Mountain Top Institute Company Limited v Kimani (Appeal E013 of 2021) [2022] KEELRC 13558 (KLR) (15 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13558 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

APPEAL E013 OF 2021

ON MAKAU, J

DECEMBER 15, 2022

BETWEEN

MOUNTAIN TOP INSTITUTE COMPANY LIMITED .... APPELLANT

AND

DIONICIO MAINA KIMANI .... RESPONDENT

(Being an appeal from the ruling delivered on 30th September 2021, by Honourable Nelly W. Kariuki (Principal Magistrate) in Nyeri Chief Magistrate's ELRC Case No. 17 of 2020)

JUDGMENT

Introduction

1. The respondent was employed by the appellant from August 1, 2008 to April 21, 2020 as a day security guard. His salary was Kshs 13,500 per month minus house allowance. On April 21, 2020, his services were terminated by the appellant.

2. The respondent brought suit on June 5, 2020 alleging that the appellant had summarily dismissed him for no justifiable reason and without prior notice or hearing as required by the law. Therefore he prayed for compensatory damages plus terminal benefits amounting to Kshs 435,850, certificate of service, costs and interest.

3. Allegedly, service of summons was effected upon the appellant but he failed to enter appearance and the suit proceeded by formal proof. After considering the unchallenged evidence, the trial court (Hon Kariuki – PM) entered judgment on July 8, 2021 granting all the prayers sought by the respondent including an award of Kshs 435,850 as compensation plus terminal damages.

4. On July 27, 2021 warrants of attachment were issued to Mbusera Auctioneers to execute the decree against the appellant and on August 2, 2020, the appellant filed application dated even date under certificate of urgency, seeking stay of execution and setting aside of the *ex parte* hearing and the

judgment entered on July 8, 2021. The gist of the application was that failure to enter appearance was due to lack of service of summons to enter appearance.

5. The appellant further contended that the time when the summons were allegedly served, going by the affidavit of service, was during the Covid-19 pandemic when the Government had closed all the learning institutions and restricted movement of people. The appellant contended that the day of the alleged service was even on a Saturday and the institution was closed. The appellant sought to cross-examine the process server but it was not allowed.

6. The respondent opposed the application and after considering the material presented by the parties the court (Hon Kariuki, PM) dismissed the application vide the ruling delivered on September 30, 2021 after being satisfied that proper service of summons was made upon the appellant on June 6, 2020.

7. Aggrieved by the said ruling, the appellant filed a memorandum of appeal on October 22, 2021 challenging the entire ruling on 12 grounds of appeal. However the said grounds were consolidated to 6 in the appellant's written submissions filed to dispose of the appeal. The 6 grounds were framed as follows;-

    1. Whether the learned magistrate erred in law and in fact by ruling that there was proper service of the summons.

    2. Whether the learned magistrate erred in law and fact by disregarding the appellant's uncontroverted evidence that the appellant's company had been closed during the period of March to June 2020.

    3. Whether the learned magistrate erred in fact and in law by driving the appellant herein from the seat of justice and/or denying the appellant an opportunity to be heard based on technicalities.

    4. Whether the learned magistrate erred in law and fact by failing to set aside the judgment entered on the July 8, 2021 as a matter of right.

    5. Whether the learned magistrate erred in fact and in law by failing to exercise her discretion judiciously.

    6. Whether the learned magistrate erred in fact and in law by dismissing the applicant's notice of motion dated August 2, 2021 which was against the weight of the evidence before the court, the relevant facts and the applicable law.

8. As regards the first ground, the appellant reiterated that as at the time of the alleged service of summons, its office was closed in line with Government Covid-19 guidelines which had closed down all learning institutions and restricted movement of people.

9. It is further submitted that the advocate who went to serve was not specific on whom he served with summons to enter appearance because in his affidavit of service he says he served a manager and in the next paragraph he states that he served a receptionist. It was submitted for the appellant that service upon a company through a receptionist was defective and contrary to order 5 rule 3 of the *Civil Procedure Rules* which expressly provides for the procedure of serving summons on a corporation like the appellant.

10. It was further submitted that the name of the person who was allegedly served was not mentioned in the affidavit of service and in any case being a receptionist, she would not fall within the meaning of a principal officer of the company. For emphasis, reliance was placed on the case of *Agigreen Consulting Corp Limited v National Irrigation Board* [2020] eKLR where it was held that an affidavit of service must prima facie disclose proper and actual service for it to yield to a regular judgment.

11. The appellant urged the court to allow the appeal because the judgment herein was irregular since there was no proper service of summons to enter appearance on the company as required by order 5 rule 3(a) of the *Civil Procedure Rules*. Reliance was placed on *Elizabeth Kavere & another v Lilian Atho & another* [2020] eKLR where the court held that an irregular judgment, that is one which is obtained without service of summons, should be set aside *ex debito justitiae*.

12. The appellant further submitted that the trial court erred by dismissing the application to set aside the exparte judgment against the weight of the evidence before the court, the relevant facts and the applicable law. It was submitted that the appellant has a defence which raises triable issues and ought to have its day in court to be heard.

13. In response the respondent submitted on two issues namely, whether the *ex parte* judgment delivered on July 8, 2021 was regular, and whether the trial court erred in dismissing the notice of motion dated August 2, 2021.

14. As regards the first issue, the respondent submitted that the judgment entered on July 8, 2021 was regular because the appellant was properly served with summons to enter appearance and the pleadings. It was submitted that the appellant admitted service in paragraph 7 of the supporting affidavit.

15. The respondent submitted that the affidavit of service dated December 15, 2021 (page 42 of the record of appeal) in paragraphs 3 and 6 describes how, where and to whom service was effected. It contended that the service was on a manager of the appellant and the place of service has not been contested. It was also argued that service of show cause and warrants of attachment were served using similar mode on July 27, 2021.

16. It was further submitted that the appellant has not tendered any evidence like a notice to the staff or students about the closure of the institution due to Covid-19 pandemic. The respondent contended that the appellant was properly served under order 5 rule 15 of the *Civil Procedure Rules* and rule 11 of the *ELRC Procedure Rules* and urged the court not to interfere with the decision of the trial court.

17. For emphasis, reliance was placed on the case of *National Bank of Kenya v Puntland Agencies Limited & 2 others* [2006] eKLR where it was held that once service is denied by a defendant the evidential burden shifts to the plaintiff to prove that service was in fact done. Further reliance was placed on the case of *K-Rep Bank v Segment Distributors Ltd* [2017] eKLR where the court held that a default judgment is regular if it is entered after summons and plaint are duly served.

18. As regards the second issue, it was submitted that the trial court did not err by dismissing the notice of motion dated August 2, 2021 because the court considered the affidavit of service and satisfied herself that a representative of the appellant was duly served with summons in two occasions. Furthermore the appellant did not dispute its physical address and the fact that its representative was served and received the summons.

19. It was further submitted that the appellant did not annex a draft defence to the application dated August 2, 2021 and as such there was no demonstration of a defence with triable issues. It was argued that a regular judgment can only be set aside if there is a defence that raises triable issues. To fortify the foregoing submissions, reliance was placed on the case of *Jondu Enterprises Limited v Spectre International* [2019] eKLR, *Thomas Odhiambo Okello v Peter Wanyama* [2019] eKLR, *Abdalla Muhamed & another v Mbarak Shoka* [1990] eKLR and *Peter v East Africa Cargo Services Ltd* [1974] EA 75 where the court emphasized that a regular judgment would not be set aside unless there is a defence that raises triable issues.

20. For reasons above the respondent urged the court to decline the appeal since the dismissed application was only a knee jerk reaction intended to deny him enjoyment of the fruits of his regular judgment. He also prayed for costs of the appeal.

Analysis and Determination

21. Having considered the record of appeal and the rival submissions I must state that my mandate in this matter, being a first appeal is to reevaluate the evidence on record in order to arrive at my own independent findings and conclusions. The issues for determination herein are;

    a. Whether the appellant was served with summons to enter appearance before the exparte hearing and judgment was entered.

    b. Whether the exparte hearing and judgment should be set aside.

    c. Who pays costs of the appeal.

Service of Summons

22. The appellant denies service of summons to enter appearance and avers that the alleged service was improperly effected on a person who was not a principal officer during Covid-19 pandemic and that led to the exparte judgment. However, the respondent maintains that the service was properly done on a manager of the appellant and therefore the judgment entered was regular and it should not be interfered with.

23. The relevant law to consider is rule 12 of the *ELRC Procedure Rules* which provides that;-

    > " (1) Service on a corporate body may be effected –
    >
    > a. On the secretary, director or any other principal officer of the corporate body."

24. The foregoing Rule is similar to provisions of order 5 rule (3)(a) of the *Civil Procedure Rules* cited by both parties herein. The said two provisions give personal service on a corporate body the first priority. It is also clear that a process server has only 3 persons to serve on behalf of a corporate body namely; the secretary, director or any other principal officer of the corporation.

25. I have perused the affidavit of service sworn by Mr Joshua Kiboi Advocate. Paragraph 3 states that he went to serve in the company of the respondent (claimant) who obviously ought to have known the principal officers of the appellant. It is deposed that the counsel was directed to the manager's office and at the reception, he met a lady who introduced herself as the manager and she accepted service of summons to enter appearance and the pleadings but declined to sign.

26. The name of the lady has not been stated and one wonders why, if at all the claimant had indeed accompanied the counsel to serve the summons. Paragraph 4 of the affidavit of service then states:

    > " That the said receptionist was not known to me before service. She was only pointed out to me by the claimant who was well known to her."

27. The burden of prove remains with the respondent (claimant) to prove that service was done on a principal officer of the appellant company. I have perused his replying affidavit dated 7th August, 2021 and noted that he did not disclose the name of the officer who he witnessed being served.

28. In paragraph 6 of replying affidavit, he stated that;

> "That the applicant is not being candid with this honourable court as they were duly served with summons to enter appearance on June 6, 2020, which were [sic] summon were duly received by the applicant's representative."

29. The conclusion I draw from the affidavit of service and the subsequent replying affidavit by the respondent is that either the summons were not served at all or they were served on the office receptionist whose name has been withheld from the court deliberately in order to defeat the course of justice. Therefore I find and hold that the exparte judgment entered on September 30, 2021 was irregular.

30. In the case of *James Kanyiita Nderitu & another v Marios Philota Ghikas & another* [2016] eKLR, the Court of Appeal held that;-

> "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 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 issues or whether there has been inordinate delay in applying to set aside 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."

31. Having found that the judgment herein was irregular because the appellant was not served with summons to enter appearance I proceed to set aside the same as guided by the Court of Appeal in the above binding precedent. In doing so, I must observe that the trial court erred in law and fact in dismissing the application dated August 2, 2021. Considering the affidavit of service and the replying affidavit, it is clear that her ruling was not based on evidence.

32. For the reasons aforementioned, and guided by precedent, I allow the appeal in the following terms;-

    a. The ruling of the trial court dated September 30, 2021 is set aside.

    b. Order 5 of the notice of motion dated August 2, 2021 is granted.

    c. Costs of the appeal shall be paid by the respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF DECEMBER, 2022.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on April 15, 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with rule 28 (3) of the *ELRC*

Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE