



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 384 OF 2018

SARAH WAMUYU KIRAGU.....APPELLANT

VERSUS

JOHN IRUNGU.....RESPONDENT

(Being an appeal from the ruling and order of Hon. D.O. Mbeja (Mr.) (Senior Resident Magistrate) delivered on 19th July, 2018 in CMCC NO. 7183 OF 2017)

JUDGEMENT

1. The respondent who was the plaintiff in CMCC NO. 7183 of 2017 instituted the suit against the appellant herein by way of the plaint dated 22nd September, 2017 seeking for special damages of Kshs.820,000/= plus costs of the suit for breach of contract.
2. It was pleaded in the plaint that the parties entered into an agreement dated 8th August, 2014 for the service and supply of LPOs (Local Purchase Orders) with the respondent providing the necessary funds.
3. The respondent further pleaded that pursuant to the agreement, he paid to the appellant the sum of Kshs.575,000/= to be paid back with a profit of Kshs.245,000/= totaling Kshs.820,000/= but that the appellant failed and/or neglected to pay the said amount, thereby subjecting the respondent to severe financial losses.
4. Subsequently, the respondent sought for and obtained default judgment against the appellant on 17th January, 2018 in the sum of Kshs.820,000/= plus costs of the suit and interest thereon.
5. The appellant through her advocates then filed a notice of appointment of advocates on 6th February, 2018 followed by the Notice of Motion dated 21st February, 2018 seeking an order setting aside the aforesaid judgment on the basis of non-service of summons and a further order that the appellant be granted leave to file her statement of defence out of time. The same was opposed by the respondent through a replying affidavits sworn by *Willy Mwendwa Velle* and the respondent separately.
6. The application was heard before the trial court by way of written submissions. The trial court vide its ruling of 19th July, 2018 dismissed the said application with costs.
7. The appellant has now appealed against the said ruling. The memorandum of appeal dated 16th August, 2018 is premised on 12 grounds largely touching on the issues of service of summons and that the trial court did not consider the relevant principles surrounding the setting aside of *ex parte* judgments.
8. The appeal was canvassed by way of written submissions. The appellant submits that service of the summons to enter appearance was not served upon her personally or through her advocates or in the manner set out under Order 5 of the Civil Procedure Rules, and that the learned trial magistrate ought to have appreciated this and allowed the application.
9. It is also the appellant's submission that owing to the fact that the integrity of the service process was brought to question, the learned trial magistrate ought to have required the attendance of the relevant process server for purposes of examining his evidence.
10. Further to the above, the appellant argues that the learned trial magistrate did not consider the relevant principles for setting aside default judgments in dismissing her application, going a step further to contend that the respondent could have adequately been compensated for any delay occasioned in filing the defence. In the end, the appellant urges this court to do substantive justice to all the parties by allowing the appeal.
11. On his part, the respondent argued that proper service was effected upon the appellant and that the affidavit of service on record was

never challenged, neither did the appellant dispute that she resided in the place where service was effected. The respondent stood his ground that service was properly effected and the default judgment was regularly entered

12. It is also the respondent's submission that the learned trial magistrate took into account all the relevant factors into consideration and having done so, arrived at a proper finding by dismissing the application.

13. On the issue of costs, the respondent urged this court to appreciate the thumb rule that costs follow the event and that the same lies with the discretion of the court.

14. The respondent is of the submission that the appeal is for dismissal.

15. I have considered the grounds of appeal as well as the rival submissions alongside the applicable authorities cited. Being a court of first appeal, I have equally re-evaluated and re-examined the evidence as well as the material placed before the trial court.

16. I will address grounds 2), 3), 4), 6), 7), 10) and 12) of the appeal which concern the issue of whether there was proper service of summons upon the appellant, which will in turn establish whether the default judgment was regularly entered.

17. In her affidavit in support of the aforementioned application dated 21st February, 2018 the appellant stated that she was never personally served with summons to enter appearance and only came to learn of the existence of the suit when she was served with a copy of the notice of entry of judgment and intention to execute. The appellant went on to assert that at the time the summons and copy of the plaint were alleged to have been affixed somewhere in her house, she was away on an official business trip and that upon her return, she could not trace the documents anywhere.

18. In his replying affidavit, *Willy Mwenda Velle*, the process server who conducted the service, explained that he had previously served the appellant with a copy of the demand letter in the suit and that on the material day, he effected service of the summons and suit documents by affixing the same on the appellant's front door, since the persons inside had declined to open the door. The deponent further explained that the appellant later on contacted him to complain about the service and that a conversation ensued between them by way of text messages. A copy of the text messages was attached to the affidavit. The deponent insisted that the appellant was made aware of the suit against her prior to the entry of judgment.

19. A second replying affidavit was sworn by the respondent, who supported the averments made by the process server save to add that the mere fact that the appellant averred to having failed to locate the suit documents is evidence enough that she was aware of the court proceedings.

20. In her supplementary affidavit in response to the two (2) replies, the appellant reiterated that she was never served with the suit documents but collected them at a later date after judgment had already been entered against her. She went ahead to mention that on the alleged date of service, the process server called her and she informed him that she was not at home, to which he responded by indicating that he would leave the documents at her house. The appellant later confirmed with her watchman that no documents had been left by the process server and that in any event, the said watchman did not let the process server in due to the appellant's absence.

21. In her submissions before the trial court, the appellant argued that service upon her ought to have been effected in accordance with the provisions of Order 5, Rule 8 of the Civil Procedure Rules at the first instance and it is only when a party cannot be found or reached that substituted service can be effected upon the filing of an application in court. It was the appellant's submission that the court did not order for substituted service, hence the purported service was improper and consequently, the default judgment entered was irregular.

22. In his opposing submissions, the respondent contended that service was properly effected upon the appellant, since the appellant had been evading service and it is on that basis that the process server opted to effect service at her place of residence. The respondent further argued that the appellant has not sought leave of the court to cross-examine the process server on the contents of his affidavit of service.

23. The trial court, upon hearing the parties, ruled that the appellant had properly been served with the suit documents going by the affidavit of service on record, which therefore meant that the default judgment was regularly entered.

24. I have re-evaluated the above material and now render the following view. The procedure for service of summons is clearly set out under **Order 5** of the **Civil Procedure Rules ("the Rules")**. **Rule 8** of the said Order specifically provides for personal service or service through the relevant defendant's agent.

25. Whereas I have noted that a copy of the affidavit of service was not attached to the appellant's record of appeal, I managed to locate the same from the lower court file. The affidavit, sworn by Willy Mwendwa Velle and filed on 10th January, 2018, confirmed the averments made in the deponent's replying affidavit mentioned hereinabove.

26. It is apparent that the appellant was not personally served or served through her agent; rather, service was effected pursuant to the provisions of Order 5, Rule 14 of the Rules which caters for alternative means of service other than personal service in the following manner:

"Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with an affidavit of service."

27. The process server explained that he was unable to personally serve the appellant by virtue of the fact that she did not contact him to organize for a meet-up as agreed, hence his decision to serve her at her residence in Komarock Phase 5A, House No. 105 by affixing the suit documents on her door since she was not at home. I am also able to establish that the parties communicated on phone; the appellant in fact stated that she was made aware of the service though when she returned from her business trip, she could not trace the documents at her house.

28. In addition to the above, the appellant has not denied that the residence at which the suit documents were served was truly her residence or that she had previously been served with the demand letter by the process server in this instance at her home. In fact, she stated in her supplementary affidavit that the respondent is well known to her and that he knows where she resides.

29. From the foregoing, I am satisfied that the evidence reflects that service of the summons was properly effected in line with the provisions of Order 5, Rule 14 of the Rules and furthermore, there is really nothing to indicate that the appellant was completely oblivious of the existence of the suit but for one reason or another did not enter appearance and/or file her defence. In that case, the default judgment was properly entered.

30. I also noted the appellant's argument that the respondent did not apply to court prior to effecting service at her residence, as is required under Order 5, Rule 17 of the Rules thereby making the service improper. I have looked at the said Order and established that it provides for substituted service only in instances where the summons cannot be served in accordance with the preceding Rules of Order 5. In my reasoned view, the subject of substituted service under this Rule would not come into play since it has already been established that the summons were served as per Rule 14 of the Order, which does not require the filing of an application or obtainment of a court order.

31. On the subject of cross-examination of the process server, I have taken the appellant's views into account. It is true that

Order 5, Rule 16 of the Rules expresses thus:

“On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.”

32. My understanding of the above provision is that a court of law has the discretion to call for the examination of a process server where there is doubt as to whether service was properly effected. There is nothing compelling a court to summon a process server for examination and it lies purely with the court's discretion to decide whether or not to apply the said provision. If at all the appellant was convinced as to the improper service of the summons, my opinion is that she ought to have invoked the provisions of **Order 19, Rule 2** of the Rules by applying to have the process server cross-examined; this was not done.

33. Consequently, I am persuaded that the learned trial magistrate's finding that the appellant was not only served but properly served was reasonable in the circumstances.

34. I am now left with grounds 1), 5), 8), 9) and 11) of the appeal relating to whether the trial court considered and correctly applied the principles for setting aside a default judgment. On her part, the appellant stated before the trial court that she stands to be prejudiced by virtue of the fact that she has a strong defence. In his reply, the respondent asserted that the appellant has not denied being indebted to him.

35. In her submissions, the appellant reinforced her position that hers is an arguable defence which raises triable issues and that it would be in the interest of justice that she be granted the opportunity to defend her case.

36. On his part, the respondent vehemently submitted that the appellant's defence constitutes mere denials and is aimed at inhibiting the course of justice.

37. In his ruling, the learned trial magistrate cited the principles for setting aside a default judgment, reasoning that whether or not to set aside a default/ex parte judgment is a matter of judicial discretion which ought to be exercised judiciously to avoid injustice or hardship.

38. The principles that may offer guidance to the courts in addressing applications seeking to set aside a default judgment have been discussed in a number of judicial authorities such as the renowned case of **Mbogo & Another V Shah, [1968] EA 93** and the Court of Appeal case of **James Kanyiita Nderitu & Another v Marios Philotas Ghiks & Another [2016] eKLR**. These include the explanation given for failure to enter appearance or file a defence within time; the length of time that has passed since the interlocutory judgment was entered; whether the intended defence raises triable issues and the prejudice either of the parties was likely to suffer if the application was allowed or dismissed. Further to this, **Order 10, Rule 11** of the Rules enables the court to exercise its discretion in setting aside or varying a judgment on just terms.

39. It has already been determined that the learned trial magistrate arrived at a correct finding in respect to the service of summons and consequently, entry of the default judgment.

40. Be that as it may, I have perused the impugned ruling and noted that the learned trial magistrate ought not to have considered the issue of service of summons in isolation but should have contemporaneously considered whether the appellant's statement of defence raises triable issue or the prejudice that either of the parties would stand to suffer.

41. On the subject of whether the defence raises triable issues, I have perused the draft statement of defence attached to the appellant's application before the trial court and noted that the same is between the appellant and a different party. Furthermore, the same relates to an entirely different case number; it would therefore appear there was a confusion in the case heading. Be that as it may, the facts stated therein

relate to the suit and I have noted that it raises certain issues which I consider to be triable in nature, such as:

a. Whether the parties entered into the agreement as purported and whether the appellant's signature appearing on the agreement is a forgery.

b. Whether the respondent made any payments to the appellant in respect to the agreement and whether the appellant was obligated to refund the said payments with profit.

42. In view of the foregoing, I am convinced that the appellant's defence raises *prima facie* triable issues and the learned trial magistrate ought to have considered this factor in his analysis but he did not at all touch on it. It would have been in the interest of justice to grant the appellant the opportunity of being heard on merit. However, it is clear from the affidavit evidence that such an opportunity was always present but the appellant intentionally refused to enter appearance. The appellant also purposely refused to file a defence.

For the above reason the fact that the appellant's defence raises triable issue is no guarantee to setting aside a default judgment.

43) In the end this appeal lacks merit. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 20th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent