REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA ATNAKURU

CIVIL APPEAL N0.20 OF 2011

JOHN WARUITA WAKIBIA.....1ST DEF/APPELLANT

SAMUEL WANJUI GITONGA.....2ND DEF/ APPELLANT

VERSUS

DALMAS POSE KILEYIA.....PLAINTIFF/ RESPONDENT

RULING

Aggrieved by the dismissal of their application dated 21st December, 2011 by the trial magistrate (D.K Mikoyan) on 7th February, 2011, the appellants brought the appeal herein seeking to set aside and/ or vary that decision on the grounds that the trial magistrate erred by failing to consider that the accident which constituted the substratum of the suit was denied by the appellant and that the defence filed raised triable issues. The trial magistrate is also faulted for having failed to appreciate that the appellants were not served with summons to enter appearance and for holding that the impugned service was proper.

On 19th December, 2013 counsels for the respective parties filed consent in the following terms:-

"By consent of the Advocates for both parties:-

1. This appeal be heard by way of written submissions.

2. The submissions be filed for highlighting on 4th March, 2014..."

Subsequently the advocates filed their respective submissions and highlighted them on 23rd June, 2014.

The appellants' submissions

In the submissions filed on behalf of the appellants it is pointed out that the appeal herein is against the lower court's refusal to set aside its *ex parte* judgment in favour of the respondent (the judgment is in respect of a fatal road traffic accident which occurred on 4th January, 2009 along Tippis-Albao road in Mau Narok). The appellants contend that if they had been granted an. opportunity, they would have proved that the deceased contributed to the occurrence of the accident. That way, they would have changed the trial magistrate's judgment on liability.

In his *ex parte* judgment, the trial magistrate had found the appellants 100°/o liable for causing the accident and awarded the deceased's estate Kshs. 100,000/ = for loss of expectation of life; Kshs. 80,000/= for pain and suffering and Kshs. 35,000/= for special damages and Kshs. 480,000/= on

account of lost years.

When the appellants were notified of the judgment they sought to set aside the proceedings leading to entry of the judgment and the consequential decree therefrom. They also sought leave to file their defence out of time. Their application to set aside the ex parte proceeding was heard but dismissed on 7/2/2011. Consequently, they filed the present appeal on the grounds that they were not served with summons to enter appearance, that the ex-parte proceedings were taken without their knowledge and that they were not given a chance to be heard. The appellants also contended that service of summons was not proper and that their defence raised triable issues.

Referring to **Mwalia** v. **Kenya Bureau of Standards (2001)1 E.A 151** where Ringera J. (as he then was) drew a distinction between a regular and an irregular ex parte judgment and laid down the factors to be considered in setting aside judgments in default of appearance or defence; the appellants have submitted that the *ex parte* judgment hereto was irregular and should be set aside *ex debito justiciae*.

Service was not proper

It is the appellants' case that the service of process herein was not proper. That fact is said to be born out by the affidavits of the process server, Wilson Wanjohi, and that of the respondent's advocate, Elizabeth Omwenyo, which illustrate failed attempt to effect service to the appellants. Subsequently, the respondent's application for substituted service, dated 51812009, was allowed on 19I 10I 2009. It is contended that, under the Civil Procedure Rules, substituted service can only be resorted to as a last resort (where all efforts of effecting service to the defendant have failed or have been exhausted).

In the circumstances of this case, the respondent's advocate is blamed for having failed to get the address of the 1st appellant from his insurance company yet after the suit was heard and determined ex parte, he quickly forwarded the judgment to the 1st appellant's insurer.

It is further submitted that **Order 5 rule 17** of the **Civil Procedure Rules, 2010** does not provide for substituted service of suit papers through registered post but only by advertisement in the media. That being the case, it is argued that, the option of substituted service was not available to the respondent.

The defence and triable issues

The appellants contend that the trial magistrate did not consider their defence as he was by law obligated to do. In this regard, it is submitted that whereas the burden of proof lay with the respondent, the appellants had the burden to proof contributory negligence and reduce their extend of liability. Citing the decision in **Jones v. Livox Quarries Ld**., **(1952) 2 Q.B 608** and the provisions of **Section 4** of the **Law Reform Act, Cap 26 Laws of Kenya**, where the right to plead and prove contributory negligence is acknowledged, the appellants contend that they have evidence capable of proving that the deceased contributed to the occurence of the accident.

Based on the observation of Sir William Duffus, P., in the case of **Patel** v. **East Africa Cargo Handling Services (1974) E.A 75** quoted with approval by the Court of Appeal in **Ceneast Airlines Ltd** v. **Kenya Shell Ltd (2000) 2 E.A 362**, it is submitted that the appellants' defence has triable issues which should be heard and determined by way of trial so as to ensure that justice is not only done but is manifestly seen to have been done. In **Patel** v. **East Africa Cargo Handling Services** (supra), Sir William Duffus, P., observed:-

> **"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 to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not ...set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merit does not mean, in my view, a defence that must succeed, it means as Sheridan J., put it "a triable defence," that is an issue which raises a prima facie defence and which should go to trial for**

adjudication."

Whether any prejudice occasioned on the defendant is compensable It is the appellants' case that any delay occasioned by the appeal will be compensated. In this regard, it is pointed out that a sum of Kshs.754,785/= has been deposited in an interest earning account in the joint names of the parties' advocates. That being the case, the appellants argue, the respondent will be reasonably compensated regardless of the outcome of the appeal.

In conclusion, the court was referred to **Article 50 (1)** of the **Constitution of Kenya, 2010** and the decision in **Maina** v.**Mugiria Civil Appeal No.27 of 1982** (unreported) where it was held:-

> **"...there are no limits or restrictions on the judge's discretion except that if he does vary the judgment 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 fetter the wide discretion given it by the rules...."**

Article 50(1) of the Constitution of Kenya on the other hand, gives every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.

Submissions by the respondent

The respondent has opposed the appeal on three limbs namely, the legality of the application which is the subject matter of the appeal; the issue of service and whether there is a defence on merit.

Legality of the application

On this limb, it is submitted that the appellants having moved the court by way of a chamber summons, (a procedure not provided for under the Civil Procedure Rules, 2010), the trial magistrate was justified in holding that:-

> **"Finally there is attack on the provisions invoked by the defendant. The defendant's have filed chamber summons which is not registered in the Civil Procedure Rules which came into force on 10th December, 2010. As if that is not enough, defendant has invoked a non existent provision of the law to seek the setting aside of ex-parte proceedings, judgment as well as leave of the court. The defects deals a blow to this application."** (Emphasis supplied).

The respondent contends that **Order 51 Rule 1** of the **Civil Procedure Rules**, which was applicable at the time, required that the application be by notice of motion; that failure to bring the application by way of notice of motion meant that the court's hands were tied as it could not adjudicate on pleadings based on non existent provisions of the law. The respondent contends that the defect in the application was not a procedural technicality and that it went to the substance of the application.

Service of summons

Concerning the question of service, the trial court is said to have been right when it observed:-

> **"Going by chronology of events, the last known address to the plaintiff is that found at the Registrar of vehicles in Exh. P3, copy of records. Those records were gotten on 7/9/2009. unlike the details in the police abstract given on 16/2/2009. 1 am satisfied that service was proper."**

The address indicated on the police abstract is said to have been given by the 1st appellant. Further that when the appellants filed their application for stay of execution, the 2nd appellant swore an affidavit dated the 21/12/2010 in which his address his given as P.O Box 17311

Nakuru (the same address used to send demand letters). Although the address used to effect the impugned service is different from the one indicated in the police abstract, it is submitted that the reason for use of a different address was properly explained (certificate of official search yielded a different postal address of the 2nd appellant who was the registered owner of the motor vehicle which caused the accident).

Arguing that **Order 5 rule 17(1)** of the **Civil Procedure Rules** allows for substituted service, it is submitted that it was perfectly logical to send the pleadings to the address provided in the certificate of official search.

Concerning the contention that the respondent did not put enough efforts to effect personal service on the appellants, it is argued that the affidavits filed on the attempts made to locate the appellants and the search at the motor vehicles registry is enough proof of the measures taken to establish the whereabouts of the appellants.

Whether there is a defence on merit

On this question it is acknowledged that the court has wide discretion to set aside ex parte judgment but the contention is that the court equally has discretion to refuse to do so. Arguing that this is a good case where the court would be justified in refusing to exercise its discretion in favour of the appellants, the respondent submits that all materials on record show that the appellants' failure to enter appearance and file defence was deliberate.

Arguing that exercise of judicial discretion ought to be guided by the facts surrounding the circumstances of each case, the respondent insists that the overall conduct of the appellants disentitles them good standing in a court of equity.

As for the defence on record, it is submitted that it is improper as the appellants purported to file a defence without leave of the court. The respondent contend that the appellant ought to have filed a ***"draft defence"*** and not a ***"defence."***

Should this court be inclined to allow the impugned defence to stand, it is nevertheless, urged to refuse to exercise its discretion in favour of the appellants because the other issues raised in opposition to the appeal outweigh any reason to allow the exhibited defence to stand. In this regard, the court is referred to **Michael Kamau Gakundi** v. **Daima Bank Ltd. Nairobi HCCC No.43 of 1999** where Havelock J. quoted with approval the decision in **Maina** v. **Mugaria** thus:-

> **"this discretion is intended so to be exercised to avoid injustice or hardship....but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of Justice… "**

Principles and/ or factors to consider when determining an application for setting aside an *ex parte* order or judgment:

The principles and/ or factors that a court should consider when determining an application for setting aside an *ex parte* judgment or order were set down by the Court of Appeal in **Pithon Waweru Maina** v. **Thuku Mugiria C.A No.27 of 1982 (1983)eKLR** thus:-

> **"(a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment 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 fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd (1974] EA 75 at 76 C and E**
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> **(b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed**

to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.

(c) Thirdly the Courtof Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah (1968] EA 93. Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (Jesse Kimani v McConnel (1966] EA 547, 555 F). The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court. (Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7)."

Applying the foregoing principles to the circumstances of this case, I note that the trial magistrates refusal to set aside his ex parte judgment was informed by:-

a) His belief that the appellants had full knowledge of the case but failed to enter appearance and/or file a defence;

b) That no reasonable explanation was offered for failure to enter appearance or file a defence and

c) That applicants cited non-existent provisions of the law.

The question of service

It is noteworthy that the documents that were allegedly sent to the appellants namely, demand letter and the summons to enter appearance were sent through different postal addresses. The demand letter was sent through the address indicated in the Police Abstract to wit, P.O BOX 17311-20100 Nakuru. The summons to enter appearance were subsequently sent through P.O BOX 1001-20117 which according to the certificate of search provided by the registrar of the motor vehicle was the 2nd appellant's postal address. The 2nd appellant's denial of the 2nd address was rejected by the trial magistrate. In so doing the trial magistrate observed:-

"Going by chronology of events, the last known address to the plaintiff is that found at the Registrar of vehicles in Exh. P3, copy of records. Those records were gotten on 7/9/2009. Unlike the details in the police abstract given on 16/2/2009. 1am satisfied that service was proper.....There is no other reasonable explanation for that delay."

Was the trial magistrate justified in concluding that the service was proper and that no reasonable explanation was offered for the delay?

My answer to this question is in the negative. This is because there were two postal addresses linked to the 2nd respondent. Secondly, the there was no evidence that the 2nd appellant was frequently using the last known address. Thirdly, as there were two possible addresses through which the appellant could be reached, there is no way the service can be said to have been proper when it was only set to one of

the possible addresses through which the 2nd appellant could be reached. The possibility that summons were send to the wrong address, in the circumstances of this case, cannot be ruled out. **Competency of the application relied on to set aside the trial magistrate's judgment:-**

As was pointed in the respondent's submissions above, the other reason for rejection of the appellants' application is the fact that it was brought under provisions of law that had ever since been repealed to wit, **Order IX A Rule 10** and **11** of the **repealed Civil Procedure Rules**. It is noteworthy that the application was also brought under Section 3A of the Civil Procedure Act.

Under that Section 3A, the trial magistrate had power, notwithstanding the defect in the application to make such orders as might have been necessary for the ends of justice. Article 159(2)(d) of the Constitution of Kenya, which was in force at the time the trial magistrate made his decision, also put an obligation on the trial magistrate to dispense justice without undue regard to technicalities.

Since the trial magistrate was able to appreciate the nature of orders sought, and their being no prejudice suffered by the applicant's for the application having being brought under the wrong provisions of the law, I cannot agree that the application, even though defective, was fatally defective.

As concerns the appellant's defence, I am of the view that failure to describe the defence annexed to the affidavit sworn in support of the application hereto did not prejudice any of the parties. In any event, pursuant to the orders sought in the impugned application, the appellant had referred the court to no other statement of defence but the statement of defence annexed to his supporing affidavit and in respect of which he sought leave to file defence out of time. See prayer 5 of the impugned application.

In paragraph 6 of the appellant's intended statement of defence, the appellant contended that, if at all the accident occurred, it was caused and/ or substantially contributed to by the negligence of the deceased. The particulars of negligence on the part of the deceased are listed there under.

In my view, the defence filed by the appellants raised a triable issue namely, whether the deceased contributed to its occurrence? Consequently the exparte judgment entered is set aside.

The upshot of the foregoing is that the appeal has merit and is allowed. The costs of the appeal shall be borne by the respondent

Delivered and dated this 7th day of October, 2014 at Nakuru.

H. A. OMONDI

JUDGE