REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 2 OF 2019

JASON MBUGUA KURIA.....APPELLANT

=VRS=

1. KENNEDY KURIA.....1ST RESPONDENT

2. LUCY NJERI KIMANI.....2ND RESPONDENT

{Being an Appeal against the Judgement of Hon. N. M. Kyanya Nyamori – RM Thika

dated & delivered on the 17th day December 2018 in the original Thika

Chief Magistrate's Court Children Case No. 156 of 2018}

JUDGEMENT

The appellant filed this appeal following the dismissal of his application dated 21st November 2018 in which he had sought to set aside the interlocutory judgment entered against him on 26th September 2018. He had also in the same application sought leave to file a defence out of time. The gist of that Notice of Motion as can be discerned from the grounds on the face thereof, the supporting affidavit and arguments of counsel was that the appellant was never properly served with summons to enter appearance as the service was in fact effected upon an Advocate who did not have instructions to act in the matter. The trial court was not persuaded by the arguments of counsel for the appellant and so it dismissed the application.

The grounds upon which this appeal is premised are: -

> **"1) That the learned magistrate erred in law and in fact in deciding that service of summons had been properly effected to the Appellant against clear stipulation of law.**
>
> **2) That the learned trial magistrate erred in law and in fact in finding that service of summons on an advocate acting for the Appellant in different matter constituted service on any other filled suit.**
>
> **3) That the learned trial magistrate erred in law and in fact in failing to set aside the exparte interlocutory judgment against the Appellant despite evidence that the Appellant was not served.**
>
> **4) The learned trial magistrate erred in law and in fact failing to find that the exparte interlocutory judgment against the Appellant was unconstitutional and prejudicial towards him.**
>
> **5) That the learned trial magistrate erred in law and fact in failing to appreciate that the appellant had a good defence with triable issues."**

On 2nd March 2020, Counsel for the parties agreed to canvass the appeal by way of written submissions. Those of the appellant were filed on 4th June 2020 but those of the respondent have not been filed to-date.

In summary Counsel for the appellant conceded that the ex-parte interlocutory judgment was entered for failure to enter appearance or to file a defence within the stipulated time. Counsel however submitted that the failure to enter appearance was not as a result of negligence or lack of due diligence on the part of the appellant but rather because of the manner in which the summons were served. Counsel submitted that

summons were not served on the appellant personally but were served upon an advocate who was acting for the appellant in a previous suit **(Misc. Children's Application No. 1 of 2017)** which had already been concluded. Counsel stated that her firm did not have instructions to act in the new matter and the only reason the summons were received in her chambers was because her secretary was not aware that they did not have authority to act in the new matter. Counsel pointed out that she had not filed a notice of appointment in the suit. Counsel contended that in the circumstances the advocate did not qualify to be the agent for the appellant envisaged in **Order 5 Rule 8 of The Civil Procedure Rules**. In support of her submissions Counsel relied on the decision of Matheka – J in the case of **First Capital Limited v Naisiare Kirehu & Another [2018] EKLR** where she stated: -

> **"with due respect to Counsel for the plaintiff the manner in which an Advocate comes on record for a litigant is not a matter of conjecture. There must be a notice of appointment filed indicating that Advocate is on record for that purpose. As at the time pleadings were filed by the plaintiff, there was no Advocate on record for the 1st Defendant, the pleadings would have been expressly addressed to them. Clearly there was no service on the 1st Defendant/Appellant and the orders granted ex-parte should not have been confirmed in the first place." (emphasis added).**

Counsel contended that the fact that a prior relationship existed between the appellant and counsel did not qualify her to be his agent in the new case and Counsel for the respondent ought to have conducted due diligence in that regard but not assume that she had authority to act in the matter. To buttress this submission Counsel cited the case of **Aluodo Florence Akinyi v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR** where the case of Kimeu Kasese (citation not supplied) was cited with approval and where it was stated: -

> **"……it is not the relationship of the person served to the Defendant that counts but rather whether or not he is an authorized agent."**

Counsel further asserted that the appellant delayed in entering appearance and filing his defence because he was unaware of the said suit and that he became aware of the same while in Marsabit and he immediately instructed his advocates but by then time to enter appearance had lapsed. Counsel stated that she then filed an application seeking leave to file defence but the application was not allowed. Counsel contended that the mere fact that this appeal was filed before evidence on formal proof was tendered goes to show that the appellant was and is still serious in defending the suit and that there was no evasion or intent on the part of the appellant to frustrate the respondent's case. Putting reliance on **Order 10 Rule 11 of the Civil Procedure Rules** and the case of **Shah v Mbogo & Another [1967] EA 116** cited with approval in the case **of Jomo Kenyatta University of Agriculture & Technology v Mussa Ezekiel Oebah [2014] eKLR**. Counsel submitted that this court is clothed with a very wide discretion to set aside an exparte judgment except that if the judgment is set aside or varied it must be done on terms that are just. Counsel stated that the appellant has a good, solid and meritorious defence and if allowed to proceed to full trial the Respondents shall suffer no prejudice. Counsel contended that this is a matter that involves maintenance of a person who is aged well over eighteen years, where paternity is disputed and where the appellant's income is not within the respondent's knowledge and if the interlocutory judgment is not set aside the respondents shall proceed to execute and the appellant will be prejudiced as he will be condemned to pay Kshs. 473,200/= each academic year, costs of the suit and interest without being given a chance to be heard. Counsel further submitted that should the exparte judgment be found to be irregular then this court would be oblidged to set it aside *exdebito justitiae* as was held by Njagi – J in the case of **Fidelity Commercial Bank Ltd v Owen Amos Ndung'u & Another HCCC NO. 241 of 1991** (unreported) cited with approval by **Olga Sewe – J in the case of K-Rep Bank Limited v Segment Distributors Limited [2017] eKLR**. Counsel also cited the case of **James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR** where it was held: -

> **"if there is no service of summons to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court *ex-debito justitiae.* Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the Judicial process."**

Counsel further asserted that failure to allow the Appellant's prayer would not only amount to breach of the appellant's constitutional right to fair hearing enshrined in Article 50 of the Constitution but also a breach of the principles of natural justice. Counsel contended that the right to be heard is not only a legal principle but is also a constitutional one which apples in equal measure and to all of the parties involved in all court proceedings and hearings regardless of their nature. On this, Counsel cited the case of **Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR**. Counsel submitted therefore that it is only fair and just and in the interest of justice that the interlocutory judgment against the Appellant be set aside and he be allowed to file his defence so that the matter can proceed for full hearing.

My duty as a first Appellate court was well spelt out in the case of **Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123** and it is to reconsider and analyze the evidence in the trial court so as to arrive at my own independent conclusion. From the grounds of appeal and submissions of counsel three issues arise for determination: -

> **1. Whether or not service was properly effected upon the appellant.**
>
> **2. Whether or not the interlocutory judgment entered in the court below was proper and regular and whether there exist good grounds to set it aside.**
>
> **3. Whether or not the defence filed albeit out of time raises triable issues.**

In regard to issue No. 1 **Order 5 Rule 8 of the Civil Procedure Rules** provides: -

"8. Service to be on defendant in person or on his agent.

> **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."

In the instant case it is not disputed that on 3rd September 2018 the summons to enter appearance were served upon the firm of Waithera Murangi & Co. Advocates. It is also evident that whereas that firm had acted for the appellant in a prior suit the appellant had not instructed the firm of Waithera Mwangi & Co. Advocates to act for him in the instant suit. Order 5 Rule 8 (1) requires that where practicable service shall in the first instance be made on the defendant in person but service may also be effected on an agent empowered to accept service. In our case there is nothing to suggest that the appellant had an agent empowered to accept service. Indeed, it is said the service was effected upon an Advocate. Sub rule 8(2) makes it clear that service upon an advocate can only be valid where that advocate has instructions to accept the service and to enter an appearance to the summons. In this case the advocate upon who service was effected categorically disputes that she had instructions to act for the appellant in the suit a fact which even the trial court seemed to acknowledge and the only reason it found against the appellant was because knowing that her firm did not have instructions the advocate did not take any steps to inform the advocate for the respondent and she did not also take steps to inform the appellant of the suit. Counsel gave an explanation to the effect that the summons were received by a secretary but when she herself became aware of the same she contacted the appellant who immediately gave her instructions to act in the case but by then the default judgment had been entered. It is my finding that to hold that the default judgment cannot be set aside because of the **'sluggishness of the advocate'** would be tantamount to punishing a client due to the sins of the advocate which is not permissible. To also say that the judgment could not be set aside because an advocate who did not have instructions was served would be to punish the appellant when he was not aware of the suit against him given that he had not instructed the Advocate. In effect my finding is that from whatever angle we look at it there was no proper service in this case.

Issue No. 2: This issue flows directly from issue No. 1 and having found that there was no proper service it follows that the judgment entered against the appellant was irregular. The distinction between a regular and irregular judgment was explained by Njagi – J, as he then was in the case of **Fidelity Commercial Bank Ltd v Owen Amos Ndung'u & Another HCCC NO. 241 of 1998 (UR)** cited with approval in **K-Rep Bank Limited [2017] eKLR** where he stated: -

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

(See also the case of James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another [20160 e KLR where the court stated: -

"If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex-debito justitiae. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process."

In the upshot therefore and noting that it would be an affront of justice to condemn the Appellant unheard I proceed to set the default judgment ex debito justitiae.

Issue 3: Whether the defense on record raises triable issues and whether leave ought to be granted to file the same out of time. |In the case of **Tree Shade Motors Ltd v DT Dobie & Another [1995 - 1998] IEA 324** it was held that: -

"Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."

I have perused the statement of defence on record and am persuaded that the same raises triable issues bearing in mind that a triable issue need not be one that must succeed. Accordingly, leave to file defence out of time is granted and the defence on record shall be deemed as duly filed and parties shall be at liberty to take the next step in the lower court. As for the costs of this appeal I do order that given that circumstances of the case each party shall bear his own. It is so ordered.

Judgement signed and dated in Nyamira this 24th February, 2021.

E. N. MAINA

JUDGE

Judgement signed, dated and delivered Electronically at Kiambu via Microsoft Teams this 9th day of March 2021.

MARY KASANGO

JUDGE