



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 114 OF 2006

LOCHAB BROTHERS LIMITED:..... APPELLANT

VERSUS

LILIAN MUMBI NG'ANG'A:..... 1ST RESPONDENT

MOSES NYONGESA KHAEMBA:..... 2ND RESPONDENT

MARY MWAURA:..... 3RD RESPONDENT

JUDGMENT

The Appellant, **LOCHAB BROTHERS LIMITED**, was the 2nd Defendant before the trial court. The other two defendants were **MOSES NYONGESA KHAEMBA** and **MARY MWAURA**.

The 1st Respondent herein, **LILIAN MUMBI NG'ANG'A** was the plaintiff in that case. She sued the 3 defendants for compensation, arising from a motor-vehicle accident involving three vehicles. Each of the 3 defendants owned one of the three vehicles in question.

The 1st and 2nd defendants did not Enter Appearance or file any defences. Consequently, the court entered judgement against them, in default of appearance. However, the 3rd defendant Entered Appearance and also filed a Defence.

Subsequently, there was a full trial, as between the plaintiff and the 3rd Defendant. On the 7th March 2003, the learned trial magistrate delivered his judgment. He awarded to the plaintiff the sum of Kshs. 3,000/- as Special Damages, and Kshs. 600,000/- as General Damages for Pain and Suffering.

The trial Court exonerated the 3rd Defendant from all liability. It went on to hold that the 1st defendant was 30% liable, whilst the 2nd Defendant was 70% liable.

When the plaintiff took steps to execute the Decree, the 2nd Defendant sought and obtained a stay of execution. The 2nd Defendant also sought the setting aside of the Exparte Judgement which had been entered against it.

The main ground upon which the 2nd Defendant asked the trial court to set aside the Exparte Judgement was that it was never served with the Summons to Enter Appearance. According to the 2nd defendant, it was never made aware of the case until the Court Broker arrived at their premises, to execute the Decree.

On 18th August 2006, the trial court dismissed the 2nd Defendant's application.

It is that decision which prompted the appeal before me.

When canvassing its appeal, the appellant reiterated that it was never served with the Summons to Enter Appearance.

It was pointed out that whilst the Process Server served a lady named **EUNICE**, the appellant had never employed anybody by that name.

In any event, the appellant asserts the alleged service was improper, when it is borne in mind that the appellant is a Corporation. It was the appellant's contention that service upon it ought to have been effected upon a principal officer of the corporation.

In the case of **LUCY WANJIRU KABUTHA -VS- JANE MUTHONI MUCHERU, CIVIL APPEAL NO. 82 OF 2002**, Musinga J. (as he then was) cited with approval, the following words of the Court of Appeal in **JOHN AKASIRWA -VS- ALFRED INAT KIMUSU, CIVIL APPEAL NO. 16 OF 1999**:

“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 the litigation has notice of the same and therefore chooses to enter appearance or not.”

Musinga J. went on to hold that if there had been no proper service of summons to enter appearance, the court had no option but to set aside the default judgement *ex debito justitiae*.

In the case of **TOTAL KENYA LIMITED -VS- SUPA HAULIERS LIMITED, HCCC NO. 939 OF 2002**, Ondeyo J. expressed herself thus;

“If there is no proper service at all, of summons to enter appearance to the suit, then there cannot be a regular default judgement, but if the judgement is a regular one, then the court has a discretion to set aside such judgement and any consequential decree or order, upon such terms as are just (see Order 1 X A Rule 10), so that it can do justice between the parties.”

Those authorities referred to above were cited by the appellant.

On her part, the respondent placed reliance upon **PATEL -VS- E.A. CARGO HANDLING SERVICES LIMITED [1974] E.A 75**, wherein the Court of Appeal held as follows, at page 76;

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgement, as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits.”

By necessary implication, it follows that where a judgement was not a regular one, there would be no need for the defendant to satisfy the court that he had a reasonable defence, before the said judgement could be set aside.

The Respondent pointed out, in her written submissions that there were only two issues, namely:

- “(i) Non service of summons upon the Appellant, and***
- ii. Appellant's having a good Defence to the claim.”***

However, the Respondent went on to canvass the issue of Res Judicata. She noted that the appellant had filed an earlier application seeking orders to set aside the default judgement. As that earlier application was dismissed, the Respondent submitted that it was not open to the appellant to bring the application dated 31st January, 2006.

To my mind, the introduction of the question as to whether or not the application dated 31st January,

2006 was Res Judicata, is a red herring. It is tantamount to an attempt to introduce a cross-appeal, when none was filed.

The Respondent is saying that the learned trial magistrate ought not to have given consideration to that application.

I am afraid, that it is not open to the Respondent to take that route. Had she intended to do so, she ought to have first canvassed that point before the trial court. If thereafter the trial court made a finding on that issue, which was prejudicial to the Respondent, it would then have been open to challenge such a finding.

There being no decision from the trial court on that issue, I find that this appellate court cannot be called upon to make a finding on it

I now proceed to consider whether or not there had been proper service of the summons to enter appearance.

In **TOTAL KENYA LIMITED -VS- SUPA HAULIERS LIMITED, HCCC NO. 939 OF 2002,** Ondeyo J. discussed the mode of service on a corporation. The learned judge said;

“The Defendant is a limited liability company and the mode of service of summons upon it is prescribed in Order V Rule 2, which I have set out elsewhere in this ruling. A case for service of summons upon a corporation, by way of registered post only arises after a process server has tried in vain to find any of the corporation's principal officers for purposes of service. Those principal officers, as is set out in Order V Rule 2 are, the corporation secretary, director or any other principal officers of the corporation.

How is the court to know that attempts were made in vain by the process server, to effect service of summons upon the principal officers of a corporation? It must be deponed in the affidavit of service to justify the mode of service opted for.”

In this case, the process server did not depone about the efforts he made in trying to serve the principal officers of the appellant, before serving the lady named Eunice. Secondly, the process server did not indicate the nature of the relationship between the said Eunice and the Company, Lochab Brothers Limited.

The onus is upon the plaintiff to prove that the summons to enter appearance was properly served. That onus cannot be discharged by faulting the company for not proving that Eunice was not their employee.

Even assuming that Eunice was indeed an employee of the company, the respondent would have been obliged to demonstrate that she was the appropriate person to receive the summons to enter appearance on behalf of the company.

In the event, I find and hold that the service of summons to enter appearance was not properly served upon the appellant. Accordingly, it follows that the default judgement entered against that corporation was not regular. It therefore has to be set aside. If the court was to sustain the said judgment, a grave injustice would have been visited upon the appellant because the company would have been condemned without being accorded an opportunity to decide whether or not to put forward a Defence, before the court entered judgement against it.

I do now allow the appeal and set aside the default judgement against the appellant. I also set aside all the consequential orders that flowed from the said judgement.

The costs of the appeal are awarded to the appellant.

DATED, SIGNED AND DELIVERED AT ELDORET

THIS 6TH DAY OF MARCH, 2014

FRED. A. OCHIENG

JUDGE