REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 204 OF 2014

NAIROBI BOTTLERS LIMITED...APPELLANT

VERSUS

HENRY ADERO OVIYO.....RESPONDENT

(Being an appeal from the Ruling delivered on 16th May, 2014 by Hon. S. Atambo (PM) Milimani Commercial Courts in CMCC No. 1802 of 2011)

JUDGMENT

1. The Appellant, Nairobi Bottlers Ltd, was sued by the Respondent, Henry Adero Oviyo for damages for injuries arising out an injury stated to have been sustained while the Respondent was in the course of the Appellant's employment. The Respondent blamed the injury on the Appellant's failure to provide a safe system of work. The Respondent also gave particulars of the alleged negligence on the Appellant's part.

2. Interlocutory judgment was entered for the Respondent against the Appellant who had not entered appearance or filed a defence. The case subsequently proceeded to formal proof. Judgment was entered for the Respondent on 100% liability for Ksh.300,000/= costs and interest on 21st June, 2013.

3. On 5th November, 2013 the Appellant moved the court seeking orders *inter alia*, to set aside the *exparte* judgment and all the consequential orders and to declare the execution process by the Respondent unlawful. It was stated that the failure to enter appearance and file a defence was not deliberate nor intentional but due to failure to serve the Appellant with the Summons to Enter Appearance; failure to be served with a hearing notice for the formal proof and/or notice of entry of judgment. It was further stated that the Appellant had a good defence which included a preliminary objection that the suit was time barred. That the application was brought without delay and that no prejudice would be occasioned to the Respondent if the application was allowed.

4. The application was opposed. It was averred that the Appellant was first issued with a demand notice, a reminder of the same and was eventually served with the pleadings and the Summons to Enter Appearance. That in it's application, the Appellant failed to annex the back page of the Summons to Enter Appearance which page had been duly stamped as received. It is contended there is no requirement to serve a hearing notice on a party who had failed to enter appearance. That notice of entry of judgment was served. The Respondent saw the application as a delaying tactic meant to deny him of the fruits of the judgment.

5. In a ruling delivered on 16th May, 2014 the trial magistrate dismissed the application with costs. That is what triggered the appeal herein.

6. The Appellant raised ten grounds of appeal which can be summarized as follows:

a. That there was no proper service of Summons to Enter Appearance and therefor the entry of the interlocutory judgment was irregular.

b. That the trial magistrate erred by failing to hold that the Draft Defence raised triable issues including failure to hold that the Respondents case was time barred.

c. That the trial magistrate erred in finding that the Appellant was liable to pay the decretal sum.

d. That the trial magistrate erred in holding that the Appellant was served with the Notice of entry of judgment.

7. During the hearing of the appeal, the Respondent was not present though served. The Appellant filed written submissions which I have considered.

8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".**

9. The principles applicable in determining whether to set aside an exparte judgment were laid out by the Court of Appeal in the case of **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** as follows:

> **"a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.** *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E b).* **Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.** *Shah v Mbogo [1967]EA 116at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.c).* **Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.** *Mbogo v Shah [1968]EA 93.*

10. On service on summons on a corporation, Order 5 rule 3 (a) provides as follows:

> **"Subject to any other written law, where the suit is against a corporation the summons may be served –**
>
> **(a) on the secretary, director or other principal officer of the corporation."**

11. The Summons to Enter Appearance dated 6th June, 2011 reflects that the same was served on 29th February, 2012 by the process server, Paul Lukendo Matura. The said summons bears the stamp of the Appellant's manager, Boniface Munyao. The affidavit of service reflects that service was effected on the said manager who was pointed out by the Respondent, Henry Adero Oviyo. The Respondent was an employee of the Appellant. It is expected that he knew the Appellant's office and also knew the manager. No request was made by the Appellant to cross- examine the said process server to challenge any of the averment made in the affidavit of service. The denial that the Appellant's offices are not situated at Jomo Kenyatta International Airport is therefore not convincing.

12. The conclusion by this court is that the Appellant was properly served and therefore the judgment was regularly entered. A manager is a principal officer of a corporation.

13. The Draft Defence admits the description of the parties and that the Respondent was it's employee then denies the rest of the averments in the plaint. The accident is blamed on the Plaintiff or contributed to by the Plaintiff. The defence of *volenti non fit injuria* is also pleaded together with the issue of time limitation. These are issues that could have been interrogated by the trial magistrate if the Appellant had entered appearance and filed a defence. However, this court's view is that the Appellant deliberately failed to enter appearance and is undeserving of this court's discretion.

14. The upshot is that I find no merits in the appeal and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 6th day of May, 2020

B. THURANIRA JADEN

JUDGE