



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL APPEAL NO. 103 OF 2017**

*(An appeal arising from the ruling and order of the Hon. B. Ochieng, Chief Magistrate (CM), in Kakamega CMCCC No. 183 of 2015 of 6<sup>th</sup> September 2017)*

**LEAH MALESI.....APPELLANT**

**VERSUS**

**NANCY MANOGO .....RESPONDENT**

**JUDGMENT**

1. The suit at the trial court was initiated by the respondent herein against the appellant, for general damages for slander arising from words that the appellant allegedly uttered on divers dates in 2014 and 2015, of and concerning the respondent.
2. There is an affidavit of service on record filed on 10<sup>th</sup> June 2015, sworn on 25<sup>th</sup> May 2015, which indicates that the appellant was served with the pleadings on 15<sup>th</sup> May 2015. It indicates where she was served, the time of service and the person who pointed her out for service.
3. The appellant did not enter appearance nor file defence, and on 10<sup>th</sup> June 2015 the respondent filed a request for judgement, and judgement was entered on 12<sup>th</sup> June 2015. The matter was thereafter fixed for formal proof and the respondent formally proved her case on 12<sup>th</sup> August 2015. Judgment was delivered on 7<sup>th</sup> October 2015 in her favour. Thereafter the respondent initiated proceedings for execution of her decree, by way of notice to show cause, which culminated in the appellant being committed to civil jail.
4. That appears to be the trigger for the filing of a Motion dated, 23<sup>rd</sup> May 2016, for the setting aside of the judgement. In the supporting affidavit, the appellant did not dwell on whether she had been served, and, therefore, there was no explanation for her failure to enter appearance and file defence. The affidavit was more on the nature of the relationship between her and the respondent. The fact that she did not deny service was raised by the respondent in her replying affidavit. A ruling was delivered on 6<sup>th</sup> September 2017, dismissing the application, on grounds that the appellant had not denied service and had not explained why she failed to appear and file defence. The court considered the defence and did not think it was meritorious.
5. The appellant was aggrieved and lodged the present appeal raising various grounds. The appeal was canvassed by way of written submissions.
6. The appellant seeks the setting aside of an interlocutory judgement that had been entered following her failure to enter appearance and file defence. In deciding whether or not to set aside the judgement, the principal consideration would be whether there was proper service, the other considerations are secondary. In this case the appellant made no effort to establish whether or not she was served, and if she was served why she was unable to enter appearance and file defence. Without that the court cannot exercise discretion in her favour. The consideration as to whether or not she had a reasonable or arguable defence is entered into once it is established that there was proper service but the defendant failed to appear on account of mistake or inadvertence.
7. I do not find any basis upon which I can possibly exercise discretion on behalf of the appellant. I am not persuaded that the trial court did not exercise its discretion properly. Her appeal has no merit and it is hereby dismissed with no orders as to costs.

**DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8<sup>TH</sup> DAY OF MAY, 2020**

**W. MUSYOKA**

**JUDGE**