IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 215 OF 2008

BETWEEN

PETER GITAHI KAMAITHA …….…..……. APPELLANT

AND

NYERI MUNICIPAL COUNCIL ……...…… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Makhandia, J.) dated 15th October, 2007

in

H.C.C.A No. 130 of 2003)

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JUDGMENT OF THE COURT

1. This is a second appeal from the judgment of the High Court dated 15th October, 2007 wherein the learned Judge (Makhandia, J. as he then was) upheld the Chief Magistrate Court's decision declining to set aside the order dismissing the appellant's suit for non-attendance.

2. The appellant filed suit in the subordinate court against the respondent seeking *inter alia* payment of salary arrears or terminal dues. The respondent entered appearance and filed a statement of defence. When the suit came up for hearing on 24th March, 2003 it was dismissed for non-attendance by the appellant. Thereafter, the appellant filed an application dated 2nd April, 2003 seeking an order setting aside the dismissal of the suit for non-attendance.

3. The appellant deposed that the suit came up for hearing on 10th February, 2003 when it was stood over generally. He learnt about the dismissal on 31st March, 2003 when he visited the registry to find out about the status of the suit. Upon inquiring from his then advocates, Messrs K. Mugambi, he was informed that they had not been served with the hearing notice. The appellant deposed that the affidavit of service indicated that the hearing notice was served upon his advocates in Agip House on 6th floor yet his

advocates' offices were in Bima House, 8th floor until December, 2002 when they shifted to Nyambene House, 2nd Floor. On the one hand, according to the appellant, the secretary by the name Lucy who allegedly received the hearing notice has never worked in his advocates' office. On the other hand, Mr. Amos Kathuri Mugambi who had conduct of the suit on behalf of the appellant deposed that the said Lucy had left employment in December, 2002. Mr. Amos Mugambi also deposed that on the material day he was engaged in the High Court at Nairobi and could not attend the hearing of the suit.

4. The respondent opposed the application by filing grounds of opposition and a replying affidavit. According to the respondent, the appellant's advocates were properly served with the hearing notice. The respondent argued that the application was misconceived and an abuse of the court process.

5. After considering the application on merit, the subordinate court dismissed the same. Aggrieved with the decision, the appellant preferred an appeal in the High Court. The High Court (Makhandia, J. as he then was) vide a judgment dated 15th October, 2007 dismissed the appeal. It is that decision that has provoked this appeal which is based on the following grounds:-

1. ***The learned Judge erred and misdirected himself in failing to set out the facts of law applicable and therefore deliver a reasoned ruling on the contested issue.***

2. ***The learned Judge erred in law for failing to find that under Order V rule 16 of the Civil Procedure Rules, Chapter 21, the learned magistrate ought to have had the deponents examined on oath in the face of conflicting affidavits filed to try and ascertain the truth.***

3. ***The learned Judge erred in law for failing to apply the principles laid down in Karatina Garments Ltd –vs- Nyanarua (1976) KLR 94 by the East African Court of Appeal which was binding on the Court that is;***

    i. In the case of conflicting affidavits filed, it was proper for the deponents to be examined on oath to try and ascertain the truth.

    ii. That the courts should lean towards a policy of decided cases on their merits rather than encourage ex-parte judgments based on procedural technicalities.

4. ***The learned Judge erred in law for relying on the evidence of the process server which had not been tested through cross examination to establish the truth.***

5. ***The learned Judge erred in law and in fact by finding that the physical address/location of the appellant's advocate was immaterial despite the respondent's advocate having omitted to indicate the address on the hearing notice.***

6. ***The learned Judge misdirected himself by stating that in the case of Karatina Garments Ltd-vs-Nyanarua (1976)KLR 94 by East Africa Court of Appeal, the parties were the ones who moved the court to have the deponent examined on oath, while it was the court on its own motion as it was faced with conflicting affidavits.***

6. M/s Onindo, learned counsel for the appellant, submitted that the main issue in this appeal was whether the hearing notice was served upon the appellant's advocate. She argued that the affidavit of service indicated that the appellant's advocate was served with the hearing notice at Agip House yet their offices had never been in the said building. She submitted that the affidavit of service indicated that service was effected upon the firm of Mugambi yet the firm representing the appellant was known as K. Mugambi. Both lower courts erred in finding the above mentioned issues irrelevant. According to M/s Onindo, since there were two conflicting affidavits on the issue of service, the subordinate court ought to have taken fresh evidence. He urged this Court to allow the appeal.

7. Mr. Wahome, learned counsel for the respondent, in opposing the appeal submitted that this being a

second appeal, this Court was restricted to consider issues of law only. The issues raised by the appellant in the appeal were factual. The two lower courts made concurrent findings on these issues of fact. He argued that the appellant never moved the subordinate court to cross examine the process server on his affidavit of service. The issue was being raised for the first time before this Court. Based on the contradictions in the appellant's evidence on the issue of service, the learned Judge exercised his discretion properly by finding in favour of the respondent. He urged the Court to dismiss the appeal.

8. Whether or not to set aside an order obtained in default of non-attendance, as in this case, is a matter of judicial discretion. The learned Judge exercised his discretion by declining to set aside the dismissal order. It is trite that as an appellate Court we cannot interfere with the exercise of that discretion unless we are satisfied that the learned Judge erred in principle or that he acted perversely on the facts. See this Court's decision in ***C.M.C Holdings Ltd. –vs- James Mumo Nzioka – Civil Appeal No. 329 of 2001.***

9. Did the learned Judge properly exercise his discretion? In ***Municipal Council of Meru –vs- National Housing Corporation & 54 others*** , this Court aptly observed that:-

> ***"One cannot answer this question without a consideration that the discretion of the Court to set aside default judgment is unfettered and the primary concern of the Court is to do justice between the parties; that the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice."***

See ***Shah –vs- Mbogo (1967) EA 116.***

Further, this Court in ***Municipal Council of Meru –vs- National Housing Corporation & 54 others (supra)*** held,

> ***"In exercising the discretion, the Court usually considers the reason, if any, given for the default and the merits or otherwise of the case of the party against whom the judgment was entered but is not limited to only those considerations"***

The reason advanced by the appellant for non-attendance was that the hearing notice was not served upon his then advocate.

10. ***Order V rule 16*** of the former ***Civil Procedure Rules*** provided:-

> ***"On any allegation that a summon 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 on his proceedings, and may make such further enquiry 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."***

In our view the said provision does not make it mandatory for the court to examine the process server on oath every time there is an allegation by party that he/she was not served. What the provisions obligate a court to do is to consider the allegation and the evidence and determine if there was proper service. This examination can be through affidavit evidence or through cross examination of the parties on the issue of service. This Court in ***Karatina Garments Ltd. –vs- Nyanarua (1976) KLR 94*** held,

> ***"We are of the view that in a case like this one where the respondent denied having been served with a summons, it was proper for the court to inquire into this aspect of the matter; and in the face of the conflicting affidavits filed, it was again proper for the deponents to be examined on oath to try and ascertain the truth."***

11. From the above case, it is clear that a court in considering whether there was indeed proper service ought to examine the evidence and in the face of conflicting affidavits the court is obligated to examine

the deponents under oath. The ***Karatina Garments Ltd case*** is distinguishable from this case. In that in the said case there were conflicting affidavits on the issue of service while in this case the affidavit evidence adduced by the appellant on the issue of service was full of contradictions and gave credence to the respondent's contention that the hearing notice was served. The appellant and Mr. Amos Kathuri Mugambi, who had conduct of the suit on behalf of the appellant, swore affidavits in support of the allegation that the hearing notice was not served. We concur with the following observations by the learned Judge:-

> ***"According to the affidavit of service, the hearing notice was served on one Lucy, a secretary in the employment of K. Mugambi & Co. Advocates. Whereas in his further supporting affidavit, Amos Kathuri Mugambi Esq. admits having at some time had an employee by that name. Mr. Ng'ang'a on the other hand, stated in his submissions during the hearing of the application that the alleged secretary had never worked for Messrs K. Mugambi & Co. Advocates. Indeed even the appellant in his supporting affidavit denied that his advocate had an employee by that name. The learned magistrate read mischief in this apparent contradiction. He felt that and rightly so in my view that the court was not being told the truth. There is yet another element of contradiction. The advocate deponed that he was not served with the hearing notice yet in the same breath depones that he 'was having a matter in High Court Nairobi HCCC No. 2739 of 1985 on 24th March, 2003. So I could not attend the court at Nyeri…' Does this averment not suggest that the appellant's counsel was actually aware of the date of the hearing but failed to turn up because he had another matter in Nairobi?"***

11. Based on the foregoing contradictions in the appellant's affidavit evidence, the subordinate court could not on its own motion order the process server to be examined under oath. This is because the learned magistrate was convinced and rightly so that the appellant's advocate was served with the hearing notice.

12. We also concur with the learned Judge that the reference in the affidavit of service that the appellant's advocates' offices were at Agip House might have been a mistake and or inadvertent error. Why do we say so? Both lower courts scrutinized the hearing notice annexed to the affidavit of service and noted that the appellant's advocates stamp was fixed on the reverse side. The appellant's advocates never alleged that the said stamp was a forgery. This to us demonstrated that the appellant's advocates were served with the hearing notice. We find that the said error did not in any way alter the fact that the hearing notice was served.

13. The upshot of the foregoing is that we see no reason to interfere with the concurrent findings of the two lower courts that the hearing notice was served upon the appellant's advocate. We also find no reason to interfere with the discretion exercised by the subordinate court in declining to set aside the dismissal order. Consequently, the appeal herein lacks merit and is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 22nd day of July, 2014.

ALNASHIR VISRAM

…….

JUDGE OF APPEAL

MARTHA KOOME

……..

JUDGE OF APPEAL

J. OTIENO-ODEK

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR