



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 36 OF 2016

SAID ALI JAMA.....APPELLANT

VERSUS

SAADA SWALEH MBARAKA t/a SWALEH TRADING....RESPONDENT

J U D G M E N T

1. The decision challenged in this appeal was one by which the trial court determined an application dated 12/01/2016 by the Respondent. In that application the respondent sought an order for setting aside of an earlier order dated 09/07/2015 in the which the court allowed an application by the Appellant said to have sought orders of summary judgment.

2. The said Notice of Motion set out the grounds for seeking the setting aside to have been that the erstwhile advocate did not inform the Respondent about the application for summary judgment with a consequence that the same was not opposed and that there was a strong defence against the claim. Those facts were deponed to in the Affidavit by the Respondent in which it was asserted that a perusal of the court filed did not reveal any Affidavit of service of the Application dated 12/01/2016 and also stating that there was no privity between the Respondent and the Appellant but rather it was the Respondent's husband who was a business partner of the Appellant.

3. The application was opposed by the Appellant by a Replying Affidavit by the Appellant sworn on the 15/01/2016. The gist of the opposition was that having been filed on the 12/01/2016, the same was served upon Ms CHIDZIPHA & COMPANY ADVOCATES on the 16/6/2015 who then did not respond to the same and on the 9/7/2016 the same was allowed as an opposed. It was then added that after the judgment a notice of entry of judgment was served but even that was never responded to hence execution lawfully followed.

4. Based on these Affidavits and annexures thereto the question for determination before the trial court was whether or not a case had been established for setting aside which is essentially a discretionary matter except where no service is proved in which event there is no discretion to be exercised but the judgment must be set aside ex-debito justified.

5. In discharging his mandate under the law the trial court did render himself in the following words:-

“The application dated 12/02/2015 was filed on served upon the firm of Ms. JAPHETH CHIDZIPHA & COMPANY ADVOCATES then on record for the defendant. On 12/06/2015, an ex-parte hearing date for this application was fixed at the Registry. The same was to be heard on 09/07/2015 after service of the hearing notice. On 09/07/2015, the record shows that only Ms. Egesa Advocate was present for the plaintiff/applicant. In her address to the court, she stated that the application for hearing was dated 12/02/2015 seeking for summary judgment. That the application was unopposed as it was duly served but there was no appearance. She prayed for orders. The court then ordered that “application allowed as prayed”. This is the order that is being challenged.

As I have stated earlier, there is no evidence on record that the application dated 12/02/2015 was served upon the defendant/respondent. Despite this, an ex-parte hearing date of 09/07/2015 was taken at the Registry on 12/06/2015 with a stipulation that notice was to issue. From the record, there is an affidavit of service by SAMUEL KARIMI GIKUNJU a licensed court process server sworn and filed in court on 08/07/2015 in which he depones that on 16/06/2015, he served the application dated 12/02/2015 upon Ms. JAPHETH CHIDZIPHA & COMPANY ADVOCATES. That the secretary who was so served acknowledged receipt by stamping and signing his copies which he returned to court as duly served. Unfortunately, there is no such application attached to this affidavit of service duly received by the advocates aforesaid. Failure to so attach a duly served copy of the application dated 12/02/2015 can only mean that such an application was not duly served as alleged. It would appear, the learned trial magistrate did not address himself to this issue before granting the prayers sought in the application. This reason is sufficient to have the orders of 09/07/2015 set aside”.

6. It is clear that the judgment was set aside on the basis that there was no evidence of service to support the deposition in the Affidavit of

service that the application was indeed received and acknowledged by the Respondents' advocates then on record.

7. This being a first appeal, the court, even if it proceeds by way of retrial, has the parameters well set. One of the parameters is that it should be slow to interfere with orders made upon exercise of judicial discretion and those made upon factual findings unless the discretion be demonstrated to have been exercised improperly or where the findings upon facts are not supported by the evidence available.

8. I have had the benefit of reading the court file and I have indeed seen the Affidavit sworn by SAMUEL KIRIMI GIKUNGU on the 8/7/2015. While it says that the application was indeed received and acknowledged, no such acknowledgment was exhibited. NO attempt was made before the trial court to exhibit such acknowledgment. It must be repeated here that service of process goes to the very foundation of the right to be heard and it is a right that is incapable of limitation and thus wherever it is alleged to have been sidestepped the person whose duty it was to observe the right must demonstrate that there was indeed due observance.

9. In this matter there having been no demonstration of service by the Appellant, I do find that the trial court was perfectly within its rights to find as it did and to set aside. I may only add that there having been no sufficient evidence of service, there was no discretion to be exercised. The court was bound to set aside as of right^[1]. This determination settles grounds 3 & 4 of the Memorandum of Appeal.

10. The 1st and 2nd grounds of appeal are on the technical question of whether the application having been filed by an advocate heretofore not on record, and after the judgement had been obtained, was properly on record. Those grounds must be seen to be based on the provision of Order 9 Rule 9 Civil Procedure Rules. The Rule provides:-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

a) Upon an application with notice to all the parties or

b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”.

11. It cannot be gainsaid that the provision is couched in mandatory terms. However it is to me a rule of procedure that cannot be seen or let to override the substantive-law on the right to an advocate of own choice. Even with the decisions cited, in my view the choice to change an advocate at the time the respondent did should not have been exalted over and above the need to determine the substantive dispute between the parties. This is not to say that Rules of Procedure are inconsequential. It is to say that Rules of Procedure must remain handmaids of justice and not its masters. One may ask what would have been the effect of acceding to the request that the papers filed were not properly filed. To me the effect would have been to strike out the application before hearing it on the merits and thus leaving the doors wide open for the Respondent to start afresh. Such would not have determined the substantive issue whether or not the Orders of 9/7/2015 were validly given.

12. But, my understanding of the rule, going by the background and historical facts which led to its introduction in the statute. It was intended to protect the interests of an advocate being taken over from. The mischief at that time, leading to the inclusion of the rules, was that there were advocates and litigants who would let other advocates toil towards prosecuting a case and only come at the eleventh hours, many times without notice to all else, and just file a notice of change or Notice to act in person. The rule was thus intended, and the intention remains, *‘to protect the interests of an advocate who has been in the matter’* and limited to the question of fees payable. Thus to this court that rule should never be a real dispute between the litigants who should not dictate to each other on their chosen representation.

13. It is apparent from the record that even though the question of the competence of the application was raised, the trial court opted not to address it and offered no reasons for such option. That could have been an error but it is the kind of an error that I do not consider to vitiate the decision thereby reached on the merits of the application. The trial court went into the substance of the matter before him and reached a decision that I have held was just and in consonance with the law applicable. I find that the merits of the application having been delved into, it would be too late now in this appeal, to concentrate on the technical issues without being seen to worship-technicality over substance. Those two grounds equally fail and are dismissed.

14. The fifth ground of appeal faults the trial court for having failed to consider the pleadings filed with a view to establishing if indeed the Respondent had raised a point for determination at trial to merit setting aside.

15. That would have been a valid question if there was established proper service and the court was being asked to exercise a discretion. In the present case as said before, once the service of the application became wanting there was no discretion to exercise. The court was obligated to set aside as it did.

16. The last ground of appeal is that omnibus but prevalent ground in many appeals accusing the court of failure to consider the submissions offered by the Appellant. To this court such a ground cannot of itself upset the decision of the trial court made on the merits unless it be demonstrated that the conclusions thereby reached be contrary to the facts revealed and the law applicable.

17. For all the above reasons the appeal fails for lacking on merits and the same is hereby dismissed with costs.

Dated and delivered at Mombasa this 18th day of October 2019.

P.J.O. OTIENO

JUDGE

[\[1\]](#) James Kanyiita Nderitu & Another vs Mario S Philotas Ghikas [2016] eKLR