



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 586 OF 2016

KIPKAI ENTERPRISES LTD.....PLAINTIFF

VERSUS

MAURINE LOUISE OSEMBE.....DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 3/6/2016. She sought among other prayers, an order for payment of rental arrears of Kshs 4,020,000. The plaintiff also sought an eviction order. Subsequent to the issuance of summons to enter appearance, a request for judgment dated 14/7/2016 was filed by the plaintiff's advocates. Attached to the request for judgment was an affidavit of service sworn on 14/7/2016 by a process server by the name Julius Mutua Muthoka. He deposed in the affidavit of service that he had served the defendant with summons to enter appearance on 23/6/2016 at the Java Restaurant located at Galleria Shopping Mall along Langata Road. The Deputy Registrar did not enter judgment. She instead directed that the matter be causerlisted before a judge for directions.

2. Subsequently, the matter was listed before a different Deputy Registrar on 25/4/2017 and the Learned Deputy Registrar directed that the matter be listed for formal proof before Kemei J on 22/5/2017 during the service week. Consequently, exparte hearing of the suit proceeded before Kemei J, leading to a judgment rendered on 22/9/2017 in which Kemei J awarded the plaintiff a total of Kshs 5,075,500.

3. On 17/1/2018, the defendant brought an application seeking to set aside the exparte proceedings and judgment. The application was supported by her affidavit expressed to have been sworn on 17/1/2017 (sic). She contended that she had never been served with summons to enter appearance. She added that she came to learn about the suit on 11/9/2017 when she received a phone call from an anonymous caller who phoned her from cell phone number 0727861235 and described himself as a good samaritan working in the Judiciary. She added that she had a defence to the plaintiff's claim and that she intended to present a counterclaim. She further contended that she was ready to provide a reasonable security if the court so directed.

4. The application was contested by the plaintiff through a replying affidavit sworn on 6/3/2018 by Jane Nyaboke Njagi, a director of the plaintiff company. She deposed that the defendant was duly served with summons to enter appearance and that service took place at Java Restaurant, Galleria Mall, Langata Road. She further deposed that she accompanied the process server, pointed out the defendant, and witnessed the service.

5. The application was canvassed by way of both oral and written submissions. The applicant submitted that service of summons was a mandatory requirement under the Civil Procedure Rules and where a summon to enter appearance has not been served, the exparte judgment is a nullity and ought to be set aside. Reliance was placed on the case of **Naran v Ramji (1954) 21EACA 20** and the case of **Khamis v Kirobe (1956) 23 EACA** to buttress this point. The applicant further submitted that the respondent had deliberately failed to avail the

process server for cross-examination. Further, the applicant submitted that she had an arguable defence and counterclaim, both raising triable issues.

6. In response, the respondent submitted that the applicant had failed to satisfy the court to issue an order summoning the process server. It added that the fact that the replying affidavit was sworn by a director who was present and pointed out the defendant at the time of service was sufficient demonstration of service. The respondent further submitted that the applicant had not given a good reason to the court as to why there was delay in filing the application. Lastly, it was submitted that the applicant had failed to satisfy the criteria for setting aside an ex parte judgment in that she had failed to demonstrate that: (i) her draft defence raised triable issues; (ii) no prejudice would be suffered by the plaintiff; and (iii) she brought the application without undue delay. The respondent urged the court to dismiss the application.

7. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence. The single issue falling for determination in this application is whether the applicant has satisfied the criteria for setting aside an ex parte judgment.

8. The jurisdiction to set aside ex parte judgment is a discretionary one and is exercised upon a well established criteria. The Court of Appeal discussed the criteria in the case of **James Kanyita Nderitu & another v Marios Philotas Ghika & another (2016) eKLR**. The Court of Appeal further outlined the distinction between regular and an irregular ex-parte judgment and set out the criteria to be adopted when exercising jurisdiction to set aside either of the two categories of exparte judgment. It stated thus:

“In a regular default judgment, the defendant will have been duly served with Summons to Enter Appearance, but for one reason or another, he had failed to enter appearance or to file defence resulting in default Judgment. Such a defendant is entitled under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of Appearance or defence, as the case may be, the length of time that has elapsed since the default Judgment was entered, whether the intended defence raises triable issues, the respective prejudice each party is likely to suffer, whether on the whole it is in the interest of justice to set aside the default judgment, among others.

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with Summons to Enter Appearance. In such a situation, the default judgment is set aside ex-debito justitiae as a matter of right. The court does not even have to be moved by the party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raised triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reasons why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations.”

9. In **Shah v Mbogo & Another 1967 E.A 116**, the Court of Appeal stated that the discretion to set aside an ex parte judgment is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable error but not to assist a party who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.

10. The Hon Duffus, President of the Court of Appeal, similarly set out the following guidelines in **Patel v E.A Cargo Handling Services Limited (1974) E.A :-**

“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 usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on merits does not mean, in my view, a defence that must succeed. It means, as SHERIDAN J put it, “a triable issue” that is, an issue which raised a prima facie defence and which should go on trial for adjudication.”

11. The principles which emerge from the above decisions are, firstly, that where the judgment sought to be set aside is irregular in that there

was no proper service upon the defendant, the court has no discretion in the matter; such judgment ought to be set aside as a requirement of justice (*ex debito justitiae*). Such judgment is set aside as a matter of course in order to uphold the rule of natural justice that a party should not be condemned unheard. Secondly, where a party was properly served with summons, the resultant judgment is a regular judgment. The court has a discretion to set aside a regular judgment on reasonable terms. In so doing, the court takes into account various factors such as the reason why no defence was filed, the length of time that has lapsed since the judgment was entered, whether there is a defence that raises triable issues, the prejudice that either party may suffer, and whether it is in the interest of justice to set aside the judgment.

12. In the application under consideration, the affidavit of service indicates that the applicant was served at the Java Restaurant at Galleria Shopping Mall along Langata Road. The process server was accompanied by Jane Nyaboke Njagi, a director of the respondent, who pointed out the applicant. The said Jane Nyaboke Njagi swore a replying affidavit in which she reiterated that she was present and sat and chatted with the respondent at the time of service. She deposed that she discussed the matter with the applicant and the applicant complained that the suit was unnecessary because she was willing to pay the rent arrears.

13. The applicant denies service but does not deny being at the Java Restaurant at Galleria at the time of the alleged service. Secondly, the applicant has not identified the alleged good samaritan who apparently not only knew her but also had her phone contact and took it upon himself to make an international call to her to inform her about the case on 11/9/2017, about eleven days before the impugned judgment was rendered by Kemei J. Thirdly, in paragraph 20 of her supporting affidavit, the applicant indicates that she learnt about the case on 11/9/2017. The present application was brought on 17/1/2018. She has not given any satisfactory reason for the delay of more than four months. She has not placed before court any evidence to show that she was out of the country as alleged. A certified copy of her passport showing departure and return entries would have been handy in demonstrating to the court that indeed she was out of the country at the time she learnt about the suit and that she acted promptly as soon as she came back to the country.

14. My finding on the issue of service therefore is that the applicant was served with summons to enter appearance. What is before court therefore is a regular judgment.

15. On whether or not the regular judgment should be set aside, it is clear that the applicant was served. In her own admission, she contends that she knew about this suit on 11/9/2017, eleven days before Kemei J rendered the impugned judgment. She has not tendered a plausible explanation as to why it took her more than four months to bring the present application. She has also not tendered any evidence that she at any time during the tenancy paid the rent arrears claimed in the suit and awarded in the impugned judgment.

16. In the circumstances, I do not think the applicant has made out a case to warrant the setting aside of the Judgment of Kemei J. Accordingly, the notice of motion dated 17/1/2018 is declined for lack of merit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JUNE 2019.

B M EBOSO

JUDGE

In the presence of:-

Muthuri holding brief for Ms Cheron for defendant

Court Clerk - Waweru