REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 130 OF 2019

PETER NDETI NDOLO.....APPELLANT

VERSUS

WILLIAM MUTISYA MUINDI.....RESPONDENT

(An Appeal from the Ruling Hon. A. Nyoike, PM at Machakos Civil Case No.334 of 2013

made and dated 12.9.2019 and all subsequent orders emanating therefrom)

BETWEEN

WILLIAM MUTISYA MUINDI.....PLAINTIFF

VERSUS

PETER NDETI NDOLO.....DEFENDANT

JUDGEMENT

1. The Respondent herein filed a suit against the Appellant for a sum of Kshs 340,000.00 with interest. The cause of action according to the Respondent arose from money advanced to the Respondent by the Appellant at the Respondent's request for which the Respondent gave to the Respondent a cheque for Kshs 470,000/- but which cheque was on due presentation dishonoured. Subsequently, the Appellant paid the Respondent Kshs 130,000/- leaving a balance of Kshs 340,000.00.

2. From the record, on 17th January, 2017, the hearing date was fixed by a representative of the Respondent for 22nd February, 2017 and it was directed that a hearing notice do issue. On 22nd February, 2017, only the Respondent was represented and the Respondent's counsel informed the Court that the Appellant had been served and he was ready for hearing with one witness. The Court then slated the hearing to 10 am when the Plaintiff testified and closed his case. Judgement was subsequently delivered on 19th July, 2017 in which the court found for the Respondent and entered judgement as prayed.

3. By an application dated 18th March, 2019, the Appellant sought to have the proceedings leading to the said judgement, the judgement itself and the decree set aside. The ground upon which the application was based was that the Appellant who was ten acting in person attended court on 27th January, 2016 when he requested for time to enable him seek legal counsel and the matter was adjourned to 16th March, 2016. On that day, however, the court was not sitting.

4. Thereafter, he was never served with any notice to attend court and he only became aware that judgement in the matter had been delivered when he was served with the Notice to Show Cause on 7th March, 2019. It was then that he instructed his present advocates to peruse the Court file when it was discovered that the matter proceeded to hearing on 22nd February, 2017 in his absence.

5. In response the Respondent insisted that the Appellant was duly served and that it was dishonest on his part to allege otherwise hence the application was made with the sole intention of denying the Respondent the fruits of a lawfully obtained judgement. It was noted that the

Appellant had not denied the mobile number and the places he met the process server. The said process server, in his affidavit of service deposed that on 19th January, 2017, upon receipt of the hearing notice from the Respondent's advocates' firm, he, at 12.30pm called the Appellant through his mobile phone number which he disclosed having served the Appellant before, and that the two agreed to meet at Mulu Gardens within Machakos Town. 45 minutes later, they met and the Appellant was duly served with the hearing notice which he accepted but declined to acknowledge by signing the principal copy.

6. Upon hearing the application, the learned trial magistrate found that the Appellant attended the court on several occasions and was given a last adjournment on 26th January, 2016 and directed to prepare for hearing on 16th MARCH, 2016 a date when the Court was not sitting and subsequently a date was given by the Court on which the same proceeded for hearing in his absence. According to the Court, the Appellant was duly served and the learned magistrate proceeded to issue judgement.

7. The Court noted that though judgement was delivered on 19th July, 2017, it was not until 18th March, 2019 that the application was filed after a period which, according to the court was unexplainable. It was the Court's view that the delay in filing the application and to attends court despite being aware can only point to an attempt by the Appellant at abusing the court process. Accordingly, the application was dismissed with costs.

8. Aggrieved by the said decision, the Appellant lodged this appeal citing the following grounds:

> **1) The learned magistrate erred in law and facts when she failed to set aside the proceedings of 22.2.2017 and subsequent judgment rendered on 19.7.2017, the decree issuing there from dated 12.10.2017 and all other subsequent orders and allow the defendant Applicant to participate in the hearing of the case and defend his case.**
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> **2) The learned magistrate erred in law and facts when she failed to consider the issue of service of the hearing notice which was never effected on the defendant/applicant who was unrepresented at the time.**
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> **3) The learned magistrate erred in law and facts when she failed to consider the fact the appellant herein became aware of the judgment and decree only after being served on 7.3.2019 with a notice to show cause.**
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> **4) The learned magistrate erred in law and facts when she took away the right of the appellant to be heard.**
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> **5) The learned magistrate erred in law and facts when she failed to regard the Defendant/applicant's submissions on the application dated 18.3.2019.**
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> **6) The learned magistrate erred in law and facts when she failed to uphold the rules of natural justice in the entire application dated 18.3.2019.**

9. In this appeal it is submitted on behalf of the Appellant that though the contention by the Defendant was that he had not been served with the hearing notice when the matter proceeded, the learned magistrate did not make a finding on the issue. It was submitted that though in the ruling it is acknowledged that the Defendant had been attending court, the Court failed to address the explanation of his failure to attend court when the hearing proceeded. Though the Appellant's assertion is that he was never served with the hearing notice, the learned magistrate blamed him for not taking action yet he could not have taken action when he had not been served. It was submitted that the Appellant filed the application when he became aware of the judgment after being served with a notice to show cause. In support of the submissions, the Appellant relied on **Sammy Maina vs. Stephen Muriuki [1984] eKLR**.

10. It was submitted that the Appellant demonstrated that he had not been served. The process server took advantage of knowing the Appellant's cell phone number and the place where they had met before to mislead the court that he had served the hearing notice. Since the Appellant had been religiously attending court previously, it was submitted that is no reason why he would not have attended court.

11. It was submitted that the Appellant's application hinged on securing his right to be heard. The right remains sacrosanct and fully protected under the law. It was submitted that this is a case whereby the learned magistrate ought to have exercised her discretion in favour of the Appellant. In the failure to so, she ended up breaching the right of the Appellant to be heard as a consequence breaching the rule of natural justice. Reliance was placed on **Elite Earthmovers Ltd v. Krisha Behal & Sons [2005] 1KLR 379** and **Esther Wamaitha Njihia & 2 others v. Safaricom Limited [2014] eKLR**.

12. It was urged that the Appellant's appeal has merit and the court was urged to allow the same by setting aside the orders of the learned magistrate and allow the application.

13. On behalf of the Respondent it was submitted that the appellant never denied that mobile number 0729-068678 which the process server used to communicate with him does not belong to him. Further, the Appellant never denied that he met the process server on the venue mentioned in the affidavit of service. To the Respondent, it is malicious on the part of the appellant to allege he was not served when proper service was duly effected on him.

14. According to the Respondent, in civil suits, he who alleges must prove. If the appellant was serious in proving that he was not served with the hearing notice, then he should have applied for the process server to be availed to court for cross-examination. This he failed to do because he knows service was effected upon him. The Court was also urged to take into account the period of delay between the day the suit proceeded for hearing on 22-2-2017 and when the application dated 18-3-2019 to set aside the judgement was filed in court on 18-3-2019 a period of one year eight months which was inordinate and was unexplained hence disentitles the appellant from the exercise of this courts discretion.

15. According to the Respondent, the claim in the plaint is for a liquidated sum of Kenya Shillings 340,000/= being the balance of a friendly loan which had been advanced to the appellant by the respondent. This appeal as well as the application earlier made have been made with the sole aim denying the respondent from enjoying the fruits of his judgement by ensuring the case drags in court forever. This should not be allowed as this is a 2013 matter and litigation must come to an end. According to the Respondent, the amount owing to interest and costs has increased to Kenya Shillings 630,683/= as per the Notice to Show Cause. Accordingly, the Court was urged to find that the appeal has no merits and proceed to dismiss it with costs to the respondent.

Determinations

16. I have considered the foregoing, the submissions filed on behalf of the parties herein and the authorities relied upon in support thereof.

17. Having considered the foregoing, the question is whether in the circumstances of this case the Court ought to set aside the *ex parte* judgement. As was held by the Court of Appeal in **CMC Holdings Ltd vs. Nzioki [2004] KLR 173**:

> **"In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously…In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input...What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed."**

18. That the decision whether or not to set aside *ex parte* judgement is discretionary is not in doubt. The discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See **Shah vs. Mbogo & Another [1967] EA 116**.

19. In **Remco Limited vs. Mistry Jadva Parbat & Co. Ltd. & 2 Others Nairobi (Milimani) HCCC No. 171 of 2001 [2002] 1 EA 233** the Court set out the principles guiding setting aside *ex parte* judgements as follows:

> **(i). if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside *ex debito justitiae* (as a matter of right) on the application by the defendant and such a Judgement 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 itself.**
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> **(ii). if the default judgement is a regular one, the Court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order 9A rule 10 [now Order 10 Rule 11] of the Civil Procedure Rules.**

20. In this case, it is the Appellant's case that the judgement that was entered herein was irregular as he was never served with the hearing notice. In considering whether or not to set aside the default judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure.

21. In this case, regrettably, the learned trial magistrate did not make an express finding that the Appellant was served. She seemed to have been persuaded by the fact that the trial court was satisfied that service was duly effected. However, in an application seeking to set aside the judgement, the judge hearing the application must make a determination as to whether service was actually effected. In those circumstances, it is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is *prima facie* defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the *ex parte* judgement. See **Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647.**

22. In this case the defendant's failure to appear in court is attributed to the failure by the Respondent to serve the hearing notice. In this case, there was an affidavit of service to the effect that service was duly effected on the Appellant by a process server who had effected service on the Appellant before. It was also on record that the Appellant had on several occasions attended the court for hearing. The Court of Appeal in **Baiywo vs. Bach [1987] KLR 89; [1986-1989] EA 27** expressed itself on the matter as hereunder:

> **"There is a presumption of service as stated in the process server's report, and the burden 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."**

23. It would therefore have been prudent if the process server had been availed for cross-examination. However, it was upon the Appellant to seek for his availability for the said purpose. Had the learned trial magistrate made an express finding regarding the service of the hearing notice on the Appellant, it would have been an uphill task persuading this Court to allow the appeal. However, in light of that omission, this Court cannot foretell what would have been the outcome of the application had the trial court addressed its mind to the need to make a specific finding on the service of the hearing notice.

24. In the premises, I allow this appeal, set aside the judgement and consequential orders and direct that the matter be heard *de novo*. However, as the Appellant did not mention anything regarding the merits of his defence, I direct that the Appellant deposits the sum of Kshs 340,000/- in a joint interest earning account in the names of both counsel for the Respondent and the Appellant pending the hearing and determination of the case within 30 days from the date of this judgement and in default, the application before the trial court be deemed as having been dismissed with costs.

25. As the parties are not entirely to blame, there will be no order as to the costs of this appeal.

26. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 7TH DAY OF DECEMBER, 2021

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Nagwere for Mr Mutia for the Appellant

Mr Mukula for Mr Sila for the Respondent

CA Susan