REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 92 OF 2008

1. MUSA CHELAGAT YATICH

2. PENINAH CHEROGONY.....APPELLANTS

VERSUS

OSCAH AMUTABI.....RESPONDENT

(Appeal against the judgement and decree by Hon. W. N. Njage (PM) in Eldoret CMCC No. 1046 of 2004 delivered on 21st August, 2008)

JUDGEMENT

1. The appellant has filed this appeal on the following grounds:

a) That the learned magistrate erred in law in failing to give notice of his ruling.

b) That the learned magistrate erred in law and fact by finding that the appellants had been served with summons to enter appearance based on an affidavit of service disputed by the appellants without authentication.

c) That the learned magistrate erred in law and fact by upholding a judgment based on judgement entered in default of appearance when there was no mention of or affidavit of service in respect of one of the appellants.

d) That the learned magistrate erred in law and fact by refusing the appellants leave to defend when service of summons was disputed and when the appellants have exhibited a draft defence raising many triable issues.

e) That the learned magistrate erred in law and fact in failing to determine that since the respondent's suit was premised on defective pleadings the appellants draft defence raised triable issues.

2. The appellant's filed an application dated 4th September, 2007 seeking to have the ex parte judgment entered by the trial court set aside and that they be allowed to defend the suit, that there be stay of execution of decree and that the process server be cross examined on whether he duly served the 2nd appellant. The grounds upon which the appellants brought the motion was that they were not served with summons to enter appearance and that the 2nd appellant is not the registered owner of the suit motor vehicle. The respondent in response thereto filed a replying affidavit in which the advocate representing him contended that the appellants were duly served but ignored to enter appearance. He stated that he was informed by the process server Muyale Wachiya that the 1st appellant was duly served and a return of service filed in court before interlocutory judgment was entered. That the appellants did not show that they have triable issues in the defence.

3. The trial court dismissed the application on the basis that the appellants' counsel while arguing the application did not address the issue of cross examination of the process server and further that the defence did not raise triable issues.

4. This is a first appeal and this court is duty bound to re-evaluate the issues afresh with a view of arriving at its own independent conclusion. I have given due consideration to the application, the response thereto and the rival submissions. The issues that fall for determination are:

a) Whether or not service was effected upon the appellants.

b) Whether or not the appellant's draft defence raises triable issues.

5. The return of service by the process server, Muyale Wachiya indicated that summons was served upon the 2nd appellant. It is on the basis of the said affidavit that interlocutory judgment was entered against the appellants. The court in **John Akasirwa v. Alfred Inai Kimuso (C.A. No. 164 of 1999)** UR had this to say:

"Proper service of summons to enter appearance in litigation is a crucial matter in the process whereby the court satisfies itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not. Hence the need for strict compliance with order 5 Rule 9 [1]. The ideal form of service in personal service, it is only when the defendant cannot be found, that service on his agent empowered to accept service is acceptable."

6. In view of the above and the fact that the return of service does not indicate that service was served on the 1st appellant, I am inclined to find that there was no proper service. I now turn to the trial court's finding that the appellant's advocates failure to address the issue of cross examination was an indication that so doing would be averse to his client's case. Courts have a duty to ensure that justice is met. It is unclear why the trial court did not suo moto question the appellant's advocate on the said failure just to ensure that there is no stone unturned on the issue and arrive at a just finding on the same considering also that the return of service did not address service upon the 1st appellant. In the end, I find that there was no proper service upon the appellants.

7. On the second issue, the appellants denied that any accident occurred involving motor vehicle registration number KAQ 467P on the alleged date, they denied negligence and stated that if at all the accident occurred then the same was caused by the negligence of motor vehicle registration number KLE 332. The particulars of negligence were thus listed in the defence. It is my considered view that these are issues that would require a trial. In the circumstances, I find that the defence raises triable issues which merit a determination.

8. In the end I find merit in the appeal. The trial court's ruling dated 21/08/2008 is hereby set aside and substituted with the following orders:-

(i) The Appellants Application dated 4/09/2007 is allowed in terms of prayer (b) thereof.

(ii) The exparte judgement entered against the Appellants in Eldoret CMCC No. 1046 of 2004 together with all consequential orders are hereby set aside.

(iii) The Appellants herein are ordered to file and serve their statement of defence within fourteen (14) days from the date of this judgement.

(iv) Each party to bear their own costs.

It is so ordered.

D. K. KEMEI

JUDGE

Delivered at Eldoret this 22nd day of November, 2018.

STEPHEN GITHINJI

JUDGE