Sekai Car Sales Limited v Karagita (Civil Appeal E069 of 2023)
[2024] KEHC 13255 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13255 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E069 OF 2023

DKN MAGARE, J

OCTOBER 17, 2024

BETWEEN

SEKAI CAR SALES LIMITED ..... APPELLANT

AND

WAMAITHA WACHIRA KARAGITA ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. A.G. Kibiru - CM in Nyeri CMCC No. E113 of 2020 delivered on 20th September, 2023)

JUDGMENT

1. This is an appeal from the Ruling and Order of the Hon. A.G. Kibiru, (CM) given on 20/9/2023 in Nyeri CMCC E113 of 2020. The appeal is premised on the following grounds:
    a. That the learned trial magistrate erred in fact and in law in failing to give the Appellant a chance to be heard hence going against the principal of natural justice.
    b. That the learned trial magistrate erred in fact and law by holding that the Appellant was well represented yet he did not give instructions to the advocate on record to represent him.
    c. That the learned trial magistrate erred in fact and law by not considering the averments of the Appellant and its submissions in arriving at his decision.
    d. That the learned trial magistrate erred in fact and in law by failing to appreciate that the Appellant though was wrongfully joined was not served with the Summons to Enter Appearance.
2. The question that the court will deal with is whether there are grounds for setting aside the judgment herein. The judgment was said to have been in the presence of advocates for the parties herein. The defendants in the court below were described as registered and or beneficial owners of motor vehicle registration number KCR 660T. The said motor vehicle was involved in an accident on 15/2/2020

while ferrying passengers along Chaka-Kimahure road. The police abstract indicated that David Wahome Kibui was the owner and Stanley Wachira Karagita, a passenger suffered fatal injuries.

3. A demand was said to have been made to the defendants in the suit, including the Appellant to P.O. Box 233 Kiganjo. Gachiri Kariuki & Company Advocates entered appearance for the Appellant and David Wahome Kibui and filed defence on 20/1/2021.

4. The defence indicated that they were not calling any witnesses and closed their case on 15/12/2021. There was an application dated 23/4/2023 that was filed but withdrawn with no order as to costs. Another was filed, dated 26/4/2023. A ruling was set for 13/9/2023. On 20/11/2023 another application dated the same date was filed.

5. The application dated 23/4/2023 was filed by the firm of M/s Nyandwat Odundo & Company Advocates for the Appellant herein. The main reason was that the return of service was at best fraudulent as the Appellant was never served. It was their case that it is the 1st defendant's insurance that probably instructed the firm of Gachiri Kariuki & Company Advocates.

6. In the supporting affidavit, they stated that the said motor vehicle was sold on 2/9/2018 to David Wahome and they annexed thereto a sale agreement. The address given in the CR. 12 both for the company and its directors was P.O Box 99837 Mombasa. All the owners were of Pakistan origin. The proclamation was for the accident vehicle and some office equipment. One curious element was that proclamation was carried out in Mombasa, but one of the listed vehicles was the accident vehicle, which is said to have been in Kiganjo, Nyeri.

7. An application that was hitherto withdrawn was based on the fact that there was no service. The Applicants perused the file and noted that there was an advocate on record for the Appellant without instructions. The said advocates were served for the new application dated 25/4/2023. The proclamation was said to have been in Mombasa County but there was never service upon the Appellant.

8. An affidavit was filed by the advocate for Monarch Insurance that they instructed Ms. Gachiri Kariuki & Company Advocates to enter appearance on behalf of the insured. The insurance is not named and the instructions are not attached. The affidavit leaves a sour taste in the mouth. The abstract, which is on record indicate the owners as David Wahome, who was insured by Monarch insurance vide insurance No. C19710678, policy No. *POL1001/0017*40/2019.

9. The mere fact that the Applicant was a party to the suit does not make them liable. The court equally found that the Respondent knew the owner of the vehicle as David Wahome Kibui, the 1st Defendant in the suit. It is clear that the entry of appearance by the firm of Ms Gachiri Kariuki & Company Advocates for both parties was not a mistake. It was deliberate and meant to obfuscate issues with a view to have the Appellant underwrite the judgment for their client.

10. Consequently, the entry of appearance on behalf of Monarch Insurance, who were insurers of David Wahome Kibui the 1st Defendant in the suit, was as such a nullity. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every

proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

11. Service was purported to have been done in Nyeri but proclamation was carried out in Mombasa. The allegation that David Wahome Kibui was served alongside the Appellant is clearly false. When a dispute as to service and fictitious instructions arise, an affidavit of service will suffice. The Appellant went into issues of Order 9 of the Civil Procedure Rules. Having found that the Appearance was without instructions, then all actions against the Appellant are null and void.

12. This is buttressed by the nature of the relationship between the defendants in the suit below. It is not challenged that the sale of the suit motor vehicle occurred in 2018 long before the accident in issue. In the case of Securicor Kenya Ltd v Kyumba Holdings Ltd [2005] eKLR, the Court of Appeal posited as follows:-

We think that the appellant had, by the evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time the accident occurred since it had sold it. Our holding finds support in the decision in OSAPIL VS.ADDY [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda at a registration card or logbook was only prima facie evidence of title to a motor hicle and the person whose name the vehicle was registered was presumed to be e owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise:

> " The trial Judge also found that the 2nd defendant was in possession of KWJ 816 and that he was not an employee of the appellant. She held that the accident was caused solely by the negligence of the 2nd defendant.
>
> ....in the case before us, it was proved that at the time of the accident the appellant was no longer the owner of KWJ 816. It had sold it to G.M.Thangwa to whom possession had been transferred. It appears that Mr. Karume had not been put into possession of it by the appellant. Moreover, KWJ 816 was not being driven by the appellant's driver or its employee on an occasion in which the appellant had any interest, Matatu business not being its concern. There was no relationship whatsoever between the appellant and the 2nd defendant. Indeed, there was no agency relationship. It is difficult therefore to see how the trial Judge could import into the case the doctrine of vicarious liability. It was simply not applicable.
>
> Moreover, if, which we do not consider to be the position, the appellant was still the owner by way of the logbook.

13. Clearly therefore, the proceedings against the Appellant were but a nullity and went contrary to the immortal legal principle that a party shall not be condemned unheard. A passage from the judgment of Lord Green M. R. in Orais vs. Kanseen (1943) I.K.B at page 262, which was adopted with approval in Court of Appeal decision in the case of Provincial Insurance Company of East Africa Ltd v Mordekai Mwanga Nandwa Civil Appeal No. 179 of 1995 [1995-1998] 2 EA 289, comes in handy:

> " Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent.

The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained."

14. In the case of Kenya Bus Service Limited and Others -Versus - Attorney General and The Minister for Transport and Others NRB HC Misc. 413 of 2005" (marked as 'C') the Court held that:-

"

" 2. Where there is no specific provision to set aside the courts power or jurisdiction
2. would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Acts of Parliament or Statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations.

Sir Isaac J H JACOB writing in his work entitled The Reform of Civil Procedure Law and Other Essays in Civil Procedure (1982) Version has described the inherent powers in clear terms at page 224:

"The answer is that the jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". This description has been criticized as being "metaphysical" but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court, it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The Judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the Judicial function of administering justice according to law in a regular, orderly and effective manner."

The need to administer justice in accordance with *the Constitution* occupies an even higher level due to the supremacy of *the Constitution* and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the Judicial hierarchy of values. I therefore hold that the court does have inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside ex-parte orders which by their very nature are provisional; see Wea Records Limited V Visions Channel 4 Limited & Others (1983) 2 Aller 589 cited by the 2nd interested party's Counsel Nani Njoroge Mungai and which this court applied in R v Land Registrar Kajiado & 2 Others Exparte John Kigunda HC Misc 1183 of 2004 (unreported).

As indicated in the citations of authorities elsewhere in this ruling this court has invoked this power to deal with nondisclosure of material facts such as the existence of court cases which have a bearing on the case at hand or where the process is used not to advance the cause of justice but to subvert it or use for an ulterior purpose.

15. Therefore, to the extent that the Appellant was not represented and the lower court had the impression that the advocate had instructions to represent including the Appellant, this was in error. Having not been served with the summons to enter appearance, there was no proof that the Appellant was aware of the proceedings in the lower court. The Judgment of the lower court thus was against the rules of natural justice. In underscoring the rules of procedure as necessary to realize natural justice and therefore fair trial, the Court in FCS Ltd vs Odhiambo & 9 Others [1987] KLR 182 – 188 stated inter alia as follows:

> " The rules of procedure carry into effect two objectives; first to translate into practice the rules of natural justice so that there are fair trials and the second, procedural arrangements whereby the steps of a trial are carried out in good order and within reasonable time. In my opinion where the rules are dealing with the precepts of natural justice, the court would be slow to conclude that they are mere technicalities, which may be swept under the carpet by the brush of Section 3A of the *Civil Procedure Act* on inherent jurisdiction of the court to do justice."

16. The judgment was also irregular in relation to its import against the Appellant who was condemned unheard. The Court of Appeal in *Yooshin Engineering Corporation v AIA Architects Limited (Civil Appeal E074 of 2022)* [2023] KECA 872 (KLR) (7 July 2023) (Judgment) said:

> What comes out clearly is that where the judgment is irregular in the sense that service was not effected, or that the judgment was improperly or prematurely entered, then such a judgment is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgment was irregular and that is the end of the matter. The issue of imposing conditions does not arise.
>
> However, even where the judgement is regular, the court still retains the wide discretion to set the same aside though if the Court decides to set aside the judgment, depending on the circumstances, it may do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the Plaintiff and the Defendant.

17. This court therefore finds that the Judgment against the Appellant cannot stand and must be set aside. Since the error was caused by the 1st Defendant in the lower court, each party shall bear their own costs in this appeal. The issue of the auctioneer's fees is referred for determination as between the Plaintiff and the 1st Defendant in the lower court. For the avoidance of doubt, Judgment of the lower court as against the 1st defendant remains.

Determination

18. The upshot of the foregoing is that I make the following orders: -

    a. The appeal is merited and is allowed.

b. Judgment of the lower court against the Appellant is set aside.

c. The issue of the Auctioneer's fees is referred for determination as between the Plaintiff and the 1st Defendant in the lower court.

d. The Appellant is struck out of the suit in the lower court.

e. For the avoidance of doubt, Judgment of the lower court as against the 1st defendant remains.

f. Each party shall bear their own costs in this appeal.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 17TH DAY OF OCTOBER, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Ms. Gwahala for the Appellant

Mr. Wambugu for the Respondent

Court Assistant – Jedidah