REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 412A OF 2014

BENVAR ESTATES LIMITED.....APPELLANT

-VERSUS-

ASHWIN BHANDERI.....1ST RESPONDENT

DEEPAK BHANDERI.....2ND RESPONDENT

BHANDERI ENTERPRISES LIMITED...3RD RESPONDENT

(An appeal from the ruling delivered by Honourable B.J. Bartoo (Resident Magistrate) on behalf of Honourable S.N. Telewa (Ms.) on 4th August, 2014 in Civil Suit No. 488 of 2013)

JUDGMENT

1. The appellant, being the plaintiff in Civil Suit No. 488 of 2013, filed a suit against the respondents vide a plaint dated 20th June, 2013. The appellant thereafter took out summons to enter appearance and claims to have served the same together with copies of the plaint and other documents upon the respondents. An affidavit of service was filed to that effect on 9th July, 2013.

2. The appellant then requested for judgment to be entered against the respondents under Order 10, Rules 4 and 10 of the Civil Procedure Rules for failure on the part of the respondents to enter appearance and/or file a defence within the statutory timelines. It follows that the default judgment was entered on 30th July, 2013.

3. The respondents in reaction thereto filed an application dated 7th August, 2013 seeking to have the aforesaid judgment and decree set aside and leave to defend the suit, claiming that they were never served with summons to enter appearance and that their defence raises triable issues. In her ruling of 14th August, 2014, Honourable S.N. Telewa (Resident Magistrate) found that the 3rd respondent was not properly served and that the defence raises triable issues. As a result, she allowed the respondents' application with costs.

4. The appeal before this court is against the abovementioned ruling. The memorandum of appeal dated 11th September, 2014 is premised on eight (8) grounds.

5. The appeal was canvassed by way of written submissions, which were later highlighted before this court. *Mr. Kamunda* for the appellant argued that there was an acknowledgement of service of the summons in the supporting affidavit sworn by the 1st respondent on 7th August, 2013 when he averred that he got to know about the suit on 2nd August, 2013. Counsel in turn maintained that the affidavit of service was clear on who was served and it has not been denied that the 1st and 2nd respondents are directors of the 3rd respondent, hence either of them had the capacity to accept service on behalf of the company. Furthermore, that there was no good defence by the respondents.

6. In her rival submissions, *Mrs. Rotich* for the respondents contended, *inter alia* that, the process server ought to have stated in his affidavit of service whom he served with the requisite documents, adding that there is a contradiction between the 2nd and 3rd paragraphs of the said affidavit of service. The advocate in turn stood her ground that the defence raises triable issues, with *Mr. Kamunda* offering a retort to the claims through his counter arguments.

7. This court has considered the grounds set out in the memorandum of appeal together with the submissions and oral arguments by the respective parties. It is well noted that the grounds raises three (3) major issues.

8. The principal limb concerns whether the learned trial magistrate erred in setting aside the default judgment entered. This court has observed that the basis on which the decision was arrived at is two-fold.

9. Firstly, the trial magistrate determined that there was no proper service of the summons upon the 3rd respondent. The appellant in its submissions argued that the trial magistrate erred in law and fact by stating that there was no evidence of proper service. Counsel averred that the 3rd respondent was properly served with summons since the 1st and 2nd respondents, who both happen to be the directors of the 3rd respondent, received the summons and accompanying documents on its behalf pursuant to ***Order 5, Rule 3*** of the Civil Procedure Rules. Counsel argued that there is no legal requirement for a process server to state who between the two (2) directors received the documents on behalf of the 3rd respondent, citing the case of ***Rose Chepkorir v Mwinyi Mohamed Riva & Another [2015] eKLR***.

10. In refuting the above, the respondents argued that the affidavit of service did not specify who received the documents on behalf of the 3rd respondent, giving rise to uncertainty. Reliance was placed on ***Appi Decorators Limited & Another v Yamini Builders Limited [2016] eKLR*** and ***Order 10, Rule 11*** of the Civil Procedure Rules on setting aside of an ex parte judgment.

11. The procedure for service of summons upon corporations is set out in ***Order 5, Rule 3*** (supra) 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"***

12. From the above, what comes out clearly is that any of the above relevant officers may be served with the summons on behalf of a corporation. In this instance, it is not in dispute that the 3rd respondent is a corporation. Furthermore, the 1st and 2nd respondents have not challenged their directorship of the 3rd respondent. Upon perusal of the affidavit of service of *Martin Mwaniki*, this court has noted that under paragraph 3, the 1st and 2nd respondents are said to have accepted service of the summons and documents on the 3rd respondent's behalf.

13. It is also well noted that the respondents have not denied that service was effected; rather, they are challenging the failure to specify who between the two (2) directors was served. To my understanding, Order 5, Rule 3 merely indicates the officials authorized to receive the summons on behalf of a corporation. I do believe that both directors could very well have accepted service and am convinced that service was properly effected upon the 3rd respondent through its directors (that is, the 1st and 2nd respondents) in accordance with the law and this was shown in the filed affidavit of service. Not only so, the affidavit indicated that the 1st and 2nd respondents declined to sign against the appellant's copies of the summons/documents. Consequently, I believe that the learned trial magistrate erred in finding that there was absence of proper service upon the 3rd respondent.

14. Secondly, it was also the appellant's submission that the trial magistrate's finding that the respondents' defence raises triable issues was erroneously made. That the defence consists of mere denials that are untenable. The appellant relied on the case of ***Jani Investments Limited v Mavals Kenya Limited [2000] eKLR*** in support thereof.

15. The respondents on their part maintained that their defence raises triable issues, such as the fact that it neither entered into a contract with Muremba Mines nor traded as Precise Industries Supplies, citing the cases of ***Mercy Karimi Njeru & Another v Kisima Real Estate Limited [2015] eKLR*** and ***Interglobe Services Limited v Hama Ware Housing Limited [2014] eKLR***.

16. I have perused the ruling delivered by the trial magistrate and confirmed the sentiments raised by the appellant that the magistrate merely held that the defence raises triable issues but did not explain this further. I have in turn perused the draft defence which raises issues concerning the terms of the agreement entered into between the parties herein; the payments owed to the appellant and the involvement of Muremba Mines, inter alia. I am satisfied that these amounts to triable issues and in this sense, the learned trial magistrate's finding was proper.

17. I have also observed that the defence which was eventually filed in court slightly varies from the draft defence. That notwithstanding, the filed defence states inter alia, that the 1st and 2nd defendants have neither traded as Precise Industrial Supplies nor entered into any arrangements with Muremba Mines. To my mind, these are issues that would need to go for trial for further deliberation and determination. In other words, the filed defence does raise triable issues.

18. On to the third aspect on whether the default judgment was regularly entered, it is worth reiterating that the same was entered pursuant to ***Order 10, Rules 4 and 10*** of the Civil Procedure Rules. Having established that there was proper service of the summons to enter appearance and that the respondents neither entered appearance nor filed their defence within the stipulated timelines, I am of the considered view that the judgment was regular in every respect.

19. Be that as it may, having studied her ruling, I opine that no specific reference was made to the appellant's submissions and/or authorities cited therein. On that note, I wish to draw from a case previously cited by the appellant in its aforementioned submissions. In ***Lazarus Chomba v Zakayo Gitonga Kabutha & Another [2001] eKLR*** Honourable Justice Visram considered the holding in **Tabaki Freight Services International Ltd v Margaret Mwihaki Kiarie NAIROBI HCCC NO. 2027 of 1997** that:

> **"The court's power to set aside an ex parte judgment is very wide and is exercised without limits or restrictions except that if the judgment is set aside or varied it must be done on terms that are just. The power is exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but it will not be exercised to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice…"**

20. It remains unclear whether the learned trial magistrate considered the above factors, neither is there any indication that the appellant's submissions were analyzed in the ruling, for instance, the prejudice (if any) that the appellant stands to suffer should the judgment be set aside. It therefore appears the appellant's submissions were not exhausted by the trial magistrate.

21. In answering the third and final limb as to whether the learned trial magistrate arrived at a wrong decision, I have this to say. In respect to the service of summons, I am of the view that the learned magistrate made an erroneous finding on the issue of service of summons and entry of the default judgment.

22. In the end, I find that the Appeal has merits on grounds 1, 2 and 3 of the Memorandum of Appeal dated the 11th day of September 2014. I allow the same. The ruling dated the 14th day of August in the lower court is hereby set aside.

23. Each party shall bear its own costs of the appeal.

Dated, signed and delivered at NAIROBI this 7th day of February, 2019.

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……..... for the Respondents