



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 129 OF 2013

MOHAMED MUNYE OMAR APPELLANT

V E R S U S

SHEE ATHMAN SHEE RESPONDENT

(Being an appeal from the Ruling and Order of Hon. E. Onzere (RM) delivered on 16th September, 2013 at Mombasa in CMCC No. 121 of 2012)

JUDGMENT

1. Appellant **MOHAMED MUNYE OMAR** was sued before the Mombasa Chief Magistrate's Court by the Respondent, **SHEE ATHMAN SHEE**, his landlord at one time, for the recovery of alleged rent arrears of Kshs. 282,000/-. Appellant defended the case in person by filing his defence on 15th March 2012 having previously filed his Memorandum of Appearance two days before. Both the Memorandum of Appearance and Defence do not bear the Appellant's address of service.
2. The case was fixed for full hearing on 11th January 2013 but on that date the Learned Magistrate ordered thus-

“Court – Since no Affidavit of Service was filed and due to change of Court location. I will give Defendant benefit of the doubt as he might not be aware of today's date or Court's location. I will adjourn matter to 7.12.13. Notice to issue to Defendant by registered post.”
3. On 7th February 2013 Learned Counsel for Respondent informed the Court that Appellant had been served through his postal address. The case proceeded ex parte in the absence of Appellant. Judgment in favour of the Respondent was delivered on 12th March 2013.
4. Appellant by his Notice of Motion dated 29th May 2013 sought an order of setting aside the ex parte proceedings of 7th February 2013 and the consequential judgment of 12th March 2013.
5. That application was dismissed and it is that dismissal order that is the subject of this appeal.
6. Appellant has filed long winded grounds of appeal which I believe are covered by the three issues set out as follows-

- i. **Was there an error in relying on Order 19 Rule 4 of the Civil Procedure Rules;**
 - ii. **What are the effects of defective Memorandum of Appearance; and**
 - iii. **Was there merit in Appellant’s application to set aside exparte judgment.**
7. I am aware that parameters within which I can interfere with the Learned Magistrate’s finding of fact and on exercise of jurisdiction is limited. That jurisdiction was discussed in recent Court of Appeal decisions as follows-

“PETER GICHUKI KING’ARA –Vs- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS [2014]. What are the points of law that emanate from this appeal? As it was held in the case of; MWANGI –Vs- WAMBUGU, [1984]KLR 453:

‘A Court of Appeal will not normally interfere with a finding of fact by the trial Court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is nto bound to accept the trial Judge’s finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.’”

PETER M. KARIUKI –Vs- ATTORNEY GENERAL [2014]eKLR-

‘Also in LOLWE AGENCIES LTD –Vs- MIDLAND EMPORIUM LTD, HCCC NO. 25 OF 1998 (KSM), the High Court appropriately stated that, although the granting of adjournment is discretionary, it is like all judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.’”

ISSUE NO. (i)

8. Order 19 Rule 14 provides-

“Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age.”

The Learned Magistrate referred to that Rule to support the finding that Appellant had been served with the Hearing Notice of 7th February 2013 [which for convenience I shall refer to the Hearing Notice] through the address he had shown in a replying affidavit filed in the case earlier, that was on 18th June 2012.

9. In denying being served with hearing notice Appellant in his affidavit, in support of the application to set aside exparte judgment, deponed thus-

“6. THAT I was never served with any hearing notice for the hearing on 7th February, 2013, or at all for the following reasons-

- a. **That ALL the processes in this suit, Msa CMCC No. 2401/2009, Misc. Appn. No. 83 of 2011B, Misc. Appn. No. 126 of 2011 between the same parties, have been PERSONAL, and none by postal service;**
- b. **That Post Office Box Number 83171, Mombasa allegedly used to serve me was never indicated in my pleading, the defence;**
- c. **That the same is owned by 2 Companies: Diani Villas and Euro Africa Surplus Ltd. Annexed**

- hereto and marked "A" are true copies of online yellow pages confirming the fact;
- d. That I may have mentioned the said Box number in my affidavit as I sometimes back I used to rely on my friend one John Katana, an employee of Diani Villas to deliver letters to me his employer's postal box;
 - e. That the said John Katana no longer works there, and the last time I saw him was in June 2012;
 - f. That in any case, I changed my postal address, and the last postal address to be indicated in the Court records was post office box number 83101-80100, Mombasa. Annexed hereto and marked "B" is a mention notice which was served upon the Plaintiff's Counsel;
 - g. That there is no evidence that I was served upon that address;
 - h. That there is also no indication that leave of Court was sought prior to the said postal service as required by law;
 - i. That there is equally no evidence that personal service was even attempted, before service by postal services was adopted;
 - j. That from the pleadings, it is apparent that the parties know each other;
 - k. That in addition, the Plaintiff and several process servers know my home from previous services in this matter and the others afore mentioned.

10. In response to that deposition Respondent in his replying affidavit alleged Appellant was misleading the Court in his depositions and stated that Appellant had used the address Box No. 83171-80100 – Mombasa in his Verifying Affidavit of a suit filed in the year 2009.

11. In my opinion on this issue No. (i) I find that the Magistrate fell in error. The requirement of deponent in that Rule to set out his place of abode or his postal address is not a guarantee, for the purpose of future service of process, that that place of abode or postal address remain constant. It is for that reason that I find this issue in favour of Appellant.

ISSUE NO. (ii)

12. As stated before Appellant filed his Memorandum and Defence and failed to state his address of service in those documents. Order 6 Rule 3(2) which is pertinent here provides-

"(2) A Defendant appearing in person shall state in the memorandum of appearance his addresses for service being either his place of residence or his place of business and his postal address, and if he has neither residence nor place of business in Kenya he shall state a place and postal address within Kenya which shall be his addresses for service."

13. If an appearance fails to provide address of service and the address is also not evident in the defence the Plaintiff (here Respondent) should seek for such appearance to be set aside. That is what Order 6 Rule 4 provide. It states as follows-

"4. If the memorandum of appearance does not contain an address for service within Kenya it shall not be filed; and if any address given is illusory or fictitious the appearance may be set aside on the application of the Plaintiff."

14. Since the consequence of a defective appearance is to have the same set aside it follows that the Learned Magistrate was in error in stating-

"This mandatory provision was not complied with by the Defendant in the memorandum dated 13/02/2012 and the same is thus defective as the defendant cannot use that as a leeway to show that he was not served."

15. The second issue is also in favour of Appellant. The effect of the defective

memorandum of appearance ought not to have been a finding that it was defective in the absence of an application of Respondent.

ISSUE NO. (iii)

16. Not only did Appellant show that the address used to serve the hearing notice belonged to a Limited Liability, Diana Villas, and with the statement that the Appellant had lost contact with the person in that Company whom he relied upon to give him his correspondence sent through that Company; but there was also a great question mark on whether indeed the hearing notice was served through the post. The affidavit of service filed in Court on 7th February 2013 sworn by Harrison Karisa is to the effect that the hearing notice was sent through Digo Road Post Office under Registered Post. Attached to that affidavit is handwritten paper entitled (in handwriting)-

“Under Certificate of Posting.”

That hand written statement has no evidence of having emanated from a Kenyan Post Office. Far from it. In my view that is unsatisfactory evidence of service. Order 6 Rule 6 (2) provides what should be done when there is dispute as to service. That Rule is in the following terms-

“(2) Where delivery is disputed a Certificate of Posting or other evidence of delivery shall be filed.”

17. The jurisprudence in respect of disputed service is that the process server should always be called for purpose of cross examination by the party disputing service. This is what the Court of Appeal stated in the case **DICKSON DANIEL KARABA –Vs- JOHN NGATA KARIUKI & 2 OTHERS [2010]eKLR** viz-

“Presumption as to service – There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.

Also, in Karatina Garments Ltd –Vs- Nyanarua [1976]KLR 94, the predecessor of this Court stated-

‘Where one party to proceedings denies having been served with a relevant document, it is proper for the Court to look into the matter; if the Court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth.’”

Such cross examination in this case since I have found there was no evidence of service by Registered Post, would have assisted the Court to know how, if at all, the Hearing Notice was sent.

18. I also find that the third issue is in favour of Appellant. I can do no better than to refer to the decision of Justice Ringera (as he then was) referred to in the case **SHAILESH PATEL T/A ENERGY COMPANY OF AFRICA –Vs- KESSELS ENGINEERING WORKS PVT. LIMITED & 2 OTHERS [2014]eKLR** viz-

“In the case of CHARLES MWALIA –Vs- KENYA BUREAU OF STANDARD, HCCC NO. 1058 OF 2000 NAIROBI, Justice Ringera set aside a default judgment so that parties can approach the judgment seat with the merits of their respective cases. In that case, the Judge had come to the conclusion that the ex-parte Judgment was irregular.”

I too I reach the same conclusion, that the ex parte judgment against Appellant was irregular.

CONCLUSION

19. Appellant's appeal in view of the above findings succeeds. I make the following orders-

- a. **The Ruling in Mombasa CMCC No. 121 of 2012 of 16th September 2013 is set aside *ex debito justitiae* and is substituted with order setting aside the judgment of 12th March 2012.**
- b. **This case is referred back to the Mombasa Chief Magistrate's Court for hearing by any other Magistrate other than Hon. Onzere E. M.**
- c. **Appellant shall within twenty one (21) days from today's date file another Memorandum of Appearance showing his correct address of service in default of that the Respondent may move the Court appropriately.**

DATED and DELIVERED at MOMBASA this 5TH day of MARCH, 2015.

MARY KASANGO

JUDGE