    III. Costs of the appeal shall be paid by the Respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 21ST DAY OF SEPTEMBER 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....For the Appellant

.....For the Respondent