IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 68 OF 2017

BETWEEN

PATRICK OMONDI OPIYO T/A DALLAS PUB.....APPELLANT

AND

SHABAN KEAH.....1ST RESPONDENT

MILSONS MANAGEMENT.....2ND RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Mombasa

(Otieno, J.) dated 7th November, 2016

in

***Mombasa Civil Appeal No. 131 of 2015*)**

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JUDGMENT OF THE COURT

1. This is a second appeal from the Ruling of Hon. **T. Ole Tanchu**, Senior Resident Magistrate **Mombasa in Civil Suit No. 317 of 2009,** in which he dismissed an application by the respondents herein seeking to set aside judgment entered on 18th October, 2011 after the respondents failed to appear in court for formal proof of their case.

2. Aggrieved by the said ruling, the respondents herein appealed to the **High Court vide Civil Appeal No. 131 of 2012**. The learned Judge allowed the appeal and set aside the judgment in question and ordered that the appellants therein file their defence within 15 days from the date of that judgment.

3. The appellant being aggrieved by the order setting aside his judgment moved to this Court on second appeal.

4. As we consider this appeal, it is not lost on us that on second appeal our mandate is restricted to matters of law, and further that we must show deference to the findings of the two counts below, subject to few exceptions. This mandate was clearly spelt out by this Court in **Kenya Breweries Ltd vs. Godfrey Odoyo,** Civil Appeal No. 127 of 2007 where **Onyango Otieno, JA** expressed himself as follows:-

> ***"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."***

This Court in the case of ***M'Iriungu v. R*** **[1983] KLR 455** had occasion to consider the meaning of the expression "question of law", as employed to prescribe the limits of appellate jurisdiction. At page 466, the Court stated:

> ***"In conclusion, we would agree with the views expressed in the English case of Martin v. Glyneed Distributors Ltd that where a***

right of appeal is confined to questions of law only, an appellate Court has loyalty to <u>accept the findings of fact of the lower courts</u> and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law…unless it is apparent that, <u>on the evidence, no reasonable tribunal could have reached that conclusion</u>, which would be the same as holding the decision is bad in law. We, here have resisted the temptation" [Emphasis supplied].

5. Even with that in mind, it is important to revisit, albeit briefly the facts before the trial court in order to determine whether the learned Judge arrived at the wrong conclusions of facts because questions involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record become points of law. (See the Supreme Court decision in **Gatirau Peter Munya vs Dickson Mwenda Githinji and 2 others (2014) eKLR)**.

6. The appellant filed his first plaint on 17th February, 2009. There were doubts expressed as to whether that plaint and the attendant summons to enter appearance were duly served on the respondents. Although no such documents can be traced in the record of appeal before us, there is no doubt that the respondents filed memoranda of appearance, 1st respondent on 26th February, 2009 while the 2nd and 3rd respondents filed theirs on 3rd March, 2009. In our view, bearing in mind that the purpose of service of summons on a defendant along with the plaint is to notify them of the existence of the suit and the time limit within which he/she should respond to the same, the absence of service of the summons to enter appearance in this case does not vitiate the fact that the respondents were notified of the plaint and they filed their memoranda of appearance.

7. In our view the absence of proof of service of the summons was not fatal. Although there is reference to a defence by the learned magistrate in his Ruling, the same is not part of the record before us. There is however on record an amended plaint dated 28th August, 2009. There is no record to show whether that amended plaint was served on the respondents. There does not seem to be a response to the amended plaint.

8. Almost one year later on 11th August, 2010, an application was made seeking reconstruction of the court file, which was allowed on 19th August, 2010. The order allowing the reconstruction was issued on 1st September, 2010 but before then, there was filed on 20th August, 2010 a request for judgment. It is important to note that this request was made almost one year after the amended plaint was filed. The request does not appear to have been served on the respondents. Although interlocutory judgment is said to have been entered pursuant to that request, we do not see that entry in the record. What was filed is a copy of a movement register which shows that Civil Appeal No. 317 of 2009 was placed before a magistrate with the said request. It does not however show the entry of the judgment itself.

9. The suit was therefore fixed for formal proof and the hearing notice for the formal proof was served on the 1st respondent. When the matter came up for hearing on 20th May, 2011, **Mr. Khatib**, counsel on record for the respondents was absent. The court ordered the matter to proceed in his absence. The record does not show whether the respondents were in court or not. The matter was concluded and judgment rendered on 18th October, 2011. It is that judgment that the respondents sought to have set aside vide the notice of motion dated 29th February, 2012. That notice of motion was dismissed by a Ruling dated 7th August, 2012. That is the Ruling the respondents challenged before the High Court vide the memorandum of appeal dated 9th August, 2012, which was premised on six grounds of appeal.

10. The learned Judge **Otieno J,** after hearing the appeal rendered the now impugned judgment on 7th November, 2016. In his judgment, the learned Judge rendered himself as follows:-

"… The trial court ought to have excused the applicant the penalty of being condemned unheard on the merits. There was sufficient material to warrant setting aside and the trial court was wrong in dismissing the applicant's application in that regard. Consequently, I allow this appeal, set aside the trial court's decision dated the 7th August, 2012 and in its place I substitute there (sic) with an order allowing the application on terms that the appellant files a defence to the suit within 15 days from the date of this ruling."

11. The judgment did not go down well with the appellant and so he moved to this Court by way of this second appeal. He relies on six grounds of appeal which we paraphrase in summary as follows. The learned Judge is faulted for holding that there was no request for interlocutory judgment; that there was no service of summons as provided for under **Order 10 Rule 12;** finding that the trial court had not exercised its discretion properly and judiciously; and failing to consider the issue that the respondent had notice of the date of the hearing notice of 20th May, 2012; and ultimately for setting aside the judgment which according to the appellant was a regular judgment.

12. He urged the court to allow the appeal, set aside the judgment of the High Court, and substitute thereof an order dismissing the said appeal. Parties filed submissions as directed by the court with the appellant filing his submissions on 28th February, 2018, and the respondent on 20th March, 2018.

13. At the plenary hearing of the appeal, learned counsel for both parties informed the court that they would rely on the said submissions and list of authorities made no oral highlights.

14. In his submissions **Mr. Muhuni** learned counsel for the appellant reiterated and expounded the grounds of appeal. He posited that the judgment in question was regular as the court had entered interlocutory judgment which the respondents never appealed against. In his view the entry in the file movement register was sufficient proof that interlocutory judgment had been entered and the learned Judge had therefore erred in finding otherwise. He faulted the learned Judge for invalidating the judgment on the basis that service of summons had not been proved in view of the fact that the respondent had responded by filing memorandum of appearance. He cited in support of this position this Court's decision in **<u>Equatorial Commercial Bank Ltd vs. Mohan Sons (K) Ltd</u>** (2012) eKLR. We may however point out at this point that the above authority dealt with defective summons which had nonetheless been duly served on the defendants and not a situation where no summons were served at all. We shall advert to the issue of service of summons later. Counsel further submitted that the learned Judge had no reason to interfere with the exercise of discretion by the trial Magistrate and his interference was in total disregard of the principles set

out in the celebrated case of **Shah vs. Mbogo** (1967) EA 166.

15. In response, learned counsel for the respondent maintained that the High Court had exercised its discretion judiciously bearing in mind the circumstances of the case. Although counsel submitted that there was no request for judgment in the record, we find that there was actually a formal request for interlocutory judgment dated 20th August, 2010 at page 45 of the record of Appeal. On the issue of non-service of summons, counsel maintained that they were not served with summons to enter appearance and that rendered the entire proceedings a nullity and the same ought to have been set aside *ex debito justitiae*. He called in aid this Court's decision in **James Kanyita Nderitu and another vs. Marios Philotas Ghikas & another** (2016) eKLR where the Court expressed itself as follows:-

> ***"If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. 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."***

16. We shall discuss the issue of service of summons in this matter shortly. Counsel for the respondent maintained that the learned Judge was justified in interfering with the trial magistrate's discretion because the magistrate had in arriving at his decision considered irrelevant matters. He urged the Court to dismiss this appeal.

17. We have considered all these issues, the record of appeal and the submissions along with the list of authorities. As stated earlier the law places a caveat on us not to delve into matters of fact on second appeal, and we shall therefore desist from doing so. In our view, two major issues arise for our consideration in this appeal. First and most importantly is the issue of service of summons; and second, is the broad issue of whether the learned Judge erred in interfering with the discretion of the trial magistrate.

18. On the issue of service of summons, as we indicated earlier, the issue here is not whether the summons served on the respondents were defective or not. According to the respondent they were never served with summons to enter appearance. That fact is actually not in dispute. We have gone through the record and indeed there does not appear to have been any summons served on the respondents along with the plaint and interlocutory application for injunction. However, it is not in dispute that the respondents filed their memorandum of appearance in response to the first plaint. They cannot therefore say that they did not know that the appellant had filed a suit against them. As stated earlier, the purpose of summons along with the plaint or other pleading is to notify the sued party that a suit has been filed against them and that they are required to file their defence within a particular time frame failing which the other party would be at liberty to request for judgment in default of filing a defence.

19. Service of summons accords the sued party the opportunity to be heard before any orders are issued against him/her. That is the essence of the rules of natural justice which all legal systems applaud. Where therefore judgment is entered against a party who has not been served and hence not been heard, such judgment will be set aside *ex debito justitiae.* It is nonetheless a different case all together where a party is served with summons which are defective but the said party participates in the proceedings. Such proceedings will not necessarily be set aside on account of the defect in the summons.

20. In this case, the respondents though not served did enter appearance and filed memoranda of defence. The issue of non-service of this summons in our view is inconsequential. However, it is not in doubt that the memoranda of appearance were filed in respect of the original plaint that is on 26th February, 2009 and 3rd March 2009 for the 1st respondent and 2nd and 3rd respondents respectively. There is no evidence whatsoever that the amended plaint was ever served on the respondents. The request for judgment was based on the amended plaint; and the interlocutory judgment, if at all the same was entered, was based on the amended plaint. We say "If at all it was entered" because the record does not bear entry of the said judgment.

21. The copy of the movement register is not sufficient proof that such judgment was entered. With no proof of existence of an interlocutory judgment, then there was no basis for proceeding with the matter by way of formal proof.

Under order 7 Rule 1 (2) stipulates that;

> ***"Where an amended plaint is served on a defendant,***
>
> ***(a) If he has already filed a defence, the defendant may amend his defence; and***
>
> ***(b) The defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after service of the amended plaint whichever is later."*** *(Emphasis supplied).*

22. As stated earlier, there is no evidence on record that the amended plaint was served on the respondents. Any subsequent proceedings or orders predicted on that amended plaint were therefore a nullity and any judgment emanating therefrom would be set aside *ex debito justitiae*.

23.Although the learned Judge appears to have allowed the appeal for different reasons, that is for non-service of summons in the original plaint, our finding is that the amended plaint was not served as required by law and all subsequent proceedings in respect of that amended plaint were therefore a nullity. It does not matter therefore that counsel for the respondents failed to appear for formal proof as those proceedings were a nullity. On that ground alone, it is evident that the learned magistrate was clearly wrong when he entered judgment and proceeded with formal proof. The learned Judge was therefore in order to interfere with the trial court's discretion.

24. We think we have said enough to demonstrate that this appeal lacks merit. We dismiss it with costs to the respondents. The respondents should therefore file their defence within 15 days as ordered by the High Court from the date hereof.

Dated and delivered at Malindi this 24th day of May, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR