



REPUBLIC OF KENYA



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Makomere v Isigi (Civil Appeal 13 of 2019)
[2024] KECA 1807 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1807 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 13 OF 2019
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
DECEMBER 20, 2024

BETWEEN

ALPHONIS SAMUEL MAKOMERE APPELLANT

AND

SAMMY INGUVI ISIGI RESPONDENT

(Being an appeal from the Ruling and Orders of the Environment and Land Court at Kakamega (Matheka, J.) dated 20th November, 2018 in ELC Case No. 26 of 2016)

JUDGMENT

1. This appeal arises from the ruling and orders of the Environment and Land Court (ELC)(N.A. Matheka, J.) dated 20th November, 2018. The ruling relates to a notice of motion application dated 11th July, 2018, filed by the appellant herein, which sought the following orders:
 1. – spent -
 2. -spent -
 3. That the court set aside/discharges and/or vacates all orders issued herein.
 4. That the court grants leave to defendant/applicant to file the defence and defend the case.
 5. That the process server one Zablon Ochieng’ Senge be cross examined on the contents of his affidavit of service dated 10th day of October, 2017.
 6. That this court grants the applicant any other orders it deems it fit to grant.
 7. That costs of the application be provided for.



2. The application was supported by grounds on its body, a supporting affidavit of Aphonis Samuel Makomere (the defendant/applicant) sworn on 11th July, 2018, a draft statement of defence, and a further supporting affidavit sworn on 9th August, 2018, together with annexures thereto.
3. The application at the ELC was opposed through a replying affidavit of the respondent dated 27th July, 2018. The application was canvassed through written submissions filed by the respective parties.
4. The background of the application was that the respondent filed a suit against the appellant for breach of contract; vacant possession of a parcel of land; and termination of an existing tenancy agreement between himself and the appellant in Kakamega High Court ELC No. 26 of 2016, vide a plaint dated 2nd March, 2016.
5. The appellant did not enter appearance to the suit; and the ELC proceeded to formal proof ex parte and returned a judgment in favour of the respondent. The applicant, then, brought the application dated 11th July, 2018 seeking to set aside the default judgment.
6. In his affidavits sworn on 11th July, 2018, and 9th August, 2018 in support of his application to set aside the default judgment, the appellant averred that he was not aware of the suit against him until 8th June, 2018, when he was served with a mention notice which indicated that the matter was scheduled for mention on 12th June, 2018. It was his narrative that he was served with the mention notice at his work place situated at Sabatia Market, which is opposite the office of the Assistant County Commission, next to the respondent's premises. He attended court on 12th June, 2018, and realized that the case had proceeded ex parte without his knowledge and was at an advanced stage, to wit the court was confirming whether parties had filed submissions in order to conclude the judgment. Consequently, he informed the court that he was not aware of the case but the court proceeded to fix the case for judgment on 26th June, 2018.
7. According to the appellant, he was not aware of the suit against him – and only discovered upon perusal of the court file – that there were affidavits of service wherein a process server by the name Zablou Ochieng Senge (Zablou) had claimed that he had served him with the summons to enter appearance and other court processes at his home.
8. In short, the appellant argued that the default judgment entered against him should be set aside because he had never been served with summons to enter appearance or the plaint. He sought to demonstrate this fact to the trial court through three primary arguments:
 - a. First, he pointed out that in the first affidavit of service filed by Zablou, which is dated 26th April, 2016, Zablou does not say who pointed out the appellant to him: he only states that the respondent described to him the appellant's homestead.
 - b. Second, the appellant strongly argued that the description of his home where he was purportedly served in all the four occasions, was wrong. He averred that contrary to the description in the affidavit of service that his home is situated at Chamakanga area, Chamakanga Sub-location, Ebusali West location in Sabatia Division, Hamisi, his home is actually situated at Chovegere area, Chovegere Sub-location, Busali East location, Sabatia Division within Sabatia Sub-County.
 - c. Third, the appellant faulted the sincerity of the respondent in purportedly sending the process server to effect service in his home yet they operated businesses in Sabatia whose premises were adjacent to each other. Nothing would have been easier, the appellant argued, than for the respondent to cause the service to be effected in his shop which adjoins his.



9. Additionally, the appellant beseeched the trial court to set aside the default judgment because he had a meritorious defence to the respondent's claim which, he argued, should be allowed to be ventilated on its merits. To demonstrate this, the appellant attached a draft statement of defence.
10. Naturally, the respondent vehemently opposed the appellant's efforts to set aside the default judgment in his favour. Through his replying affidavit at the trial court, he insisted that proper service had been effected; and that the two affidavits of service by Zablou which were on record clearly showed that the appellant had been served. Addressing the misdescription of the appellant's physical address in Zablou's affidavit of service, the respondent insisted that the mistake was an honest one on the part of the process server since Chamakanga is an adjoining village to Chovegere; and one can easily confuse where one begins and the other ends. Finally, the respondent averred that he directed Zablou to serve the initial court processes at the appellant's home and the latter ones at his shop in Sabatia market because at that time he filed the suit, the appellant had not started operating the shop. It is only towards the tail end of the litigation, the respondent insisted, that the appellant started operating from Sabatia market, and since then service had been effected on him there.
11. In a short and terse ruling which is the subject of this appeal, the learned Judge disbelieved the appellant's narrative. She held that she had read the four affidavits of service which were on record and was persuaded that the appellant had been served with the summons to enter appearance and other court processes. In particular, the learned Judge was persuaded that the respondent was truthful when he said he personally directed the process server to the appellant's home. In the premise, the learned Judge was satisfied that the appellant was properly served but opted to ignore the court summons. As regards the draft statement of defence annexed to the application, the learned Judge found that the same was a mere denial and did not raise any triable issues. As a result, she found that the application lacked merit and dismissed it with costs.
12. Aggrieved by the decision of the trial court, the appellant filed a Notice of Appeal dated 30th November, 2018, and a Memorandum of Appeal dated 23rd January, 2019, in which he raised five (5) grounds of appeal. These were that the learned trial judge erred in law in:
 1. Finding that the appellant was served on more than four different occasions by relying on affidavits of service of the process server which have contradicting descriptions of the appellant's home where the alleged service took place.
 2. By dismissing the appellant's application on the ground that the appellant was properly served when the process server in his affidavit of service did not say how he located the appellant.
 3. In finding that the drafted defence did not raise triable issues when the issue of payment is a matter to be proved during trial.
 4. In finding that the drafted defence is a mere denial when the appellant had raised the issue of the plaint being incurable, bad in law which is an issue to be proved during trial.
 5. By otherwise misinterpreting the law against the facts presented to her by the appellant.
13. During the virtual hearing of the appeal, there was no appearance for the appellant, whereas learned counsel, Ms. Rauto, appeared for the respondent. Nonetheless, the parties had received directions that the appeal would be canvassed by way of written submissions as well as oral highlights. The appellant had filed his written submissions through his counsel on record as had the respondent. Consequently, the Court decided to hear the case on the basis of the written submissions and Ms. Rauto's brief oral highlights.



14. In canvassing the appeal, the parties largely rehashed the arguments they had made before the ELC which I have reproduced above.
15. In addressing the grounds of appeal as filed, the appellant argued them in two (2) clusters as follows: he combined grounds 1 and 2 and argued them together; and similarly combined grounds 3 and 4 and argued them simultaneously.
16. In dealing with the first cluster, the appellant submitted that the contents of all the affidavits of service by the process server were not true as they were inconsistent, to wit they differently described the home of the appellant. He contended that the process server did not explain how he was able to identify him before service of the amended pleadings, nor was there proof of the alleged service. Further, the appellant denied that the respondent accompanied the process server to point out the appellant as he was not known to the process server. It was the appellant's submission that service was not effected and it was well calculated to deny him time to enter appearance and defend his case. He maintained that he was never served with any pleadings or documents, other than a mention notice which was for confirmation of filing submissions.
17. In dealing with the second cluster, the appellant relied on Article 50(1) of *the Constitution* for the proposition that every person has a right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court, or where appropriate, before an independent and impartial tribunal or body; and to have adequate time and facilities to prepare a defence. In this regard, he relied on the case of *Patel vs. E.A. Cargo Handling Services Ltd* [1974] EA 75 (*supra*) and *Shah vs. Mbogo* [1967] EA. He also relied on the case of *James Wanyoike & 2 Others vs. CMC Motors Group Limited & 4 Others* [2015] eKLR, wherein it was held that the court has unfettered, unlimited and unrestricted jurisdiction to set aside an *ex parte* judgment, which tests are whether there is defence on the merits; whether there would be any prejudice to the plaintiff; and what is the explanation for the delay. The appellant made no submissions on his fifth ground of appeal.
18. Opposing the appeal, the respondent rejected the appellant's contention that service was not effected upon him. The respondent reiterated the contents of his replying affidavit that service was indeed effected on the appellant on 15th March, 2016, and an affidavit to that effect was drawn and deposed on 26th April, 2016 and filed on 4th May, 2016. He argued that the process server clearly described how he managed to identify the home of the appellant; that he introduced himself and explained the purpose of his visit and proceeded to serve the appellant who accepted service. He submitted that since the appellant was served at his own residence, with no other people noted to be in the vicinity, the need for anyone pointing him out in a private residence was not mandatory.
19. While conceding that there was a misdescription of the appellant's home, the respondent insisted that the appellant himself failed to disclose the exact location of his residence if at all the same did not match the description as given. The respondent repeated the assertion that Chamakanga and Chovogere are villages which share a common boundary and that one could not tell the difference if they are unfamiliar with the locality. She further contended that the appellant opted not to cross examine the process server to enable the court to get clarity on the accuracy of his affidavit. In the premise, the affidavits of service could not be wished away and the contents therein dismissed simply because the appellant stated otherwise; as evidence had not been adduced to convince the court to the contrary. In this regard, the respondent argued that the two issues as raised are rules of procedure aimed at aiding the court in administration of justice and their application should not be so strict as to deviate from the objective of the law and the Act. For this proposition, counsel relied on *Microsoft Corporation vs. Mitsumi-Computer Garage Ltd & Another, Nairobi (Milimani) HCC, No. 810 of 2001 (KLR) 470 (2001) 2 EA 460*.



The respondent also relied on *James Kanyita Nderitu & Another vs. Marias Philotas Ghikas & Another*, Mombasa Civil Appeal No. 6 of 2015, which outlined the tests with regard to the correct approach in an application to set aside a default judgment.

20. Secondly, the respondent argued that the appellant's draft statement of defence did not meet the test enunciated in the celebrated *Patel vs. E.A. Cargo Handling Services Ltd* [1974] EA 75, as it was a mere denial and alluded to no facts which would require proof by subjecting them to trial. The respondent insisted that since there are no triable issues, it would be prejudicial to him to have to go back to trial in the case.
21. I have exhaustively considered the record of appeal, the ruling of the trial court, the appellant's grounds of appeal, the rival submissions by the parties as well as the law. In reviewing decisions of this nature from trial courts, as a first appellate court, the legal standard of review to be deployed is an abuse of discretion standard. A trial court Judge is entitled to exercise her discretion in determining whether to set aside a default judgment or not. The outer limits of that discretion are contained in Order 10 of the Civil Procedure Rules. Under this standard, this Court will only review a discretionary decision if it was made capriciously, arbitrarily, in plain error, or otherwise not in accordance with the law or logic. A reversal under this standard can only happen where this Court is persuaded that the reviewed decision lies beyond the pale of reasonable justification or range of permissible outcomes under the circumstances. In reviewing affidavits and other pieces of evidence placed before the trial court to assist it in using its discretion, the standard set in *Selle vs. Associated Motor Boat Co. Limited* (1968) EA 123) on a first appellate's court duty to reappraise the evidence and come up with its own independent evaluation and conclusions is applicable.
22. The singular issue for determination is whether the trial court erred in dismissing the appellant's application for setting aside the ex parte judgment entered in default of appearance and defence.
23. This situation is essentially governed by Order 10, Rule 11 of the Civil Procedure Rules. It provides for the setting aside of a judgment entered under Order 10. This Court has had occasion to judicially explain the applicable principles in *James Kanyita Nderitu v Marias Philotas Ghika & Another* [2016] eKLR. It is imperative to quote the Court in extenso thus:

“We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. 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 appearances 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 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....

In an irregular 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 a 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 raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason 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. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system....Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

24. When confronted with an application to set aside a default or ex parte judgment, therefore, the first task of a trial court is to determine if the default judgment is an irregular or regular one. If it is the former, the trial court must be set aside as a matter of right. If it is the latter, the trial court has unfettered discretion to determine if there is good cause and may set the default judgment aside if it so finds.
25. In the present case, there are duelling accounts of whether the appellant was served with the summons to enter appearance and other court processes. In the end, two factors militate in favour of finding, on balance, that service was not properly effected on the appellant. First, the appellant has convincingly demonstrated that there was a misdescription of his home in the various affidavits of service filed. He has also convincingly demonstrated that the misdescription is not merely venial or pettifogging – the difference is between two sub-locations not merely villages. Beyond that, the appellant has credibly questioned who pointed him out to the process server during the initial service purportedly done at his home and by a process server who was, by the process server’s own admission, not known to him by that time. It is no answer to say that the respondent was served in his homestead as counsel for the respondent does because a homestead could have many adults therein.
26. Second, where the details of service of court process are credibly impugned like happened in this case, it behooves the person claiming that proper process was effected to discharge the burden that service was, in fact, so effected. In the present case, as soon as the appellant pointed out the misdescription of his home where the service allegedly took place, the burden shifted to the respondent to demonstrate – perhaps by calling the process server as a witness – that the misdescription had no bearing on the credibility of the service.
27. While discussing when the presumption of service would be impugned, this Court, in *Shadrack Arap Baiwo vs. Bodi Bach KSM CA Civil Appeal No. 122 of 1986 [1987] eKLR*, wherein reference was made to *Chitaley and Annaji Rao*; *The Code of Civil Procedure Volume II* page 1670, stated that:

“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.”
28. In the present case, the affidavit of service was contested by the appellant; and credibly so. The burden, then, shifted to the respondent to demonstrate the truthfulness of the affidavit of service. Differently put, as circumstances stood at the conclusion of the hearing of the motion to set aside the default judgment, the appellant had placed sufficient material before the trial court to warrant a finding that it was doubtful whether service of summons to enter appearance had been effected; and that, therefore, the default judgment was irregular. That would, in turn, yield the legal conclusion that the judgment ought to have been set aside *ex debito justitiae*.



29. In any event, I am persuaded that the appellant’s draft statement of defence disclosed sufficient material to warrant the conclusion that it raised triable issues sufficient for the trial court to deploy the discretionary standard to allow the case to go to trial on the merits. The suit at bar was for breach of contract with the remedies of rescission of the contract and vacant possession prayed for. The respondent’s claim was that the appellant had only satisfied part of the bargain and that the breach should be viewed as a total breach entitling him to the drastic remedies he requested for. The draft statement of defence claims that the appellant had kept his side of the bargain faithfully and that it was the respondent who was in breach. It is obvious that the controversy was intensely fact-driven at two levels – who was, in fact, in breach of the contract; and whether the breach amounted to a total breach to warrant the drastic remedy of rescission. Those are issues raised in the draft statement of defence. As such, it is a reversible error to reach the conclusion, as the trial court did, that the draft statement of defence did not raise any triable issues. A triable issue is not one that has high or real prospects of succeeding at trial; it is one which is prima facie arguable. The requirement is not to raise a sufficiently forceful defence which is likely to succeed at trial; the requirement is to raise at least one issue which ought to be adjudicated at trial.
30. I have no doubt that the draft statement of defence attached to the appellant’s application at the trial court met this standard. As the appellant brought his application without any delay; and as no overreaching or fraudulent conduct was shown on his part, I am of the opinion that the appellant ought to have succeeded in having the default judgment set aside even if the judgment had been regular. As I found above, the judgment was irregular in any event, and the appellant was entitled to a ruling setting it aside ex debito justitiae.
31. The upshot is that I would find this appeal meritorious. I would propose that it be allowed with costs; and that the suit be remanded back to the Environment and Land Court to be heard by a judge other than N.A. Matheka, J., with the orders that the default judgment entered together with any consequential orders flowing therefrom are all set aside and directions given for the re- hearing of the suit on priority basis.

Judgment Of Kiage, JA

32. I have had the advantage of reading in draft the judgment of my learned brother Joel Ngugi, JA and I am in full agreement with his reasoning, the conclusion he reaches, and the order he proposes.
33. As Tuiyott, JA is also in agreement, the final orders in the appeal are as proposed by Joel Ngugi, JA.

Judgment Of Tuiyott, JA

34. I have had the benefit of reading in draft the judgment of Joel Ngugi, JA. I entirely agree with it and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL



JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

