



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 95 OF 2002

WHITESANDS HOTEL.....APPELLANT

VERSUS

CAMLUS OCHIENG.....RESPONDENT

J U D G M E N T

1. The suit in the lower court having been filed and summons taken out, the plaintiff served the summons upon the Defendant (now Appellant) on the 13/12/2001 and on the 28/12/2001 a request for judgment was made and a default judgment entered.

2. By an application dated 28/3/2002, the Appellant sought to have the default judgment set aside. The reasons given for the prayer to set aside were that:-

i) The summons to enter appearance served upon the Defendant on 13/12/2001 are invalid and of no effect.

ii) The undated judgment entered herein is irregular.

iii) The plaintiff proceeded with this case *ex parte* in irregular circumstances and

iv) The defense filed on 30/01/2002 raises serious triable issues which the defendant ought to be allowed to argue on the merits.

3. The Application was opposed by the Replying Affidavit of Hezron Gekonde Advocate which exhibited the summons and an Affidavit of Service sworn on 13/12/2001 by Tom Odhiambo. The Replying Affidavit insists that the judgment was regularly and validly entered. The Application was argued before the trial court on 16/5/2002 and again on 6/6/2016 and the court in its determination given upon the conclusion of the arguments, allowed the application but on terms that:-

(i) The Defendant Applicant do deposit the said sum of Kshs.428,622/= as a security in the joint names of the two firms of advocates within 15 days pending hearing and determination of the suit.

(ii) The defendant having done so do proceed with filing defence and matter will be heard and determined on its merits.

(iii) If the defendant fails to comply with the order No. 1, the plaintiff be at liberty to execute.

(iv) Costs in the cause.

4. It is the conditional setting aside which aggrieved and dissatisfied the Appellant who then filed the current appeal by the Memorandum of Appeal dated 18/6/2002. Although there are 4 broad grounds of Appeal, all can be compressed into one and be seen to challenge the decision on the grounds that on the matters availed to court the judgment was due for setting aside *ex-debito justificae*.

5. Having read the papers filed including the record of the application that gave rise to the order appeal against, it is clear to me that the only issue is whether the default judgment entered the pursuant to a request for judgment dated and filed on 28/12/2001 was validly entered. The answer to that issue must of necessity seek to establish if the summons so issued and served were validly issued and whether by the 28/12/2001 there had accrued upon the Respondent, as plaintiff then, the right to request and obtain a default judgment so that the judgment was a result of a default by the Appellant.

6. When answered, the two questions would determine whether the Appellant was entitled to settling aside as of right, if the judgment was unmerited or if he was entitled to conditional setting aside, if the judgment was regularly entered.

Analysis and determination

7. It is a cardinal principle of law that every person is entitled to a right to be heard on the allegations levelled, be it civil or criminal, and be afforded reasonable time and facilities for such right to be heard to be realized. Accordingly proper service is so fundamental for a civil litigation to pass the thresholds of a fair trial.

8. The summons issued by the court and dated 10/12/2001 demanded that the Appellant enters appearance within 10 days. The then applicable law was Order IV Rule 5 which provided;

“The time for appearance shall be fixed with reference to the place of residence of the Defendant so as to allow him him sufficient time to appear; provided the time for appearance shall not be less than 10 days”.

9. Even without pronouncements by the court, the summons issued served and used to found the default judgment were clearly and definitely invalid in so far as they affronted the basic requirement of the rules. It cannot be said that adherence to the law is the hallmark of any state that espouses to be governed by the rule of law and is a critical aspect of administration of justice. Generally an act done in violation of the law ought not to stand but must be set aside and any benefit thereby acquired ought to be restituted and forfeited. In *Cereast Airlines Ltd vs Kenya Shell Limited [2000] 2 EA 364*, the Court of Appeal had this to say of the rule:-

“The summons that was served on the Appellant in its pertinent part is as follows:-

You are required to within 10 days from the date of service hereof to enter appearance in the said suit.

This is a clear breach of Order 4 Rule 3(4) and makes the summons invalid and of no effect”.

10. Those are the words, I must use as against the summons served in this matter. They had no effect for being invalid. In other words they were null and void and nobody had any obligation to adhere to their command and therefore nobody could be burdened for failure to abide by their unlawful command. That alone was enough for the trial court to set aside the default judgment unconditionally and *ex-debito justitiae*.

11. The second point is that it was and remains a provision of the law under Civil Procedure Rules then Order XLIX Rule 3A and now Order 50 Rule 4 that time does not run between the 21st day of December and the 6th day of January in any year. Accordingly, when the summons were served on the 13th of December 2001, the defendant had upto the 11th of January 2002 to enter an appearance if the time was to be counted to the 10th day after service. Therefore, by the time the Respondent sought to request and obtain judgment, he had not acquired the right to do so and it follows that the request for judgment and the judgment that ensued were irregular and untenable. Having been so untenable, the Applicant when he sought to have an untenable judgment set aside had the right to an unconditional order of setting aside and the trial court had no justification at all to burden if with the condition to deposit the sum claimed.

12. In the recent case of *Kenya Power and Lighting Company Ltd vs Abulhakim Abdalla Mohammed & Another, Mombasa CACA No. 115 of 2016*. The court said on deposit of where a judgment is set aside:

“The contested order, which demands that a party pays substantial sums of money in a claim which is yet to be proved and in respect of which the court has found that there is an arguable defense raising triable issues, does not appear to us in any way to advance or facilitate the just, proportionate and affordable resolution of disputes as demanded by the overriding objectives”.

13. One may only add that in the present case, the judgment was irregularly obtained contrary to the law on summons and computation of time and it was thus one of the clear, if not clearest, of the cases for the court to set aside as of right and without any conditions at all.

14. The foregoing being my findings on the appeal, it follows that the appeal succeeds and is allowed on terms that the terms imposed as conditions for setting aside are set aside. The Appellant as defendant in the lower court shall have an unconditional leave to defend the suit.

15. I award to the Appellant the costs of the appeal.

Dated and delivered at Mombasa this 12th day of June 2018.

P.J.O. OTIENO

JUDGE