REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 117 OF 2007

TIMOTHY NDOLO NGULU...................................... APPELLANT

VERSUS

MATHEKA MUATINE.. RESPONDENT

(Appealing from the whole of the ruling and orders of Senior Resident Magistrate at Kangundo delivered on 25th May, 2007 in Kangundo-SRMC NO. 154 OF 1999)

JUDGMENT OF THE COURT

The Appeal

1. The appellant's appeal is against the ruling of the Lower Court dated **25th May, 2007.** The appellant has raised five (5) grounds of the appeal which are set out in the Memorandum of Appeal herein on **8th June, 2007.**

2. By that ruling, the court set aside judgment of that court on the grounds that Summons to enter appearance had not been properly served. The facts of the case is that the Appellant filed RMCC No. 154 of 1999 at Kangundo Law Court against the respondent herein claiming damages for alleged injuries in a road accident which allegedly took place on **11th September, 1998** along Nairobi-Mombasa Road. The Appellant states that the Respondent was served with summons by one **Mr. Maurice M. Makanda** a court process server on **20th February, 1999** at Matuu Market where allegedly the Respondent operates a shop. The matter proceeded by way of formal proof and an Ex-parte judgment was entered against the Respondent on **17th June, 1999** for Kshs.80,000.00 for general damages, Kshs.3,150.00 as special damages plus costs and interest. The Respondent filed the application dated **10th April, 2002** through the firm of **Njenga Mwangi & Co. Advocates**. The said application was never determined but the firm of **Muthoga Gaturu & Co**. **Advocates** came on record for the Respondent and replaced the firm of **Njenga Mwangi & Co. Advocates.** The Respondent filed the application dated **25th March, 2003** which was taken over by the firm of **M.M. Uvyu & Co. Advocates** who replaced the firm of **Muthoga Gaturu & Co. Advocates**. The application dated **25th March, 2003**, was determined on **25th May, 2007** in favour of the Respondent. The Appellant filed this appeal the subject matter of this judgment.

3. Respondent has opposed the appeal on the grounds that he was never served with summons to enter appearance; that the execution process was flawed and irregular for non compliance with the mandatory provisions of **Order XX1 Rule 6 of the Civil Procedure Rules**, and that in the interest of justice the exparte judgment be set aside and the Respondent be granted unconditional leave to defend the suit.

4. The Chamber summons was supported by the affidavit sworn by one **PW1 Mr. Gichuhi,** Advocate

who deponed that the Respondent was not served with Summons in accordance with the Civil Procedure Rules. The said **Mr.Gichuhi** further deponed that the affidavit of service was sworn before an Advocate who had no practicing certificate at the time and that the accident allegedly occurred on Mombasa road which was outside the jurisdiction of the Court. The appellant's reply was by an affidavit sworn by **Mr. Bernard Muteti Mung'ata**, Advocate on **16th March, 2003** in which he deponed that the Respondent was properly served with Summons, that the suit was properly filed in the Court, that the application was *res judicata* since a similar application dated 10th April, 2002 was filed by the firm of **Njenga Mwangi & Co. Advocates** and that the Respondent would not suffer prejudice so the ex parte judgment should remain. However, the appellant responded that the said application dated **10th April, 2002** was never determined and no such record has been shown in the record of appeal. The application dated **25th March, 2003** was therefore not *res judicata.*

5. The appellant's case is that the trial court grossly misdirected itself by failing to interrogate the facts of the case. The court failed to appreciate the facts that the Respondent was aware of the suit and he had even paid half the decretal sum. Further, the trial court held that the service of summons was done by an incompetent person one Maurice Makanda an alleged advocate of High Court of Kenya. However, the said Maurice Makanda was a licensed process server and was duly instructed by a licensed advocate the firm of **M/S B.M. Mung'ata & Co. Advocates.** That was an error of fact made by the court. It is on that sole ground of service that the court allowed the application and set aside proceedings and judgment. It was submitted for the appellant that this court should make a finding that the holding of the trial court that Maurice Makanda was an "alleged" advocate with no practicing certificate was erroneous and in its place substitute with a finding that Maurice Makanda was process server. Further, the appellant submitted that interestingly, the trial court castigated the respondent and held that he was guilty of laches yet it proceeded to allow his application. During the hearing of the application, it was submitted that Counsel for Respondent herein admitted that the Respondent had filed Memorandum of Appearance after interlocutory judgment was entered. Issue is then, how could he claim he was not served with summon? He was entering appearance to which summons? Clearly, it was submitted, the process was well served and the court should find so.

6. The appellant submitted that the trial courts mislead itself when it delved into issues of an Advocate who was not a party to the proceeding. It held that Law Society of Kenya had certified that Maurice Makanda did not have a practicing certificate. However, what is on record from Law Society of Kenya is letter referring to a different person, one Joseph Muinde Mutinda but not Maurice Makanda who was a process server. Those were extraneous issue which were not material to this suit. The said Joseph Muinde Mutinda was not a party to this suit thus his competence or otherwise should not have influenced the trial court in making the erroneous ruling.

Submissions

7. Parties filed submissions which I have considered. The respondent opposed the appeal, citing the law, and submitting that the law as then was clear on the service of summons. **Order V Rule 15(1)** as then stated that;

> ***"The servicing 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 were served and the name and 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. 8 of Appendix A with such variations as circumstances may require".***

8. The respondent submitted that the learned magistrate found that the Respondent had a defence which raises triable issues and she therefore ordered the Respondent to file his defence within fourteen (14) days of the ruling.

Determination

9. Having considered the application and submissions of the parties, this court raises the following issues for determination.

> **i. whether the process was duly served.**
>
> **ii. whether the trial magistrate was inconsistent in her findings.**

10. As for the first issue record at page 2 of the trial court's ruling shows that the trial court found out that the Summons were served by an incompetent person. However, it is not clear in the said ruling what led the court to make such a finding. The issue of service was a seriously contested issue, and the court ought to have called the process server to give evidence to ascertain the truth of service or his status as process server. It is noted that the court declared service improper even after the defendant had entered appearance. It is the finding of this court that the declaration that the process server was not qualified was made without valid verification.

11. On the second issue it is noted that the court at page 2 of the ruling castigated the respondent during the hearing of the application to set aside the judgment. The court observed as follows:

> ***"The applicant has delayed in prosecuting the application – i.e. four (4) years therefore prejudicing the respondent"***

12. At page 3 of the ruling the learned magistrate observed;

> ***"The applicant herein is a very indolent litigant. His general conduct of taking four (4) years to follow his right and instructions of several counsels to delay the hearing of the matter herein cannot go uncondemned… "the law assists the vigilant and not the indolent". The applicant is guilty of the doctrine of laches. His conduct will not go unpunished."***

13. Despite the above observations, the learned magistrate allowed the application almost as prayed, setting aside the ex-parte judgment.

14. This court finds that the learned magistrate failed to appreciate her own raised worthy concerns. It is the finding of this court that the trial court had no evidence to invalidate the service of summons. Further, the defendant in the trail court had already entered appearance on the basis of those summons, and it is alleged by the appellant without denial from the respondent that part of the decretal had been paid by the respondent.

15. For the foregoing reasons, and considering there is already too much delay in finalizing the suit, the appeal herein succeeds with costs to the appellant.

That is the judgment of the court.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 7TH DAY OF MARCH, 2017

……………….

DAVID KEMEI

JUDGE

In the presence of;

Mulelu – for Nthiwa for Appellant

Court Assistant - Munyao