REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO 26 OF 2019

KENNEDY WANGUNYU.....APPELLANT

VERSUS

MARTHA WANGARI KAMAU.....RESPONDENT

(Appeal from the ruling and order delivered by Hon. Kasera, SPM

on 3rd July 2019 in Kajiado CMCC No.386 of 2017)

JUDGMENT

1. This is an appeal from the ruling and order by **Hon. Kasera SPM**, dated 3rd July 2019. In that ruling, the trial court dismissed an application to set aside a default judgment entered against the Appellant for failure to enter appearance or file a defence.

2. Aggrieved by that ruling, the Appellant filed a memorandum of appeal dated 31st July 2019, and raised the following grounds namely:

> ***1. The Learned Magistrate erred in law and in fact in dismissing the appellant's Application to set aside the judgement without considering the overwhelming evidence in favour of the Appellant.***
>
> ***2. The Learned Magistrate erred in failing to appreciate that service of summons to enter appearance and copy of the Plaint is mandatory to sustain all subsequent proceedings in the case.***
>
> ***3. The Learned Magistrate erred in law and in fact in assuming that service of decree and certificate of costs obtained ex-parte and/or warrant of arrest in execution thereof is a substitute for service of summons to enter appearance and Plaint.***
>
> ***4. The Learned Magistrate erred in law and in fact in failing to call the process server for examination on the face of dispute on service***
>
> ***5. The Learned Magistrate erred in law and in fact in failing to consider exhibits annexed to the Appellant's affidavit in support of his application to set aside the judgment giving overwhelming evidence to warrant leave to defend the suit.***
>
> ***6. The Learned Magistrate erred in law and in fact in dismissing the Appellant's application on technicalities.***
>
> ***7. The Learned Magistrate erred in law and in fact in failing to apply and do substantial justice to the case before her.***
>
> ***8. The Learned erred in law and in fact in failing to appreciate that the amended Plaint and thereby the suit was incompetent untenable and unsustainable for lack of compliance with the mandatory provisions of the Civil Procedure Rules.***
>
> ***9. The Learned Magistrate erred in law and in fact in failing to conduct a hearing and/or put the respondent to formally prove damages and/or loss emanating from damages that can only be verified by an expert witness.***
>
> ***10. The Learned Magistrate erred in law and in fact in granting an order to return the vehicle to the respondent upon an interlocutory application and well before the determination of the suit wherein the return of the vehicle to the respondent was a substantive prayer.***

11. The Learned Magistrate erred in law and in fact in pre-maturely using the police to recover the vehicle from the Appellant before hearing the Appellant on the circumstance under which the vehicle was put in his custody by the respondent.

12. The Learned Magistrate erred in law and in fact in awarding the respondent costs under the Advocates Remuneration Order whereas at all material time the Respondent acted in person thus not entitled to costs awardable where parties are appearing by advocates.

13. The Learned Magistrate erred in law and in fact by wholly misapplying her judicial discretion in the circumstances obtaining in this case.

3. During the hearing of the appeal, Mr. Adera, learned counsel for the Appellant, submitted that the trial court erred in dismissing the Appellant's application to set aside the default judgment, despite the fact that the Appellant was not served with summons to enter appearance and copy of the Plaint.

4. According to counsel, the only document that was served was the order issued on 18th September2017. He submitted that no summons were issued and that this is clear from the trial court's record as there is no file copy or the one served. He argued that failure to serve summons to enter appearance invalidated any subsequent proceedings.

5. In counsel's view, only when summons have been, served is the defendant called report to respond to the plaintiff's claim. He argued that it is the duty of the court before proceeding with the suit to satisfy itself that summons have been served on the defendant. He submitted that where the court finds that summons was not served, it does not exercise its discretion, but has to set aside the default judgment.

6. Mr. Adera further blamed the trial court for dismissing the application to set aside the default judgement on technicalities because it had cited the old Civil Procedure Rules instead of the new Rules. He argued that under Order 51 rule 10(11, citation of rules or lack of it, is a technicality and is not a requirement. In counsel's view, the court should have exercised its discretion, taking into account other factors, including doubts on the proprietor of the vehicle.

7. He relied on the copies on record showing different persons as owners of the motor vehicle; the prayers in the Plaint and the receipts to prove this claim, and urge the court to allow the appeal.

8. Miss Kihara, learned counsel for the Respondent, opposed the appeal. Highlighting their written submissions filed on 5th December 2019, counsel admitted that no summons were issued or served. Counsel also admitted that only the Order compelling the Appellant to release the motor vehicle was served.

9. Miss Kihara submitted that the court ordered the Respondent to file a full suit on 17th October 2017 and the Respondent later amended the plaint before the hearing. She further submitted that affidavits of service were filed after every service but Appellant declined to accept service. She submitted, therefore, that the Appellant was aware of the suit and that the Appellant had also stated that he was served with warrants of execution.

10. She relied on the decision in ***Tropical Foods International& another v Eastern and Southern African Trade and Development Bank & another [2017] eKLR***. In their view, just because the Appellant refused to accept service, cannot entitle them to challenge the service. Miss Kihara also denied that the matter was decided on technicality. She therefore urged the court to dismiss the appeal with costs.

11. I have considered this appeal, submission by counsel for the parties and the authorities relied on. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate and reassess the evidence and make its own decision to it. The court should however bear in mind that it did not see witnesses testify and give allowance for that.

12. In ***Selle and another v Associated Motor Boat Company Limited and others*** [1968] EA 123, the East African Court of Appeal held that:

"An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally."

13. Further in ***Williamson Diamonds Ltd and another v Brown*** [1970] EA 1, the same court held that:

"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."

14. And in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] e KLR, the Court of Appeal stated;

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

15. This is an interlocutory appeal challenging the decision of the trial court dismissing the Appellant's application to set aside the default

judgement. The Appellant argues that he was not served with summons to enter appearance and was, therefore, not aware of the suit. The trial court however dismissed that application on 3rd July 2019, prompting this appeal.

16. I have considered the submissions and perused the record of the trial court. The Respondent's counsel has admitted that no summons was issued and, it was not served. She agrees with the Appellant's submissions that summons has never been issued in this matter.

17. Order 5 rule 1 of the Civil Procedure Rules, 2010 provides with, respect to service of summons, thus:

> ***"(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.***
>
> ***(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.***
>
> ***(3) Every summons shall be accompanied by a copy of the plaint.***
>
> ***(4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:***
>
> ***Provided that the time for appearance shall not be less than ten days.***
>
> ***(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule." (emphasis)***

18. The rule is clear that upon filing the suit, summons should issue, ordering the defendant to enter appearance and file defence. Further, every summons to be served should be accompanied with a copy of the plaint. Sub rule (5), makes it clear that the summons is to be prepared by the plaintiff and filed together with the plaint so that the court can sign it for purposes of service.

19. So**,** if summons were not issued as admitted by the Respondent's counsel, how was the Appellant made aware of the suit? Miss Kihara has argued that the Appellant was served and affidavits of service filed after each service.

20. I have perused the trial court's records and what is clear, is that the suit was filed on 18th September 2017 under urgency, together with a notice of Motion. The matter was placed before the trial court and some orders made on the same day. Another application was filed on 5th October 2017 again under urgency. The matter was placed before a different court which directed that the matter be heard on priority before the trial court.

21. On 11th October 2017, the trial court issued a warrant of arrest against the Appellant and set the matter for mention on 18th October 2017. On that day, the Respondent told the court that the motor vehicle had been released, but asked that she be assisted to recover damages. The matter was then fixed for hearing on 25th July 2018. On that day, the record does not show that the Appellant was served. The Respondent was heard and there after judgment was delivered on 7th November 2018. Throughout the proceedings, the trial court did not address itself on the issue of summons or service thereof on the Appellant.

22. The Appellant then filed an application to set aside the judgment which was heard by way of written submissions. The court delivered its ruling on 3rd July 2019, dismissing that application. The court made a finding that the Appellant had been served with the order directing him to release the motor vehicle, but did not bother to find out the details of the suit or even defend the suit. The trial court further stated that the rules cited in the application did not exist. The trial court, therefore, dismissed the application on grounds, first; that the Appellant was aware of the suit and, second; that the rules cited did not exist.

23. Though the court stated that the rules cited did not exist, it is clear that it was relied on a technicality of procedure to dismiss that application. It failed to deal with the substantive issue of whether the Appellant had been served with summons and copy of the Plaint. Without dealing with this substantive issue, the trial court could not rely on the technicality to dismiss the application.

24. Order 51 rule 10(2) provides that ***"No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."*** It is obvious that by dismissing the application for citing wrong rules, the trial court went against this rule.

25. This Court is aware of the importance of procedure in litigation, as was emphasized in ***Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others*** [2016] eKLR, that rules of procedure are important in the conduct of litigations, and that in many cases, procedure is closely intertwined with the substance of a case.

26. It should, however, not be the case, that the court pays more attention to procedure to the extent of relegating substance at the expense of fairness, thus defeating the very justice it is supposed to serve. As this court observed in ***Imara Steels Mills Ltd*** *v Heritage* ***Insurance Company Ltd*** [2019] eKLR, if the court were to pay so much attention in the manner it has been moved to challenge what is obviously a wrong decision, it would amount to running away from the constitutional edict that justice be administered without undue regard to procedural technicalities.

27. When a court of law is called upon to dispense justice, it should always bear in mind the overriding objective in determining civil matters. In this regard, the Court of Appeal stated in ***E. Muriu Kamau & Another v. National Bank of Kenya Ltd*****.,** CA No. 258 of 2009 (UR180/2009), that:

> ***"The courts… in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing.*** (Emphasis). (See also ***Coast Development Authority v Adam Kazungu Mzamba & 49 others*** [2016] eKLR).

28. I have gone through the trial court's record. I am unable to find any affidavit stating that the Appellant was served with the Plaint. Even though the Appellant may have stated that he was served with the order for the release of the vehicle, the summons was not issued and has never been served as required by the rules. The suit, therefore, proceeded without service of the summons and a copy of the plaint. The conclusion I come to, therefore, is that the judgment entered against the Appellant was irregular.

29. The law is that once the court comes to the conclusion that the judgment is irregular, it must set it aside as a matter of course. In this regard, the Court of Appeal stated in ***James Kanyiita Nderitu & another v Marios Philotas Lilikas & another*** [2016] that**;**

> ***"In an irregular default judgment…the judgment will have been entered against a defendant who has not been served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justicie, as a matter of right. The court does not even have to be moved by a party. Once it comes to its notice that the judgment is irregular.it can set the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system"***

30. The right to be heard was also underscored by the Supreme Court of India in ***Sangram Singh v Election Tribunal Koteh*** 1955 AIR 425, where it stated;

> ***"[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."***

31. Applying the above principles to the present appeal, there is no doubt that the impugned default judgment was entered because the Appellant had not been served with summons as required by law. That action deprived him an opportunity to be heard and was, therefore, condemned unheard. The court could not excuse the Respondent for not serving summons but blame the Appellant for relying on rules that did not exist. The duty of the court was to render substantive justice to all parties at all times.

32. For the above reasons I am satisfied that this appeal has merit and must succeed. Consequently, this appeal is allowed as follows:

> ***a) The ruling of the trial court dated 3rd July 2019 dismissing the Appellant's application is hereby set aside.***
>
> ***b) The application dated 23rd November 2018 is allowed with the result that the default judgment entered against the Appellant on 7th November 2018 and all consequential orders are hereby set aside.***
>
> ***c) The suit before the Chief Magistrate's court be heard a fresh before any other magistrate other that Hon. M. Kasera.***
>
> ***d) The Appellant shall have costs of the appeal,***

Dated, Signed and Delivered at Kajiado this 14th February 2020.

E. C. MWITA

JUDGE