REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 7 OF 2017

JULIUS MUTUKU NGUKU.....APPELLANT

VERSUS

ANNA JAEL MUSELE.....1ST RESPONDENT

MICHAEL KIMULI MUSELE.....2ND RESPONDENT

(Being an Appeal from the Ruling of the Chief Magistrate's Court at Machakos in Civil Case No. 825 of 2008 delivered on 29th March, 2017 by Hon. A.G. Kibiru – Chief Magistrate)

JUDGMENT

1. This Appeal arises from a Ruling delivered in the Chief Magistrate's Court at Machakos on 29th March, 2017 in Machakos CMCC No. 825 of 2008. The Ruling was in respect of the Appellant's Notice of Motion dated 26th June, 2013 ('*the Application*') in which the Appellant sought for the following orders:

> ***a. Judgment entered herein and all consequential orders thereof be set aside and the Defendant allowed to defend the Plaintiff's suit on merit;***
>
> ***b. The draft Defence and Counter-claim attached hereto be deemed duly filed and served upon payment of the requisite fees; and***
>
> ***c. The costs of the Application be provided for.***

2. The orders sought in the Application were premised on the grounds that: the Defendant was never served with the Summons to Enter Appearance, Notice of Entry of Judgment and/or Decree as alleged by the process-server or at all and the Defendant has, as against the Plaintiffs' suit, a strong Defence that raises triable issues and had he been served with the Summons to Enter Appearance, this court would have come to a completely different decision after hearing all the parties.

3. The Application in the lower court was opposed by the Plaintiff who deponed that the Defendant was duly served with Summons to Enter Appearance and the Plaint whereupon he allegedly entered appearance in person but failed to file a Defence within the statutory timelines.

4. In the Ruling delivered on 27th March, 2017, the learned Magistrate disallowed the Appellant's Application on the ground that the Appellant had been served with the Summons to Enter Appearance and had indeed entered appearance but ignored to file a Defence.

5. In the Memorandum of Appeal, the Appellant has faulted the Ruling of the learned Magistrate for failing to set aside the ex-parte Judgment and Decree; for failing to allow the Defendant to defend the suit on its merits and for failing to find that the Defendant had a strong Defence and Counter-claim that raises triable issues.

6. The Appellant further faulted the learned Magistrate for failing to set aside the execution order issued against the Defendant; for failing to find that the Defendant's Notice of Motion dated 30th August, 2013 did meet the threshold set out under Order 10 Rule 11 of the Civil Procedure Rules, 2010; and for failing to grant the prayers sought in the Notice of Motion dated 30th August, 2013.

7. The Appeal proceeded by way of written submissions. The Appellant's advocate submitted that Section 20 of the Civil Procedure Act provides that where a suit has been duly instituted, the Defendant shall be served in the manner prescribed to enter an appearance and answer the claim; that Order 5 Rule 6 of the Civil Procedure Rules, provides for mode of service of summons and that Order 5 Rule 8(1) of the Civil Procedure Rules provides for service to be upon the Defendant personally unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.

8. Counsel submitted that the Appellant denied having been served with the Plaint and Summons to Enter Appearance and that the alleged Affidavit of Service sworn by the process-server did not state whether the process-server knew the Appellant before he allegedly served him with the Plaint and Summons to Enter Appearance.

9. It was submitted that in the Judgment delivered on 23rd March, 2012, the learned Magistrate found that the Defendant neither entered appearance nor filed a Defence**;** that the alleged Memorandum of Appearance in Person allegedly filed by the Defendant/Appellant on 2nd October, 2008 was not valid and that the said Memorandum of Appearance in Person was not signed by the Defendant. Counsel relied on the case of *Omar Shallo vs. Jubilee Party of Kenya & Another [2017] eKLR,* where the court held that:

> *"…further, in line with rules 13 and 15, a person who has been served is required to sign acknowledgement of service on the original summons, and an affidavit of service must be consequently filed as proof that service has been effected. The affidavit of service should show the time when and the manner in which summons was served and the name and address if the person, if any, identifying the person served and witnessing the delivery or tender of summons. Procedure for service cannot be sacrificed as mere technicalities. That was what the court concluded in the case of Law Society of Kenya v Martin Day & 3 Others [2015] eKLR thus: the question is whether failure to adhere to such clear elaborate procedural requirements of the Civil Procedure rules on the validity of and service of summons outside the jurisdiction of this court are mere procedural technicalities that can be sacrificed at the altar of substantive justice. In my humble view, those rules of engagement that prompt the hearing and disposal of a suit cannot be mere procedural technicalities contemplated by Article 159(2)(d) of the Constitution of Kenya, 2010 and or the overriding objectives espoused in sections 1A and 1B of the Civil Procedure Act. As was held in the case of Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others [2013] eKLR, by Kiage JA, courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines which make the process of judicial adjudication and determination fair, just, certain and even handed…The Supreme Court in the case of Raila Odinga & 5 Others v IEBC & 3 Others [2013] eKLR, also held that Article 159(2)(d) of the Constitution is not a panacea for all procedural shortfalls,…it is plain to us that Article 159(2)(d) is applicable on a case to case basis. A summons is a judicial document calling upon the Defendant to submit to the jurisdiction of the court and if the party is not given that opportunity to so appear and either defend or admit the claim. How else would that party submit to the jurisdiction of the court particularly when that defendant is a foreigner residing outside the jurisdiction of the court….it is clear that a party must make effort to serve any court process through personal service."*

10. Whereas the Appellant denied, under oath, having been served with the Summons and Plaint, it was submitted, he was locked out of the seat of justice because he was never afforded an opportunity to be heard; that the evidential burden of proof of service shifted to the Respondents to proof service of the Summons to the Appellant but the same was never discharged and that the legal burden of proof was upon the Respondents to prove service upon the Appellant.

11. In drawing the contra-distinction between the legal burden and evidential burden, counsel relied on the Supreme Court of Kenya decision in the *Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR,* in the majority decision at paragraph 132 as follows:

> *"though the legal and evidential burden of establishing facts and contentions which will support a party's case is static and remains constant through a trial with the Plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden shifts and its position at any time is determined by answering the question as to who will lose if no further evidence is introduced."*

12. Counsel placed reliance on the case of *Isaac Awuondo vs. Surgipharm Limited & Another [2011] eKLR,* where the Court of Appeal reiterated the following principles in *Moi University vs. Vishva Builders Limited Civil Appeal No. 296 of 2004 (unreported)* that:

> *"the law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend…even one triable issue is sufficient – see H.D. Hasmani v Bnque Du Congo Belge (1938) 5 E.A.C.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel v E.A Cargo Handling Services Ltd [1974] E.A. 75 at page 76 Duffus P. said "in this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan put it 'a triable issue' that is an issue which raises a prima facie defence and which should go to trial for adjudication."*

13. Counsel also relied on the case of *Ternic Enterprises Limited (supra)* which quoted with approval the case of *Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359* where it was held that,

> *"…we must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now settled that if the defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend."*

14. Counsel submitted that the Appellant made two Applications dated 26th June, 2013 and 30th August, 2013 in which he annexed the draft Defence and Counter-claim and that a perusal of the draft Defence and Counter-claim would have showed that the Defence and Counter-claim raised triable issues with great chances of success.

15. The Appellant's counsel submitted that the Appellant was at all material times living together with his family on and was the registered owner of property reference number Athi River/Athi River Block 1/672; that by failing to allow the Appellant's Defence and Counter-claim, the court denied the Appellant his inalienable right to be heard and hence he was condemned unheard and that the right to be heard is a key component of the right to a fair hearing.

16. Counsel submitted that the Appellant having been locked out of the seat of justice to defend the suit led the court in issuing orders of

eviction against the Appellant while he was sitting on his own property; that the Appellant's house and other structures were demolished and that the Appellant was evicted from his property together with his family leaving them homeless and incurred great loss and damage.

17. The Respondents' counsel submitted that the Appellant was served through his son; that the Appellant subsequently entered Appearance and never filed a Defence and that the Appellant appeared in court on several occasions and the court gave him permission to file his Defence but declined to do so.

18. Counsel submitted that the conduct of the Appellant was such that he did not deserve to be heard when he failed to file his Defence; that the court did not need to go into whether the Appellant had a Defence and Counter-claim which raises a triable issue and that the Appellant waited until he was evicted from the suit premises to file the Application for setting aside the Judgment.

Analysis and findings:

19. The record from the lower court shows that the Respondents sued the Appellant vide a Plaint dated 4th February, 2008. In the Plaint, the Respondents sought for orders of a permanent injunction restraining the Appellant from entering or occupying land known as Athi River/Athi River Block 1/666 *(the suit property).*

20. The record shows that a Memorandum of Appearance in person was filed in court on 3rd October, 2008. The Defendant has denied ever filing the said Memorandum of Appearance in Person. According to the Appellant, he never filed the said Memorandum of Appearance because he was never served with the summons to enter appearance.

21. The proceedings show that having not filed a Defence, Judgment was entered as against the Appellant on 15th December, 2008. When the matter came up for hearing on 11th May, 2009, the court directed the Appellant to file and serve his Application to set aside the default Judgment within fourteen (14) days, and to pay costs of Kshs. 3,500.

22. When the matter came up for mention on 8th June, 2009, the record shows that the Appellant was in court, meaning that he was aware of the existence of the case filed against him. On the said date, the Appellant informed the court as follows:

> *"I pray for time to file the application to challenge the interlocutory Judgment and pay the said money (costs) as I had a sick person."*

23. On 21st December, 2009, the Appellant informed the trial court that he wished to be given time to *"hire a lawyer."* The court adjourned the matter on that day and directed the Appellant to pay the court adjournment fees and the Respondents' costs for the day.

24. On 23rd August, 2010, the Appellant was present in court. On that day, the Appellant informed the court that he was bereaved, and that is why he had been unable to file his papers and pay the costs as ordered by the court.

25. The court did not get tired with the Appellant. On 29th November, 2010, the court gave the Appellant a chance to file an Application to set aside interlocutory Judgment and *"if he does not, court will proceed with the Plaintiff's case."* The court then fixed the matter for hearing for 24th January, 2011.

26. The matter did not proceed for hearing on 24th January, 2011. However, the court proceeded with the hearing of the suit on 28th November, 2011 after it was convinced that the Appellant had been served with the hearing notice. The court delivered its Judgment in the matter on 23rd March, 2012 by allowing the Respondents' Plaint.

27. After the Judgment of 23rd March, 2012, the Respondents filed an Application dated 22nd February, 2013 seeking the help of the police to evict the Appellant from the suit property. The said Application was allowed by the court on 2nd April, 2013. In the meantime, the Appellant had filed an Application dated 26th January, 2013 seeking to set aside the Judgment of the court.

28. While dismissing the Appellant's Application, which Ruling is the subject of this Judgment, the trail court stated as follows:

> *"The Defendant's Application is premised on the allegation that he was not served with Summons to Enter Appearance and was therefore denied an opportunity to ventilate his case. However, the Respondent has deponed that the Application duly served and indeed filed a Memorandum of Appearance in person, but ignored to file Defence. I have indeed seen a Memorandum of Appearance dated 2nd October, 2008 and filed on 3rd October, 2008. The Defendant was also served with numerous notices of hearing."*

29. As I have summarised in this Judgment, as early as 11th May, 2009, a few months after the entry of Interlocutory Judgment, the Appellant was aware of the existence of the suit and the Judgment. Indeed, the Appellant appeared in court on 8th September, 2009; 21st December, 2009; 23rd August, 2010 and on 29th November, 2010 on which occasions the court directed the Appellant to file his Application to set aside the interlocutory Judgment of 15th December, 2008. The Appellant declined to heed the court's directives.

30. Having been aware of the existence of this suit a few months after the suit was filed, and having not filed an Application to set aside the interlocutory Judgment as advised by the court, the Appellant cannot wait until he has been evicted from the suit property to seek the same orders he had been advised to apply for but declined.

31. Indeed, since May, 2009 when the Appellant appeared in court, until in the year 2011 when he stopped attending court, the Appellant never informed the court that he had not been served with the Summons to Enter Appearance.

32. The Appellant has not denied that the Respondents are people who know his home, and that Anthony Sila, the person whom the process-server served the summons was his son. Furthermore, the Appellant did not bother to call the process-server for cross-examination on his Affidavit, contrary to the provisions of Order 5 Rule 16 of the Civil Procedure Rules which provides as follows:

> *"16. On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."*

33. That being so, it is my finding that the Appellant was served with summons. The Appellant was given numerous opportunities to file an Application setting aside the interlocutory Judgment. Having failed to do so, it is my finding that it is an abuse of the court process for the Appellant to seek to set aside the orders he was directed by the court to do four (4) years ago.

34. The Appellant seems to be of the view that he can move the court at his convenience, and at his own pace, notwithstanding the inconvenience he might cause to the court and the Respondents. That, in my view is not what the provisions of Article 159 of the Constitution and Sections 1B of the Civil Procedure Rules contemplated.

35. The two provisions of the law demands for the just and efficient disposal of the business of the court and the efficient use of the available judicial and administrative resources. Having not complied with the directives of the court timeously, the Appellant has run afoul the provisions of the law, and cannot succeed in his attempt to set aside the Judgment of the court.

36. For those reasons, I find the Appeal filed by the Appellant to be unmeritorious. The Appeal is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 30TH DAY OF OCTOBER, 2020.

O. A. ANGOTE

JUDGE