



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO.40 OF 2014

SAMUEL NJAU.....1ST APPELLANT

JOYCE MUTHONI GICHUKI.....2ND APPELLANT

VERSUS

PAULINE NYAWIRA GITONGA.....RESPONDENT

JUDGEMENT

The respondent was involved in a road traffic accident on 19th November, 2010. In her plaint filed on 9th January 2013, the respondent sought general damages arising from the injuries she sustained as a result of the accident. The plaint was amended and a fresh one was filed on 17th January, 2014. There was a change of advocates on the part of the respondent and other amendments were introduced. On 20th February 2014 a request for judgment in default of appearance and defence was made. Judgment was entered on the same day, 20th February, 2014. The matter proceeded to formal proof on 14th April 2014. Judgment was delivered on 4th August, 2014.

The appellants filed an application under certificate of urgency on 4th November, 2014. The application sought to have the interlocutory and final judgment set aside and the appellants be granted leave to enter appearance and file defence. The application was duly heard and in its ruling of 5th December, 2014, the trial court dismissed the application. The appeal herein arises from that ruling although the memorandum of appeal dated 9th December, 2014 makes reference to a judgment of 5th December, 2014.

The grounds of appeal are THAT: -

- 1. The trial Magistrate erred in law and fact by finding that the appellants were served with court summons but failed to enter appearance and defend the suit.***
- 2. The trial Court erred by failing to apply the correct principles in setting aside a judgement.***
- 3. The learned Magistrate erred in law and fact by finding that the appellants were served but failed to enter appearance yet the facts and circumstances of the case did not support such a finding.***
- 4. The trial Court erred by refusing to set aside the judgment and holding the appellant liable.***

Mr. Kisinger appeared for the appellant. Counsel submit that the appeal is basically grounded on two issues namely service and the draft defence. It is contended that the affidavit of service filed on 20th February, 2014 does not indicate that the appellants were served with summons. The judgment was entered on the basis of that affidavit. The respondent filed a supplementary affidavit in response to the application. Within the supplementary affidavit, a further affidavit of service was annexed. It is this affidavit which indicates that summons had been served. The trial court also relied on this second affidavit. By the time the second affidavit was filed, judgment had already been entered. The trial court could not have relied on the second affidavit retrospectively. Counsel further maintain that, even if the appellants were served with the summons, which service is denied, then the summons had already expired. The summons were issued on 8.1.2013 and expired on 8.1.2014. The service was effected on 3.2.2014. The second affidavit of service was filed ten (10) months later.

Counsel further submit that the trial Court did not consider whether the draft defence raised any triable issues. The ruling of the court only concentrated on the issue of service. The trial court ought to have gone to the merits of the defence. The defence deny that the respondent was a passenger in the accident vehicle and that she sustained any injuries.

Mr. Kamunyori appeared for the respondent. Counsel submit that initially, the suit was filed by Mr. Rukwaro Advocate. He took over the matter and realized that he had to amend the plaint. Counsel was present when service was effected. The summons were served by Gidraff while Edward served the amended plaint. Counsel took Edward to where the defendant was and ensured that service was effected. Further, an auctioneer filed an affidavit indicating that the appellants were served and the second appellant indicated that she had passed over the summons to her insurers.

Mr. Kamunyori further submit that even if the affidavit of Gidraff was not filed in February, it is clear that the amended plaint was served by Edward. The only ground of the appeal is service. The appellants were duly served. On the issue of the draft defence, Counsel submit that the defence is a series of mere denials.

The appeal herein raises three issues:

- 1. Were the appellants served with summons**
- 2. Were the summons valid**
- 3. Did the trial court fail to consider the appellants' draft defence.**

There are three affidavits of service. The first affidavit was sworn by **EDWARD NJUGUNA KAMANDE** on 14th February, 2014 and filed in Court on 20th February, 2014. The process server avers that he received an Amended plaint dated 17.1.2014, a verifying affidavit, supplementary statement and amended list of documents for service on 3rd February, 2014. He proceeded to Mwea town where the second appellant has a shop and operates a small petrol station. The 2nd appellant was not present and he talked to her employee by the name Susan Njeri. Susan gave her the 2nd appellant's mobile phone number. He talked to the second appellant on phone and the appellant authorized Susan to accept the service. This was on 3.2.2014 at 12.30pm.

There is a supplementary affidavit of **GIDRAPH MWANIKI KARUORO** sworn on 10th November, 2014. The process server avers that he received two sets of summons to enter appearance, Plaint, verifying affidavit, list of witness and list of documents for each defendant from the firm of Duncan Muyodi & Co. Advocates. He duly served the documents upon the 2nd appellant at Warungura market within Kirinyaga County. The 2nd appellant accepted service but declined to sign at the back of the summons saying that she would forward the same to her insurers. The second appellant accepted service on behalf of the 1st appellant. The process server returned the unsigned summons to M/S Duncan Moyodi & Co. Advocates.

There is a 3rd affidavit of **EDWARD NJUGUNA KAMANDE** Sworn on 10th November, 2014. The process server avers that it is Mr. Kamunyori who drove him in his personal car from Embu to Wanguru. On arrival at Wanguru, he tried to investigate the whereabouts of the 2nd appellant's shop but without success. He called the 1st appellant on his mobile phone. The first appellant told him he was working in Mombasa but he directed him to where to find the 2nd appellant at a petrol station at Wanguru. He went there and met Susan Njeri who gave him the phone number for the 2nd appellant. He talked to the second appellant on phone and she allowed Susan Njeri to receive the summons.

The issue is whether the appellants were served and if so whether the service was proper.

With regard to the service by Edward Njuguna Kamande, I do find that indeed there was service upon the 2nd appellant with the amended plaint, verifying affidavit and list of documents. The second service did not contain summons. It is therefore clear that the appellants were not served with summons on 3rd February, 2014. Under the law, it is the summons which calls upon defendant to defend the suit and not the plaint or verifying affidavit. When the request for judgment was made, no summons were annexed to the affidavit of service. The trial court ought to have seen the served summons (whether signed or unsigned) before entering the default judgment. In my view the affidavit of service by Edward Njuguna Kamande of 14th February, 2014 was not sufficient for the trial court to have entered the judgement. The summons are issued by the court and calls upon the defendant to enter appearance within a given period. The summons in this case were issued on 15.1.2013 and gave the appellants fifteen (15) days to enter appearance. The second affidavit by Edward Kamande was mainly meant to emphasize on the issue of service of the amended plaint. Mr. Kamunyori cannot insist that since the appellants were served with the amended plaint, they ought to have defended the suit and their failure to enter appearance entitled the trial court to enter the default judgement. The argument is not supported by the law. The amended plaint did not call upon the defendants to enter appearance or file their defence. It is simply a statement of claim which cannot be used to penalize the appellants for their failure to defend the suit. In short, there were no summons served upon the appellants on 3rd February, 2014 and the trial Court erred in law by entering the default judgement.

There is the affidavit of Gidraph Mwaniki Karuru. The affidavit is titled as a supplementary affidavit. One files a supplementary affidavit after he has filed an earlier affidavit. This affidavit was done on the same date as the second affidavit of Edward Kamande. Where is the first affidavit of service by Gidraff. Indeed the process server avers in his affidavit that he returned the unsigned summons to M/S Duncan Muyodi & Co. Advocates. He does not aver that he gave the said Advocates an affidavit of service. The process server could not recollect that he had served the 2nd appellant. No date of service is given. This is contrary to the Provisions of Order 5 rule 15(1) of the Civil Procedure Code which states as follows:-

The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and name address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.

Apart from the above, the summons annexed to the affidavit of Gidraff give the suit numbers as 156 of 2012. I have seen in the record of

Appeal the initial plaint bearing a court stamp of 1st August, 2012. The same applies to the verifying affidavit and the list of witnesses. The date of 2013 was amended by hand. The summons retain the same date of 8th January, 2013. Since Gidraff does not state the date of service, how will the Court be convinced that indeed service was effected upon the appellants. Gidraff only refers to Wanguru market in Kirinyaga County. My view on this affidavit is that Gidraff was brought in to salvage the situation as it was realized that no summons had been served. He simply got the place of service from Edward. Gidraff did not serve the summons. He did not file affidavit of service immediately after serving the appellants if indeed he served. The only conclusion I can make is that he was not issued with the summons and never effected service.

Was there need to have fresh summons issued in view of the amended plaint? In my view, there was need to have fresh summons issued after the plaint was amended. The initial plaint did not claim special damages of Ksh.181,575/=. What had been claimed was Ksh.39,572. Other claims such as second medical report, taxi expenses and wages for house help were introduced. Fresh summons ought to have been issued and the liquidated part of the claim ought to have been indicated in the summons. The indication on the summons that the amount claimed is "as per the plaint" is unprocedural. The specific amount claimed in the plaint should be indicated. This is how the court fees can be computed and clearly indicated on the summons.

Another issue is the validity of the summons. The summons were issued on 8th January, 2013. Gidraff did not serve the summons. His purported date of services is unknown. By 3rd February, 2014 when Edward served the amended plaint, the summons had expired. The life of summons under order 5 rule 2(1) of the Civil Procedure rules in twelve months. Counsel for the respondent cannot insist that since summons had already been served by Gidraff, all what was required of him was to serve the amended plaint. There was need to serve fresh summons. An amendment of a plaint may lead to inclusion of more parties. If this is to happen, then fresh summons with all the parties need to be issued. One cannot rely on the original summons. An amendment of the plaint can also lead to change of the entire claim. The fresh summons calls upon the defendant to respond to the fresh claim. Even if the defendant has been served with the original summons, there is need to have fresh summons issued so that the defendant can respond to the fresh claim as per the amended plaint. I do find that the summons had expired by 3rd February, 2014 and the service of the amended plaint without fresh summons is immaterial.

Lastly, there is the issue of the draft defence. It is a requirement that the trial Court ought to have considered the filed draft defence. The reason behind this is simple, setting aside a default judgement has a discretionary element. At times the court find that indeed service was effected. However, after seeing what the defendant is raising in the defence, the trial court may form the opinion that there is need to have the dispute fully heard. Once such an opinion is made, the court will set aside the ex-parte judgement and hear the parties. This can only happen if the court examines the defence. Where the court is of the view that service was properly effected and the defence does not raise any triable issue, the application to set aside the ex-parte judgement would be automatically declined. There would be no need to hear the parties yet the intended defence does not controvert the claim.

In the current case, the respondent contends that she was a passenger in the accident vehicle. She suffered injuries as a result of the accident. These allegations have been denied in the draft defence. The court is supposed to be a neutral arbiter. It cannot be concluded that the respondent was a passenger. The record of the trial court shows that the respondent testified on 14.4.2014. She simply adopted her statement dated 7.1.2013 and supplementary statement dated 17.1.2014. It would only be fair if the matter is fully heard. The appellants are entitled to defend the suit and even if they are found 100% liable, they will be able to mitigate the award of damages by telling the court what would be a fair compensation to the respondent. The situation is totally different when it is a one man show by the plaintiff and his advocate.

From the record of trial Court, I do find that the appeal is merited and is hereby allowed. I wish to hasten and add that at times it saves both the courts and parties time by making some form of concessions. The respondent could have agreed to have the default judgement set aside and the suit heard on merit. She had nothing to fear as she claims to have been a passenger. By now I believe the matter would have been settled. For three good years parties have been waiting for the appeal to be heard. They will go back again before the trial court and join the queue of the trial court's diary and hope that an earlier date can be found. Counsel for the respondent was well aware that there was a problem with the service. Counsel tried to use a short cut and have the matter finalized. This short cut has now turned out to be long route. The respondent has to proceed on the route. I see no good reason as to why I should order for the decretal sum of Ksh.2,506,855 to be deposited in Court by the appellants given the circumstances of this appeal.

In short, the appeal is merited and is hereby allowed. The judgment and decree of the trial court is set aside. Parties shall meet their own respective costs of the appeal.

Dated and Signed at Marsabit this.....Day of.....2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu this 15th Day of May, 2018

F. MUCHEMI

JUDGE