



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 164 of 2008

FRANCIS NDICHU GATHOGO.....APPELLANT

AND

1. MADAN MOHAN AGGARWAL T/A ESSO MOTORS SALE & SERVICES STATION

2. SAMWEL KARIMI MUBIA.....RESPONDENTS

(An appeal from Ruling and Order of the High Court of Kenya at Nyeri (Kasango, J.) dated 23rd June, 2008

in

HCCC NO.153 OF 2001

JUDGMENT OF THE COURT

By a plaint filed by the respondents and dated 29th August, 2001 at the High Court in Nyeri, they sued Samwel Karimi Mubia (1st defendant) and Francis Ndichu Gathogo (2nd defendant) the appellant in this appeal. The appellant was sued as a guarantor to the 1st defendant for the recovery of a sum of Kshs.1,489,975/= which was in respect of a hire purchase loan advanced to the 1st defendant by the respondents. An ex parte interlocutory judgment was obtained against the appellant thereby prompting him to file an application by way of a chamber summons on 29th January, 2007. In that application, the applicant sought for an order of stay of execution and the setting aside of the ex-parte interlocutory judgment for the sum of Kshs.1,405,975/= against him. That application was heard by Kasango, J. and by a ruling dated 23rd June, 2008, the application was dismissed.

That is the ruling that has given rise to this appeal. By his memorandum of appeal, the appellant has raised a total of 7 grounds to wit:

1. The learned Judge erred in law and fact in not finding that there were material adequate to warrant exercise of discretion in favour of the appellant.

2. The learned Judge erred in law and fact in not applying the principles established in setting aside an ex parte judgment.

3. The learned Judge erred in law and fact in not finding that the appellant was not served with summons as prescribed by the rules and that there was no proper and regular affidavit of service to demonstrate service.

4. The learned Judge erred in law and fact in not finding that the proceedings were a nullity as the 1st defendant died way back on 21/11/01 before the Judgment was entered against defendant and no legal representative was appointed.

5. The learned Judge erred in law and fact in not finding that the appellant had a very strong defence as he never signed the guarantee alleged.

6. The learned Judge erred in law and fact in not considering the appellant's case as presented by his 2 affidavits and submissions by the advocate.

7. The entire decision is unfair and inequitable in all the circumstances of the case.

During the arguments of this appeal, Mr. C. Kariuki learned counsel for the appellant combined all the arguments. He submitted that the appellant was sued as a guarantor; that it was not contested that the respondents repossessed the subject motor vehicle, prior to the filing of the suit; that however, the respondents did not indicate the value of the motor vehicle that was returned as against the outstanding loan, which was a triable issue raised in the intended defence.

Mr. Kariuki further submitted that the appellant had annexed a draft defence and counter claim in which he denied having signed the guarantee; that the respondent did not challenge that denial as they did not produce a copy of the alleged guarantee; and that a second vehicle belonging to the appellant was also attached and sold by the 1st respondent which was a substantial issue dismissed by the learned Judge. Lastly, a judgment was obtained ex-parte, the appellant raised an issue of service and cited authorities to show that the court had unfettered discretion to set aside ex-parte orders in the interest of substantive justice, especially where a party was not heard in a matter, but the learned Judge was not convinced.

This appeal was opposed and very strong arguments were put forward by Mr. Mahan, learned counsel for the respondent. He submitted that the learned Judge properly evaluated the matters that arose from the application to set aside what he regarded as a regular judgment. The issue of service was dealt with and the Judge made a finding that service was properly effected. A notice of appointment was filed by a firm of advocates for the defendants. The appellant also did not deny there was service nor did he deny he was a guarantor. The application to set aside the judgment was brought after an inordinate delay of two years, thus the learned Judge considered all the circumstances and arrived at the conclusion that the application did not merit the exercise of her discretion. Counsel urged us to dismiss the appeal.

This appeal raises the issue of whether the learned Judge properly exercised her discretion when she dismissed the appellant's application to set aside the ex-parte judgment. The principles that guide a Judge while exercising her discretion on whether or not to set aside an ex-parte judgment have no limit or restrictions except that the Judge should be concerned that at the end of the day, justice was done to the parties.

In *Shah v Mbogo [1967] EA 116* Harris J. said:

“...applying the principle that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”

Also a court should not interfere with the exercise of the discretion of a Judge unless satisfied that the Judge in exercising his or her discretion misdirected himself or herself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was wrong in the exercise of discretion and as a result there was injustice.

See *Sir Newbold P in Mbogo v Shah [1968] EA 93* at 96.

Was the appellant deliberately trying to obstruct or delay the cause of justice? The thrust of the appellant's application before the learned Judge as we understand it, raised two important issues; service of summons as demonstrated by an affidavit of service whose legality was challenged; and the appellant's intended defence and counter-claim which he contended raised triable issues and he was therefore denied his day in court.

A right to a hearing is a fundamental one and it is well protected in our Constitution as the foundation of our laws, the Appellate Jurisdiction Act and also the Civil Procedure Act. This is how the learned Judge dwelt with these two issues in part of her ruling:

“The second defendant merely alleged that he was not served. He did not seek to cross-examine the process server. The process server in addition to swearing the affidavit of service swore a further affidavit detailing the identity of the person who pointed out the second defendant to him. That affidavit considered together with the fact that a notice of appointment of advocates was filed on behalf of the second defendant on 6th December, 2006 (sic). I make a finding that the second defendant was served with the summons and plaint. In view of that finding (sic) in need to consider whether the second defendant has raised a prima facie defence. The second defendant's defence mostly contains denial of the plaintiff's claim. Additionally the second defendant counter claimed that the 1st defendant's motor vehicle was repossessed by the plaintiff. In making that allegation the second defendant alleged that the plaintiff's claim had been satisfied by that attachment. In my view such as allegation cannot necessary lead to the setting aside of judgment. It is essentially raising a question of accounts....”

We are of the view that a serious issue was raised about service and the competency of the affidavit of service that did not indicate where the 2nd defendant was served or who pointed him out. That information is not presented in the printed affidavit of service that was filed in the matter by Davis Wachira on 19th January, 2005. We have not come across a further affidavit by the process server that is referred to by the Judge in her ruling but an averment in the replying affidavit by Mr. Madan Aggarwal on paragraph 4 where he depones:

“That further, I have been informed that Mr. Davis Wachira a process server with Bali Sharma & Bali Sharma Advocate Nyeri filed the return of service in the Court on 18th January, 2005, wherein appellant was served on 7th December, 2004.”

The affidavit of service lacked material information and failed to meet the threshold of the provisions of Order 5 Rule 15 of the Civil Procedure Rules. This affidavit of service was challenged and although counsel did not summon the process server for cross-examination, we are of the view there was a substantive issue that touched on the validity of service which went to the root of the matter.

The second issue is the one on the triable issues raised in the defence which are twofold: The appellant denied having signed the guarantee and raised the issue of settlement of decretal sum as a result of attachment of his motor vehicle and the repossession of the subject vehicle prior to the filing of the suit.

The first issue on the signing of the guarantee was dismissed as a mere denial although the respondents did not annex a copy of the guarantee form or agreement that was signed by the appellant. That is clearly a misdirection. However, we do not wish to go further, on this issue so as not to prejudice the mind of the trial court. We find there were triable issues raised, and the appellant should be given his day in court. On the issue of delay, we agree with Mr. Mahan that there was a delay of two years. However, the appellant claims that he learnt about this case after execution had started and after a third party had failed to forestall it through objection proceedings. For reasons that we have already expressed our reservations about the validity of service, we wish to say no more on the delay.

In the upshot, we allow the appeal and set aside the ruling dated 23rd June, 2008.

The ex-parte judgment is set aside as against the appellant and the appellant is given 30 days within which to file his defence from the date of delivery of this Judgment.

The costs of this application shall abide the outcome of the suit before the High Court.

Dated and delivered at Nyeri this 6th day of February, 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

R. N. NAMBUYE

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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