



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO 141 OF 2018

DIWAFI INVESTMENTS LTD.....APPELLANT

-VERSUS-

JOAKIM MUSYOKI KIIO.....RESPONDENT

[Being an Appeal from the entire Ruling and Order of the Senior Principal Magistrate's Court of Kenya sitting at Mavoko (Hon. C.C. Oluoch) delivered on the 28th day of September, 2018 in Mavoko SPMCC No. 634 of 2014]

BETWEEN

JOAKIM MUSYOKI KIIO.....PLAINTIFF/RESPONDENT

VERSUS

DIWAFI INVESTMENT LTD.....DEFENDANT/APPLICANT

JUDGEMENT

1. By a plaint dated 26th June, 2014 filed in Mavoko S.P.M.C.C. No. 634 of 2014- Joakim Musyoki Kioo-vs-Diwafa Investment Limited, the Respondent herein claimed from the Appellant Special and general damages from a work injury claim which occurred on 5th March, 2014. It was the Respondent's case that on that day whilst acting in the course of his employment with the Appellant and as a result of the negligence of the Appellant's servant or agent, the Respondent sustained injuries.
2. Due to the failure by the appellant to appear and file the defence, an interlocutory judgement was entered against the Appellant and the matter proceeded to formal proof. After the hearing the court entered judgement against the Appellant in the sum of Kshs 752,000.00 being general damages, loss of earning capacity and special damages
3. By an application dated 5th July, 2018, the Appellant sought to have the said interlocutory judgement entered on 20th September, 2017 and all the subsequent and ancillary proceedings set aside. The said prayer was however expressly stated that the relief in question was sought pending the hearing and determination of the application. According to the Appellant the Respondent had earlier on filed Machakos CMCC No. 583 of 2014 which was dismissed for want of prosecution. It was then that the proceedings appealed from were instituted. The Appellant however contended that it was never served with summons to enter appearance or pleadings to enable it defend itself. It was also contended that no notice of entry of judgement was served upon the Appellant as required by law
4. It was the Appellant's case that the subsequent suit was barred by the doctrine of res judicata bas the same was already determined in the earlier suit.
5. In response to the application, the Respondent filed a Notice of Preliminary Objection in which it was contended that the application was defective and offended Order 51 Rule 4 and Order 2 Rule 2 of the **Civil Procedure Rules**; was misconceived, incompetent and bad in law and could not stand on its own.
6. In her ruling the learned trial magistrate did not find any merit in the objection and proceeded to determine the matter on its merit. According to her as the earlier suit was not determined on its merit the matter was not res judicata. As regards the allegation of non-service of the notice of entry of judgement, the court found that from the record no such notice was served but disagreed that the failure to do so would

vitiating a regular judgement as the said omission is only relevant when dealing with an application for stay of execution.

7. According to the learned trial magistrate the Appellant did not attach a draft defence or demonstrate that it had a good defence and did not seek to file a defence out of time. It was noted that the intention seemed to have been to have the judgement set aside pending the hearing and determination of the application hence the Respondent did not seek to defend the suit in any way.

8. According to the learned trial magistrate from the affidavit of service relied upon at the time of entry of judgement, it was indicated that the summons were served on the Appellant's Manager known as **Shakri** who signed at the back of the summons. However, in the application, the Appellant did not claim that they have no such manager or that the said affidavit contained falsehood and further never sought to cross-examine the deponent of the said affidavit. It was therefore the learned trial magistrate's finding that the interlocutory judgement was regular hence there was no basis for setting it aside more so as the Appellant had not sought leave to defend the suit. She proceeded to dismiss the application with costs.

9. In this appeal it is submitted on behalf of the Appellant that the learned magistrate did not address or consider the issue of material non-disclosure as to the existence of the suit in Machakos given that while filing the plaint in Mavoko the Respondent deposed that there was no pending suit and there were no previous proceedings between the same parties over the same subject matter. According to the Appellant, while the learned Magistrate failed to address herself as to the issue whether the Respondent's suit was an abuse of the court or brought in bad faith due to material non-disclosure, she misdirected herself as she failed to recognize that the Appellant's contention, was that the Respondent had instituted two suits in respect of an industrial claim, on the same cause of action which actions had been dismissed after being granted an opportunity to be heard but failed to appear, hence his action was an abuse of court process.

10. According to the Appellant, the doctrine of *res judicata* bars the bringing of another suit where there has been a previous suit between the same parties that has been heard and finally determined by a competent court. The rationale is that it would be pointless and a waste of judicial time, to re-litigate issues that have already been addressed and determined by the court. It was not disputed that there were previous proceedings between the parties. The question that the learned magistrate ought to have addressed is whether this previous suit involved the same issues as the Respondent's current suit and if so, whether, the previous suits were finally determined. It was submitted that a cursory look at the Respondent's suit filed at Machakos and the suit filed at Mavoko reveal that both suits were between the same parties and litigating under the same title. After the suit at Machakos was listed severally for hearing the Respondent never appeared in court despite being granted an opportunity to be heard culminating to the filing of an application by the Appellant to have the suit dismissed for want of prosecution. This application was heard inter-partes by advocates representing both parties and it was dismissed by a competent court. According to the Appellant, dismissal of a suit for want of prosecution amounts to a judgment given that parties moved the court by way of an application, were heard on merit and the Honourable court made a finding on the application. In support of that submission the Appellant relied on the case of, **Peter Ngome –vs- Plantex Company Limited [1983] eKLR**, and submitted that the only option the Respondent had was to file an application to reinstate the suit at Machakos and have it transferred to Mavoko where the cause of action arose. As regards the rationale of the doctrine of *res judicata*, reliance was placed on the decision of the Court of Appeal in **Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR**, **William Koros (Legal Personal Representative of Elijah, C.A. Koross -vs- Hezekiah Kiptoo Komen & 4 others (2015) eKLR** and **Mburu Kinyua –vs- Gachini Tutu (1978) KLR 69**.

11. It was submitted that in this case the Appellant was never issued with a formal proof notice hearing and notice of entry of judgment as is required by the law so as to enable the Appellant take the necessary action before execution.

12. It was contended that *the learned Magistrate while entering default judgment grossly erred in law and fact by relying on this affidavit of service at first instance got satisfied that service of summons was proper. She did not interrogate whether or not the said Mr. Shakiri was an employee or agent of the Appellant considering the fact the alleged process server did not attach any document to show how he was able to identify the said Mr. Shakiri. The fact that the Magistrate saw a signature of a recipient is not sufficient proof that service was effected in this instance upon a Company. According to the Appellant, it does not have a manager known as Shakiri and that is why while filing the application we alluded to the fact that no summons were served upon the Appellant and that the said summons do not bear the Appellant's company stamp or company seal as is required by law.*

13. According to the Appellant, it is also imperative for the Court to take a decision on whether the default judgment was regular or irregular. This distinction is significant for the reason that where the Court finds that the Judgment was irregular, then it ceases to have discretion in the matter but must proceed to set aside the default judgment *ex debito justitiae*. In this respect the Appellant relied on the case of **Fidelity Commercial Bank Ltd Vs. Owen Amos Ndung'u & Another, HCCC No. 241 of 1998 (UR)**, and **James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another [2016] eKLR**.

14. The Appellant therefore urge the Court to allow the appeal as prayed and to set aside the Orders of the Lower Court with costs.

15. In opposing the appeal, the Respondent submitted that Mavoko Civil Suit No. 634 of 2014 was filed first on 2nd July, 2014 whereas Machakos Civil Suit No. 583 of 2014 was filed on the 14th July 2014. It was therefore submitted that it was true that when the respondent herein stated that there was no other suit pending between parties he was being honest contrary to the contents of the respondent's submissions, which consequently means that the principle of material non-disclosure would not in any way apply herein.

16. According to the Respondent, they were not a party to Machakos Civil Suit No. 583 of 2014, and orders emanating therein cannot then apply to Mavoko Civil Suit No. 634 of 2014. It was contended that Machakos Civil Suit No. 583 of 2014 was dismissed for want of prosecution after the plaintiff's then advocate refused, declined, neglected, rejected and/or ignored to try their case whereas the Mavoko Civil Suit No. 634 of 2014 proceeded and judgment was granted on 20th September, 2017.

17. It was submitted that if at all the suits relate to the same plaintiff and cause of action, then it should be noted that the plaintiff herein chose to proceed with Mavoko Civil Suit No. 634 of 2014 as he appeared and adduced evidence on 16th August, 2017, when the instant suit came for hearing. It was submitted that neither the principle of *res judicata* nor the principle of material non-disclosure of facts would apply herein and therefore the learned magistrate **Hon. C.C. Oluoch** did not make any error whatsoever in her ruling.

18. It was the Respondent's contention that the appellant has not led any evidence to show that it was not served or that the service was improper hence the judgment obtained herein is a regular judgment. In this regard the Respondent relied on **Philip Keipto Chemwolo & Mumias Sugar Co. vs. Augustine Kabenda (1982 -88) 1 KAR** and **Shah –vs- Mbogo (1967) E.A. 116** and urged the Court to dismiss the appeal with costs.

Determinations

19. I have considered the foregoing, the submissions filed on behalf of the parties herein and the authorities relied upon in support thereof.

20. That the decision whether or not to set aside *ex parte* judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See **Shah vs. Mbogo & Another [1967] EA 116**.

21. In the applicant that was before the learned trial court, the Appellant sought the following orders:

- (1) That the application be certified as urgent and heard on priority basis.
- (2) That this Honourable Court be pleased to issue a stay of execution of the decree issued on the 20th September, 2017 pending the hearing and final determination of this application.
- (3) That this Honourable Court be pleased to set aside the interlocutory judgement entered on the 20th September 2017 and all its subsequent and ancillary proceedings pending the hearing and final determination of this application.
- (4) That the costs of this application be in the cause.

22. It is true as was found by the learned trial magistrate that there was no order setting aside the interlocutory judgement and granting the Appellant leave to defend the suit. The Appellant ought to have sought leave to amend the application but it chose not to do so. However, if that was the only issue the application ought to have been struck out instead of being dismissed since what was before the court was an incompetent application. That is my understanding of the decision in **Abbas G Essaji vs. Gordhan Dewji Solanki [1968] EA 218**.

23. However, that was not the only matter that the court dealt with. It is important to reiterate that the application before the trial court was based on only two grounds and these were the fact that the matter was *res judicata* and that summons were never served on the Appellant. The learned trial magistrate however found that there was an affidavit of service in the court file that showed that service was effected on ***Shakiri who was contended to have been the Appellant's manager. As rightly pointed out by the learned trial magistrate, the Appellant in its application did not dispute that allegation. In fact, there was no mention at all of the said Shakiri.***

24. The issues and questions which have been posed by the appellant in this appeal would have been resolved had the Appellant applied that the process server be summoned for cross-examination. In the case of **Justus Kariuki Mate & Another vs. Martin Nyaga Wambora & Another [2014] eKLR** the Court of Appeal had this to say in regards to Affidavits of Service:

“An Affidavit of Service consists of sworn factual evidence of the deponent. This Court in Baiyo --vs- Bodi Bach, Civil Appeal No. 122 of 1986 (UR) while applying the principles restated in; Miruka -vs- Abok & Another, [1990] KLR 544, Platt, JA stated: -

“There is a qualified presumption in favour of the process server recognized in MB Automobile -vs- Kampala Bus Service [1966] EA 480 at p 484 as having been the view taken by the Indian courts in construing similar legislation. On Chitaley and Annaji Rao: The Code of Civil Procedure Vol. II p 1670, the learned commentators say: -

‘3.Presumption as to service – There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.’

See also this Court’s decision in Kingsway Tyres & Automart Ltd. –vs- Rafiki Enterprises Ltd., – Civil Appeal No. 220 of 1995. Going by the material that is before us regarding the service of the order and the dicta enunciated the aforesaid authorities we agree with counsel for the 1st respondent that the burden lay with the appellants to demonstrate that the affidavit of service was incompetent.”

25. As the affidavit of service remained unchallenged, I cannot interfere with the decision by the learned trial magistrate in that regard.

26. As regards the issue of *res judicata*, the learned trial magistrate relied on the case **MWK vs. AMW [2016] eKLR** in which the decision of the Court of Appeal in **Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97** was cited with approval. In the former case the court expressed itself as follows:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res*

***judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res Judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits.”**

27. I associate myself with the said decision and in my view the learned trial magistrate arrived at the correct decision.

28. In this appeal the appellant has raised new grounds that there was non-disclosure of the previous proceedings and that the suit from which this appeal arises was an abuse of the court process. However, the application before the trial court was not based on the said grounds hence the learned trial magistrate court could not have been expected to deal with the same. As regards the failure to serve the notice of judgement, I agree with the learned trial magistrate that that was an issue for execution rather than setting aside the judgement.

29. In the premises, I find no merit in this appeal which I hereby dismiss with costs.

30. It is so ordered.

Read, signed and delivered in open Court at Machakos this 19th day of November, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Mwau for Mr Ngare for the Respondent

Mr Murithi for Mr Muindi for the Appellant

CA Geoffrey