



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 74 OF 2011

ABC CAPITAL LIMITED.....APPELLANT

- V E R S U S -

PETER MUSAU NZIOKA.....RESPONDENT

(An appeal from the ruling and orders of Hon. A. K. Ndungu in Milimani CMCC No. 3302 of 2010 delivered on 27th day of January 2011.)

JUDGEMENT

1. On 27th January 2011, Hon. A. K. Ndungu, learned Senior Principal Magistrate, dismissed the appellant's motion dated 20th July 2010, thus provoking the filing of this appeal. In the aforesaid motion, the appellant had sought to have a default judgement entered in favour of the respondent and for leave to unconditionally defend the suit. In the end the learned Senior Principal Magistrate found that the judgment was regular and that the appellant did not have a good defence.

2. On appeal, the appellant put forward the following grounds in its memorandum:

1. The learned magistrate erred in law and fact in finding that the service upon the appellant and or its agent was proper and that the grounds on service upon an unauthorized person were not proved, when such service upon the appellant was improper and service on unauthorized person had been proved.

2. The learned magistrate erred in law and fact in finding that the service on an unauthorized person was not proved by the appellant when the respondent had not discharged the burden of proof for proper service under the Order V rule 2 of the Civil Procedure Rules and which failure entitled the appellant to setting aside of the default judgment ex debito justitiae.

3. The learned magistrate erred in law and fact in failing to sufficiently frame and address the issues of service upon the appellant in light of the totality of the evidence adduced and submissions made.

4. The learned magistrate erred in law and fact in considering and placing undue weight on the evidence by the respondent when such evidence did not amount to proof of liability on the part of the appellant but reinforced the draft defence about fraud and involvement of other parties who were necessary but not named in the suit and that the appellant was not negligent and had exercised due diligence and care.

5. The learned magistrate erred in law and fact in failing to evaluate and consider the submissions by the appellant and thereby arrived at the wrong conclusion about the merit of the application.

6. The learned magistrate's made a decision that was clearly wrong and misdirected himself on the grounds and merit for the grant of the orders sought in the application and acted on matters on which he should have acted and failed to take into consideration matters he should have taken into consideration and thereby arrived at a wrong conclusion.

7. There was no good or proper basis for the orders made in the said ruling.

3. When the appeal came up for hearing, learned counsels made oral submissions. It is the submission of Mrs. Karanu, learned advocate for the appellant that the learned Senior Principal Magistrate erred when he dismissed the appellant's application, yet it has shown that the summons to enter appearance were served upon an employee who had no authority to receive the same on behalf of the company. In short, the appellant is of the submission that there was no proper service. The appellant further argued that the learned Senior Principal erred when he held that the appellant had no triable issues yet the draft defence had triable issues. It was pointed out that the draft defence had expressly stated that the appellant was not negligent.

4. On the other hand, Mr. Odhiambo, who held brief for Mr. Muema, learned advocate for the respondent was emphatic that the appellant was properly served with the summons to enter appearance through its employee. It was also argued that he draft defence contained no triable issues.

5. I have considered the grounds set out on the face of the memorandum of appeal and the rival oral submissions of learned counsels. I have also re-evaluated the arguments made before the trial court. The question which must be answered on appeal is whether or not there was proper service of the summons effected upon the appellant. The record shows that the respondent filed an action against the appellant by way of the plaint dated 26th May 2010 whereof he sought for judgment in the sum of ksh.365,000/= said to be the true market value of 8545 shares Barclays Bank of Kenya plus General damages for loss of income and costs. The respondent filed a request for entry of judgment on 9th July 2010 which request was granted on 13th July 2010. Accompanying the request for judgment is the affidavit of service of Samuel N. Gitahi sworn on 9th July 2010. In paragraph 3 of his affidavit Samuel Gitahi deponed as follows:

“That on the same day I proceeded to the offices of the defendant situate on the 5th floor of IPS building along Kimathi Street, Nairobi, where I found a secretary who only gave her name as Grace and upon explaining to her my purpose of the visit, she informed me that the director of the defendant company was not in but she had authority to receive documents on behalf of the defendant.”

6. In paragraph 4 of the aforesaid affidavit, the process server deponed that Grace accepted service and affixed on his copies the official rubber stamp. I have examined the summons retained by the process server and it is clear that the same contains the appellant’s stamp which was affixed on 24.6.2010. I have also looked at the appellant’s application dated 20.7.2010 plus the facts deponed in the supporting affidavit. One of the grounds put forward by the appellant in seeking to set aside the default judgement is that the summons to enter appearance was served upon a member of staff who not being conversant with the legal process, delayed in forwarding the same to the legal department of the appellant company. The member of staff was not named neither did the appellant challenge the contents of paragraphs 3 and 4 of the affidavit of service of Samuel N. Gitahi. With respect, I am satisfied with the manner the learned Senior Principal Magistrate dealt with the appellant’s chamber summons dated 20.7.2010. In short, the learned Senior Principal Magistrate noted that the appellant had failed to name its employee who did not understand legal processes and neither did it avail an explanation by way of an affidavit by such a staff. The learned Senior Principal Magistrate treated the averments of Gregory Omusolo as hearsay.

7. On appeal, the appellant has been unable too to explain how the trial court erred in reaching at the conclusion that service of summons was proper. I have also come to the same conclusion that there was proper service effected upon the appellant hence the default judgement was regularly obtained.

8. The other ground of appeal is that the trial magistrate erred when it came to the conclusion that the appellant’s defence raised no triable issues. The record shows that the learned Senior Principal Magistrate took into account the contents of the letter of the appellant’s chief operating officer annexed to the replying affidavit of Peter Musau Nzika, the respondent herein. In the aforesaid letter, the appellant admits that the respondent’s shares which were in the appellant’s custody were sold by fraudsters posing as the respondent.

9. In the draft defence, the appellant denied any wrong doing. A critical examination of the aforesaid annexure will reveal that the appellant had no serious defence to mount against the respondent’s claim. In my humble assessment, I find the draft defence to be without any genuine triable issues. In sum, the apparent triable issues are not genuine but were raised with the sole purposes of procrastinating the conclusion of this matter further.

10. In the end, I find no merit in this appeal. It is dismissed with costs being awarded to the respondent.

Dated, Signed and Delivered in open court this 4th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents