



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERUGOYA

CIVIL SUIT NO. 28 OF 2013

DANSON MURIUKI KIHARA.....PLAINTIFF/RESPONDENT

VERSUS

JOHNSON KABUNGO.....DEFENDANT/APPLICANT

RULING

1. By an *ex parte* Judgment of this court dated 8th December, 2017, the plaintiff was awarded the refund of loan monies lent to the defendant plus interest. The amount was 100,000/- with 14% interest from the date of filing suit to the date of judgment; and interest on the decretal sum at 6% from the date of the decree until payment in full.
2. The applicant by a motion dated 17th May, 2021, presently seeks orders from this court to:
 - a) set aside the default judgment entered against him;
 - b) cross- Maina Kagio for cross examination as to service of his affidavits dated 5th April 2017, 27th June, 2017, and 26th April, 2019;
 - c) transfer the suit to a competent court ; and
 - d) that the applicant be given leave to file an amended defence.
3. In essence, the applicant's case is that he was not informed of the court proceedings and thus had no reason to attend court. He argues that he had filed his defence, counter-claim and witness statement on 14th June 2013, which raise strong triable issues, but was denied an opportunity to make out his case; that since judgment has been entered herein, he requires leave of this court for his advocate to come on record; that the service of notices by the plaintiffs was defective in substance for failure to comply with the express provisions of the Civil Procedure Rules, Order 5 Rules 8 (on proper service) and 17 (on substituted service). He asserts that unless heard, he will be unjustly condemned.
4. Relying on **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** the applicant further argues that the main concern of the court is to do justice, and the court may set aside or vary a judgment where the defence raised a triable issue, namely, an issue which raises a *prima facie* defence which should go for trial for adjudication.
5. Further, relying on **Fidelity Commercial Bank v Owen Amos Ndungu & Another HCCC No 21 of 1988 (UR)** and **Frigoken Ltd v Value Pak Foods Ltd Hccc No 24 of 2010**, he argues that an *ex parte* judgment obtained because of no proper service or service to enter appearance, such judgment has been held irregular. As such, it is the court's duty to set aside such an irregular judgment *ex debito justitiae* and not merely upon the exercise of the court's discretion.
6. The respondent's submission is that the burden of shouldering the negligent acts of counsel lies on such counsel who, like all other professionals carry their negligent acts on their shoulders See **Omwoyo v African Highlands & Produce Co Ltd 92002) KLR**. Further, the respondent asserts that the applicant has not given any explanation for the delay in filing the application which shows a lack of seriousness.
7. Finally the respondent urges that as held in **Kenya Wildlife Services v James Mutembei (2019)KLR** stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation, and the test for stay demands a high and stringent standard.

8. The court's right to interfere with a judgment that has been entered is found in Order 10 r11 of the CPR. It provides that where judgment has been entered, the court may vary or set aside such judgment on such terms as are just.
9. The legal dispute between the parties started in 2004. The respondent had filed Kerugoya PMCC 109 of 2005 seeking for refund of Kshs 100,000/- with interest of 100% per month. That the trial court made a finding that it had no pecuniary jurisdiction. He appealed via Embu **HCCA No. 29 of 2011** and the appeal was dismissed. Later, he filed the present suit in the High Court. The applicant was served with a Notice to Show Cause made on 12th April 2021 against his immovable property L.R No. Mutira/Kiaga/1308 by the Plaintiff/Decree Holder's advocate. The applicant deponed in his supporting affidavit that he was not informed of the court proceedings as he had his advocate on record. He had no reason to attend court.
10. I have perused the file and note that the plaint was filed on 14th March 2013 through counsel Maina Kagio & Company Advocates. The respondent entered appearance in person on 31st May 2013. He subsequently filed his defence and counterclaim on 21st June 2013 through Maina & Partners who entered appearance on 14th June 2013. The reply to defence and defence to counterclaim was filed by the plaintiff on 9th July 2013.
11. There was scant movement in the matter in 2014-2015, and on 2nd March, 2016, the plaintiff was granted leave to take a hearing date. On 16/3/2017 the case was fixed for hearing; on 5/4/2017 the court directed that hearing notice be served; and on 28/6/2017 the court noted that hearing dates were served via affidavit of service and the matter proceeded to exparte hearing.
12. The applicant asserts that no such notice of hearing was served and insists that the affiant of the affidavits of service, Maina Kagio, Advocate, must be cross examined to ascertain whether indeed there was service. On his part the respondent insists that he served the lawyers who were on record for the defendant, namely, Maina & Partners.
13. I have noted from the record of proceedings that the defendant did not make appearances before the Judge in court on 7/10/2014, 15/12/2014, 18/2/2015, 4/11/2015, 2/3/2015/4/2017 for mention when various directions were issued by court. On 28/6/2017 the court heard the plaintiff's case exparte and issued judgment in default on 16/4/2019 in absence of the defendant. Equally the bill of costs was taxed and issued in the absence of the defendant.
14. On 27/4/2021 Notice to Show cause why execution should not issue dated 1st April 2021 was fixed for hearing on 27/4/2021 also in the absence of the defendant. The notice to show cause is for sale of half an acre out of land parcel Mutira/Kiaga/1308 and not the whole parcel belonging to the applicant. On 27/4/2021 the defendant appeared in person. The NTSC was adjourned for hearing on 18/5/2021. Counsel Kimathi appeared for the defendant on 18/5/2021 and indicated that the defendant had not been served.
15. On the same day the defendant filed the present application under urgency seeking, inter alia, to come on record; stay of the proceedings and setting aside of the exparte default judgment. As earlier noted, his complaint is that he was never served throughout with the various notices during the proceedings leading to the judgment and NTSC. He states that he relied entirely on his advocate
16. The applicant argues that the notices allegedly issued by the plaintiff were in violation of **Order 5 Rule 8** which provides:
- (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.**
- (2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service"**
17. The applicant also argues that there was failure to comply with **Order 5, rule 17** of the CPR on substituted service which provides that:
- (1) Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.**
- (2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally."**
18. If the plaintiff did serve the various process on counsel on record for the defendant as he has shown from his affidavits of service, then there was no irregularity in service.
19. Thus the only real question in issue is whether the defendant's counsel was served. Unless this issue is resolved execution will proceed and the applicant will be prejudiced to that extent.
20. It is unfortunate that the applicant has not explained in his application and or submissions anything concerning his counsel on record. He seems to fully admit to the fact that his counsel Maina & Partners were acting for him and are still on record, given that he is fully relying on the defence and counterclaim filed by them. He has not said he attempted to get any explanations from his counsel and failed; nor that there was a falling out with his counsel for whatever reason. His is a bare denial of personal service to himself, not a denial of service to his lawful and duly authorized advocate under the CPR.

Disposition

21. In the circumstances, and as the NTSC has not been heard, I think the most appropriate course to take in this matter is to prove the issue of service, and thereafter, if appropriate, hear the NTSC. This is the course that will best serve the interests of justice herein.

22. I therefore find, order and direct as follows:

- a. Prayer 2 of the application is hereby allowed, and the applicant's counsel be deemed to be formally on record for the applicant;
- b. Prayer 6 of the application is hereby allowed and Cross examination do take place within sixty (60) days from the date hereof;
- c. The interim order of stay of execution is extended for 90 days from the date hereof
- d. That subject to the outcome in order b, herein, all other prayers are held in abeyance.

23. Costs shall be in the cause.

24. Orders accordingly

DATED AT KERUGOYA THIS 10TH DAY OF FEBRUARY, 2022

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Kihoro for Applicant/Defendant.
2. Ms Wambui
3. Winnie Wanjiru Court Assistant