REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 325 OF 2012

DR. KIMANI WANJERI T/A SUNVIEW ESTATE....APPELLANT

-V E R S U S –

PHILIP MOGERE OMONDI.....RESPONDENT

(Being an appeal from the ruling and decree of Chief Magistrate Court (SPM) R,.A. Oganyo (Mrs) given on 19th June 2012 in C.M.C.C no. 5371 of 2010)

JUDGEMENT

1. Philip Mogere Omondi, the respondent herein filed an action against Dr. Kimani Wanjeri T/A Sunview Estate, the appellant herein, before the Chief Magistrate's Court, Nairobi vide the plaint dated 1st September 2010. In the aforesaid plaint the respondent sought for an order of permanent injunction to restrain the appellant his agents, servants or any other person acting on his authority from barring entry of the respondent's motor vehicle registration no. KAJ 714R and KAE 078D to the respondent's parking yard. He also sought for costs. The plaint was filed contemporaneously with an application for injunction. It would appear exparte orders of injunction were obtained and served together with the plaint and the summons to enter appearance. Subsequently contempt proceedings were taken out which proceedings were eventually concluded without any conviction order being issued. While the parties were busy litigating over the aforesaid applications, the respondent successfully obtained judgment in default of defence. When the appellant came to learn of the entry of judgment against him, he filed an application to have the exparte judgment set aside. The application was heard and eventually dismissed by Hon. R. Oganyo, learned Senior Principal Magistrate, on 19.6.2012. The appellant felt aggrieved by the dismissal order hence this appeal.

2. On appeal, the appellants put forward the following grounds in his memorandum:

> ***1. THAT the honourable magistrate erred in fact and in law by declining to set aside the ex parte judgement entered on 17th May 2011 while there were discernible doubts as to whether proper service of hearing notice had been done.***
>
> ***2. THAT the honourable magistrate erred in fact and in law by declining to set aside the exparte judgment entered on 17th May 2011 while there was a good defence on record which had been brought to the court's attention.***
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> ***3. THAT the honourable Magistrate erred in law and in fact in failing to hold that if there was a mistake on the part of the advocate the same should not be occasioned on the client.***
>
> ***4. THAT the honourable magistrate erred in fact and in law by failing to take into account the***

evidence adduced by the appellant thereby arriving at a wrong conclusion.

5. THAT the honourable magistrate erred in fact and in law by not taking into account the issue of misjoinder as the appellant is merely an official of the association known as Sunview Residents Association.

6. THAT the honourable magistrate erred in law by failing to consider fundamental principles of law in the issue of whether the respondent is entitled to damages as against the appellant as a person.

3. When the appeal came up for hearing this court gave directions to have the appeal disposed of by written submissions.

4. I have re-evaluated the arguments which were presented before the trial court. I have also considered the rival written submissions together with the authorities cited. Though the appellant put forward a total of 6 grounds of appeal, those grounds revolve around the question whether or not there was proper service and if yes, whether the circumstances of the dispute entitled the appellant leave to defend the suit. It is the submission of the appellant that the trial magistrate erred when she failed to set aside the exparte judgement yet there were discernible doubts as to whether proper service of the hearing notice was done. The appellant further argued that the trial magistrate erred when she failed to set aside the exparte judgement while there was a good defence on record. The appellants further argued that the trial magistrate erred when she failed to find that the mistake of counsel should not be visited upon the client.

5. The respondent on the other hand urged this court to dismiss the appeal arguing that the appellant had been properly served with the plaint and the summons to enter appearance but he instead failed to file a defence thus prompting the respondent to lawfully obtain an exparte default judgment. It was pointed out that the matter subsequently proceeded to hearing as a formal proof giving rise to the judgement of 17.5.2011. The respondent also complained of the inordinate delay in filing the application to set aside the exparte judgment before the trial court and in also prosecuting this appeal.

6. This appeal seeks to have an exparte default judgement to be set aside. The principles in determining such applications are well settled. In **Maina =vs= Mugiriga (1983) eKLR** the court of appeal held *interalia*:

> **That there are no limits or restrictions on the judge's discretion except that if he does so on such terms as may be just ..... the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fatter the wide discretion given to it by rules.**
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> In **Mbogo & Another =vs= Shah(1968) E.A 93** it ws held inter alia, **that while the court will exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error it would not assist a person who deliberately sought to obstruct or delay the course of justice**.

7. The arguments presented before this court were similar to those submitted before the trial court. It should also be pointed out that the process server who effected service was also summoned and cross-examined to determine whether proper service was carried out.

8. While testifying in cross-examination, Francis Nyakiroga Ongati, admitted that his affidavit of service was not accurate. The process server was also unable to explain why his affidavit of service mentions the offices of the advocates for the appellant i.e Saende & Co. Advocates at times to be on 7th Floor and sometimes on the 8th floor of Hazina towers. The process server also stated that he found it strange for a law firm failing to stamp documents served upon it to acknowledge receipt. It also came out clearly from the cross-examination of the secretary to the law firm of Soita & Saende advocates that at the time the process server purported to have effected service upon the firm of Soita & Saende Advocates, the offices of the aforesaid law firm were closed for the December holidays. The learned Senior Principal Magistrate

took into account the material placed before her and the lengthy submissions presented by both sides and came to the conclusion that the relevant service before the interlocutory judgment was entered on 24.12.2010, was the first service on 1st September 2010 by Francis Otieno Ngesah. The learned magistrate further stated that the defendant (appellant) effectively became aware of this suit at that point in time and ought to have filed all his papers in his defence to the suit. She then proceeded to pronounce herself in finality that the interlocutory judgment entered on 24.12.2010 and the final judgment delivered on 17.5.2011 are therefore regular and ought not to be disturbed because the appellant was aware and fully participated in the preliminary stages.

9. With great respect to the learned Senior Principal magistrate, she completely ignored to consider the applicable principles in such applications I alluded earlier in this ruling. The learned magistrate further failed to take account the inconsistencies which arose from evidence arising from the cross-examination of the process server. She further failed to take note of the fact that the appellant had a good defence with triable issues. One critically point which was also not considered is the fact that, it would appear the appellant was let down by his erstwhile advocates. Had the learned Senior Principal Magistrate considered the above factors and principles, she would have come to a different conclusion.

10. In the end, I find the appeal to be meritorious. It is allowed.

Consequently, the order of 19.6.2012 dismissing the motion dated 8.8.2011 is set aside and is substituted with an order allowing the motion in terms of prayer 3 with costs abiding the outcome of the suit. Costs of the appeal is awarded to the appellant.

Dated, Signed and Delivered in open court this 10th day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent