



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CIVIL APPEAL NO. 6 OF 2020**

***(CORAM: F.M. GIKONYO J.)***

**(Being an appeal from the ruling of Hon. W. Juma (C.M))**

**Delivered on 24<sup>th</sup> February 2020 in Narok CMCC No. 225 of 2015)**

**DAVID KOOME MATUGI.....APPELLANT**

**VERSUS**

**APA INSURANCE LIMITED.....RESPONDENT**

**JUDGMENT**

**Impugned judgment**

[1] This appeal arises from a ruling delivered on 24<sup>th</sup> February 2020 in respect to application dated 7<sup>th</sup> October 2019 which sought the following orders: -

**i. Spent**

**ii. That this court be pleased to set aside the ex parte judgment entered against the Defendant/ Applicant on 12/6/2019, the decree thereof and any consequential orders.**

**iii. That the Applicant herein be allowed to file and serve their statements of defence and of time and that the draft statement of defence hereto attached be deemed to be filed and served upon the Plaintiff/Respondent herein out of time subject to payment of the requisite court fees.**

**iv. The court do grant leave to the Defendant/ Applicant to file a defence in the suit.**

**v. The court be pleased to grant any other order it shall deem fit in the circumstance.**

**vi. Costs of application be borne by the respondent.**

[2] The Respondent filed their replying affidavit on 23/10/2019. The Applicant filed further affidavit. Parties canvassed the application by way of written submission. Upon considering the application and response by Respondent plus submissions by parties, the trial court found that service was proper. The court further stated that Respondent feels that the draft defence attached does not raise triable issues and that the Applicant seeks discretionary orders yet came to court on denial of service and not intending to have the process server called for cross examination. The court proceeded to dismiss the application dated 7/10/2019 with costs to the Respondent.

[3] The Appellant being aggrieved by the ruling of the trial court filed an amended Memorandum of Appeal dated 5<sup>th</sup> February 2021 seeking to set aside the said ruling on the following grounds: -

**i. That the learned trial magistrate erred in law and fact in finding that the Appellant was regularly served.**

**ii. That the learned trial magistrate erred in law and fact to direct her mind properly on the principles governing setting**

aside of ex parte judgments.

iii. That the learned trial magistrate erred both in law and in fact in finding that the Appellant declined to cross examine the process server.

iv. That the learned trial magistrate erred in law and fact in finding that all other grounds or issues raised by the appellant were dependent on whether a proper service was made out or not.

v. That the learned trial magistrate erred in law and fact to be guided by the spirit of the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act.

[4] The Appellant urged this court to set aside the ex- judgment herein and the Appellant be granted leave to file statement of defense. The Appellant be granted costs of the suit in the subordinate court and this appeal.

[5] Parties agreed to proceed with the appeal by way of written submissions.

#### **APPELLANT'S SUBMISSIONS**

[6] The Appellant's submission emphasizes that the affidavit of service of the process server cites a wrong phone number which the Appellant denies is his. The Appellant stated that his mobile number is **0728 006 729** and not **0728006721** as claimed by the process server. According to the Appellant, he welcomed the opportunity to cross examine the said process server but on the advice of his counsel he felt that the application ought to be allowed lack of cross examination of the process server notwithstanding. Thus, faulted the holding by the learned trial magistrate that the Appellant declined to cross examine the process server.

[7] The Appellant submitted that no service was ever made on him if any the same was irregular as both affidavits depose that the process server purportedly called the Appellant using mobile number 0728 006 721 and served him in Meru Cereals Market but the Appellant apparently declined to sign the process server's copies of documents. The Appellant insists that the allegations on service are not true since he resides and carries out business in Nkubu Shopping Center. He does not know anyone by the name Mugambi as alleged in the affidavits of service. That the said process server was not accompanied by any representative from the Respondent and they are not informed where he got the Appellant's contacts.

[8] The Appellant cited Order 5 Rules 6, 7 and 8(1) of the Civil Procedure Rules on how service of summons should be effected. The Appellant further relied **In The Case Of Law Society Of Kenya V Martin Day & 3 Others [20 15] eKLR**

[9] He also cited the case of **William Ntomauta M'ethanga Sued as M'mauta Nkari V Baikiamba Kirimania [2017] eKLR.**

[10] The Appellant urged this court to find the ex parte judgment to be irregular, and allow his appeal and grant leave to enter appearance and file his defence in order to do justice to the parties herein.

[11] The Appellant accused the trial magistrate of failure to consider the issues raised and all principles governing setting aside of the default judgment. He cited the case of **K-Rep Bank Limited V Segment Distributors Limited [2017] eKLR and James Kanyiita Nderitu & Another V Marios Philotas Ghikas & Another [2016] eKLR**

[12] The Appellant submitted that the judgment of the trial court was delivered on 12<sup>th</sup> June 2019 and the Appellant filed the application to set aside the judgment on 7<sup>th</sup> October 2019. Therefore, the delay of approximately 4 months was not inordinate. He cited the cases of **William Macharia Maina & Another V Francis Barchuro & 3 Others Kibiwitt Yator Kuryases & 8 Others (Interested Parties) eKLR, East Africa Cables Limited V Central Cables Limited (2019) eKLR And James Kanyiita Nderitu & Another V Marios Philotas Ghikas & Another [2016] eKLR**

[13] The Appellant submitted that his draft defence raised triable issue which should be adjudicated upon as the suit before the trial court is a declaratory suit in respect of **SPMCC 140 of 2015** and **NAROK SPMCC 141 of 2015**. According to the appellant the main issue for determination is whether the appellant's motor vehicle registration number **KBX 057 J** was carrying fare paying passengers and if so whether the plaintiff should pay the decretal sum arising from the above suits. the respondents heavily relied in the pleadings filed in the aforementioned suits in prosecuting its suit, he cited the case of **CFC Stanbic Bank Of Kenya Limited V Blackstone Mining Group & 2 Others [2018] eKLR**

[14] The Appellant submitted that, unlike the respondent, he will suffer great prejudice, injustice and irreparable damage if the judgment in default is upheld and the appellant is not heard. He cited the case of **Richard Murigu Wamai V Attorney General & Another [2018] eKLR**

[15] The Appellant submitted that the trial magistrate did not consider section 1A, 1B, & 3A of the Civil Procedure Act. He relied **Abdirahman Abdi V Safi Petroleum Products Ltd & 6 Others [2011] eKLR, Carol Silcock V Kassim Sharraf Mohamed [2013] eKLR.**

[16] Finally, the Appellant submitted that it is trite law that costs follow the event. He cited the case **Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai & 4 Others [2014] eKLR**

#### **RESPONDENT'S SUBMISSIONS**

[17] The Respondent submitted that the suit herein was filed on 20<sup>th</sup> July 2015 and after filing of the same the respondent instructed a duly

licensed process server, George Rasugu to serve the plaintiff, verifying affidavit and annexures relating to the suit upon the defendant, the appellant herein. The said process server proceeded to serve the documents and subsequently filed an affidavit of service on 24<sup>th</sup> November 2015. Therefore, the Appellant was duly and properly served. The burden of proving otherwise lies on who alleges otherwise. They cited the case of *Shadrack Arap Baiywo Vs Bodi Bach [1987] eKLR, Kingsway Tres & Automart Ltd Vs Rafiki Enterprises Ltd – Civil Appeal No. 220 of 1995*, and Section 107 of the Evidence Act.

[18] The Respondent submitted that in their affidavit dated 17<sup>th</sup> October 2019, they gave notice to the Appellant that the process server was ready to be cross examined on the issue of service which the Appellant failed to take the opportunity. They relied on the case of *Nancy Musili V Joyce Mbete Katisi [2019] eKLR and Amayi Okumu Kasiaka & 2 Others V Moses Okware Opari & Another [2013] eKLR*

[19] The Respondent submitted that the issue of service of summons not witnessed as required by law cannot be raised in the appeal because it was not raised in the magistrate's court.

[20] The Respondent submitted that the judgment was regular and the court had unfettered latitude to determine the appellant's application on its own discretion. The trial magistrate rightly held that there was no contest to the presumption of service going by the affidavits on record and the failure by the Appellant to cross examine the process server to challenge the issue of service. It relied on the case of *Fidelity Commercial Bank Ltd V Owen Amos Ndungu & Another HCCC No. 241 Of 1998(UR) And Philip Keipto Chemwolo and Mumias Sugar Co. Ltd Vs Augustine Kubende [1986] eKLR*.

[21] The Respondent submitted that the Appellant is not deserving of discretionary orders since he misled the court on the issue of service. They cited the case of *John Njue Nyaga V Nicholas Njiru Nyaga & Another [2013] eKLR, Shah Mbogo & Another [1967] EA 116 and Richard Nchapai Leiyangu V IEBC & 2 Others*

[22] The Respondent submitted the Appellant had insured his motor vehicle registration KBX 057J with the Respondent for carriage of own goods and for social domestic and pleasure purposes. The said vehicle was involved in an accident on 25<sup>th</sup> December 2015 occasioning injuries to two passengers who filed compensatory claims in **NAROK CMCC 140 and 141 of 2015**. The plaintiffs were described as paying passengers. The insurance cover forbade carrying passengers in the said vehicle. Therefore, even if the court considered the issue, the court would still have rejected the application it being a mere denial. This was a clear breach of contract between the Appellant and the Respondent. It relied in the case of *Paul Mutisya V Jubilee Insurance Company Of Kenya Ltd [2018] eKLR* and *Corporate Insurance Company Ltd Vs Elias Okinyi Ofire [1999] eKLR*. That considering the issue that were advanced in the application before the trial court and the draft defence, the draft defence did not raise any triable issue that would lead the court to arrive at a different finding

[23] The Respondent in conclusion urged this court to uphold the trial court's ruling and dismiss the instant appeal with costs to the respondent.

#### **ANALYSIS AND DETERMINATION**

[24] The ultimate decision I should make whether the ex parte judgment herein should be set aside. Inextricable issues to resolve thereto are:

**i. Service of summons to enter appearance.**

**ii. presence or otherwise of triable issues**

#### **Summons to enter appearance; Affidavit of service**

[25] On the basis of the affidavit of service filed in court, the trial magistrate was satisfied that the defendant/appellant was served with summons to enter appearance. And so dismissed the appellant's application to set aside the *ex parte* judgment.

[26] The trial magistrate in his ruling stated that the Appellant declined the opportunity offered to him of cross-examining the process server. The appellant seems not to attach any importance to or belittled the purpose of cross-examination of the process server. Let him consider the following.

#### **Appellant has the onus of disapproving report on service**

[27] Quite illuminating eminent work by *Chitale and Annaji Rao; The Code of Civil Procedure Volume II page 1670* that:

*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. [Underlining mine for emphasis]*

[28] See also *Shadrack arap Baiywo vs. Bodi Bach KSM CA Civil Appeal No. 122 of 1986 [1987] eKLR*, where the Court of Appeal quoted with approval the foregoing eminent writing. *M B Automobile v Kampala Bus Service, [1966] EA 480* at page 484 is also pointedly relevant on this subject.

[29] Accordingly, it was desirable for the party questioning the return of service, to put the process server in the witness box especially

where, without such cross-examination, the court is likely to find that service was effected. Ultimately, the Appellant did not discharge the burden of disapproving service, and instead was preoccupied with the notion that the service will be invalidated nonetheless. On that basis, it should be accepted that the Appellant was served as per the contents of the affidavit of service. I so find.

**Interest of justice; need to hearing case on merit**

[30] Under **Order 10 rule 11** of the *Civil Procedure Rules*, the court has unfettered discretion to set aside judgment on such terms as it deems fit and just (see *Shah v Mbogo and Another [1967] EA 116*). Even where the party applying had been served- like is the case here- the court would still have discretion to set aside *ex parte* orders in the interest of justice. Is this such case for the exercise the unfettered discretion to set aside *ex parte* orders herein?

[31] In the words of Harris J., in *SHAH v MBOGO & ANOTHER (1976) EA*, the discretion of the Court in setting aside *ex parte* order is only: -

**“...exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice”.**

[32] Although the appellant seems to have engaged in some delaying tactics, the delay herein was not such as to deny him remedy. I should consider the wider interest of justice-to have a dispute resolved on merit.

[33] Central to this question is; *Whether draft defence has triable issues to warrant leave to defend suit.*

[34] Having found that the appellant was properly served with summons to enter appearance I wish to consider whether the draft defence annexed to the application dated 7<sup>th</sup> October 2019 has triable issues to warrant exercising of this court’s discretion to set aside regular judgment entered against the defendant. I have perused, the draft defence and note that the defendants deny that at the time of the accident the subject motor vehicle was transporting private goods together with the conductor and a nonpaying passenger and maintains that the passengers in **Narok CMCC 140 and 141 of 2015** were nonpaying passengers and therefore covered under the terms of the insurance policy.

[35] The draft defence dated 7<sup>th</sup> October 2019 raises issues such as; whether there was an insurance contract between the parties; whether the passengers were covered by the insurance; and whether the appellant violated the terms of the insurance policy. These are triable issues. Triable issue is a *bona fide* issue worth of trial by a court of law; but it is not one which must succeed in the trial. It is surprising, therefore, the learned trial magistrate made a finding that the said defence raised no triable issues.

[36] Meritorious defence- one with triable issue- justifies inter partes adjudication of the issues by the court in deference to the right to a fair and public hearing of a dispute declared in article 50 of the Constitution that;

**“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court...”**

[37] Refusing the Appellant to canvass his defence and have the issues determined on merit by the court is akin to the proverbial ‘sword of the Damocles’.

[38] The upshot of this is that there was no reasonable ground for dismissing the draft defence *suo motu*; the draft defence prima facie raises triable issues.

[39] The appeal succeeds and the following orders issue;

***i. The Judgment delivered on 12<sup>th</sup> June, 2019 is set aside.***

***ii. That the Ruling delivered on 24<sup>th</sup> February, 2020 is set aside.***

***iii. The defendant is given the opportunity to be heard; file defence in 14 days and matter be heard on merit.***

***iv. The original trial court’s file is remitted back to the trial court for hearing and disposal by a magistrate of competent jurisdiction other than the trial court.***

***v. Each party to bear its own costs.***

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 22ND DAY OF JULY, 2021.**

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**F. M. GIKONYO**

**JUDGE**

**In the presence of:**

1. Mr. Karanja for the Respondent
2. Langat for the Appellant
3. Mr. Kasaso – CA

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**F. M. GIKONYO**

**JUDGE**