



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

APPEAL NO. 21 OF 2015

(Formerly HCA NO. 149 OF 2011 at Mombasa)

**(Being an appeal from the ruling of the Hon. Mr. M. Kizito, Senior Resident Magistrate,
made on 26.07.2011 in SRMCC No. 540 of 2006 at Mombasa)**

ZOIS (EPZ) LIMITED.....APPELLANT

- VERSUS -

PAUL MZEE MALONZA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th November, 2021)

JUDGMENT

The appellant filed the memorandum of appeal on 16.08.2011 through A.B. Patel & Patel Advocates. The appeal is against the ruling by Hon. M. Kizito, SRM delivered on 26.07.2011 and upon the grounds that the learned trial Magistrate erred in law and in fact by:

- 1) Holding that the defendant's application dated 28.03.2011 had no merits and dismissed the same.
- 2) Failing to give a proper or any reason for holding that the defendant's application had no merit.
- 3) Failing to appreciate the legal provisions under which the defendant's application was premised.
- 4) Ordering the defendant to file a defence when in fact, no valid summons to enter appearance had been served upon it.
- 5) Failing to appreciate or hold that the court has no jurisdiction or proceed to hear and determine the suit or order the defendant to file a defence in absence of service of a valid summons to enter appearance.
- 6) Failing to appreciate the significance of the various facts that emerged in the matter; to consider or properly consider the matter on the evidence before him or based on the relevant law; and to make a proper finding.
- 7) Disallowing the defendant's application on the basis that it ought to have filed a defence to show that it had a meritorious defence in the matter.

The appellant prayed that:

- 1) The appeal be allowed and the learned Senior Resident Magistrate's order dated 26.07.2011 contained in his ruling be set aside.
- 2) The appellant's chamber summons dated 28.03.2011 in the Senior Resident Magistrate's Court Civil Case No. 540 of 2006 be allowed as prayed therein.

The background to the appeal is as follows. The respondent filed SRMCC No. 540 of 2006 against the appellant by the plaint dated 16.01.2006 drawn by J.A. Abuodha & Company Advocates. It was an injury claim arising on 25.02.2004 by the respondent for general damages, Kshs. 2,000.00, costs of the suit and interest at court rates. The summons to enter appearance were issued dated 10.02.2006. The

affidavit of service filed on 04.03.2010 was sworn by Stephen Muli, a process server of the court. He stated that the respondent's counsel gave him on 13.02.2010 the summons to enter appearance and a hard copy of the plaint to serve upon the appellants. That on the same date he proceeded to the appellant's offices at Kikambala along Mombasa – Malindi Road and personally served the said summons and a copy of the plaint upon Mr. Zubeda the manager who was at the time of service not being personally known to the process server but being pointed out by the receptionist – he accepted service but declined to sign at the back-face and now returned to court duly served. On 04.03.2010 the respondent requested for interlocutory judgment under Order IXA Rule 3, 4, 5, and 6 of the Civil Procedure Rules on account that having been served, the appellant had failed to enter appearance or to file a defence. The interlocutory judgment was entered the same 04.03.2010. On 06.04.2010 and 08.07.2010 the matter proceeded to formal proof *ex-parte*. The judgment was delivered on 16.09.2010 for the respondent against the appellant for payment of Kshs. 74, 100.00 plus costs and interest.

By an application dated 02.02.2011 the appellant applied that the judgment entered herein on 16.09.2010 be set aside together with the consequential decree and orders. The application was allowed by consent of the parties recorded in Court on 24.03.2011 with a further consent order that the appellant to file a defence and to serve it upon the plaintiff within 14 days and mention on 14.04.2011 to confirm compliance.

The appellant did not file a defence and instead filed an urgent application dated 28.03.2011 on account that the summons to enter appearance were invalid at the time of service upon the defendant. The application was under Section 3A & 63 of the Civil Procedure Act and Order 2 Rule 15(1) (b) & (d) and Order 5 Rule 2(i) & (7) of the Civil Procedure Rules. The appellant prayed that the plaint be struck out and the suit dismissed with costs. On 26.07.2011 the application came up for hearing and counsel for the respondent herein was absent and the counsel for the appellant submitted that the application had been served but not opposed and prayed that it be allowed in its entirety. The trial Senior Resident Magistrate then made a short ruling thus, **“I have noticed from the court record that the defendant has not filed any defence herein. It is therefore clear that if the present application is allowed, the defendant will unfairly benefit from the orders sought therein as it has not disputed the plaintiff's claim against it. I thus find that the defendant is not entitled to the orders sought in the application dated 29.03.2011. Consequently, I dismiss the application with costs to the plaintiff.”** That short ruling is subject of the present appeal.

The parties filed their respective submissions. The Court has considered all the material on record. The appellant's counsel made oral submissions as well by way of highlights. It was highlighted that the issues in the appeal are basically two. First, whether the summons to enter appearance was valid as at the time of service. The summons had been issued on 10.02.2006 and served on 13.02.2010, over four years later whereas the summons had already lapsed on 10.02.2007 under Order 5 Rule 2 of the Civil Procedure Rules. Second, it was submitted that the summons had been served upon the wrong person. The appellant at paragraph 6 of the supporting affidavit of Zuber Osman Elias sworn on 28.03.2011 and annexed on the application had stated thus:

- a) Neither the said Osman (appellant's accountant) or anybody else was served with the summons to enter appearance herein whether as alleged in the affidavit of service or at any other time.
- b) The appellant has not owned offices at Kikambala along Mombasa-Malindi Road at any given time.
- c) The appellant's offices are located along Jomo Kenyatta Avenue on Talab Building and have always been so and at no time has the appellant conducted business anywhere apart from the above stated offices.
- d) The appellant has no employee known as Mr. Zubeda as alleged in the affidavit of service.
- e) The summons to enter appearance had expired and were of no consequence as they were null and void and the proceedings therefore a nullity.

For the respondent it was submitted that the consent order was that the judgment had been set aside and the appellant was to file a defence. It was submitted that all the grounds in the appeal amounted to only one ground that the Magistrate erred and further, **“There is no error here a consent order was recorded. It was the advocate's record who recorded and there was no reason why the defence has not been filed today. There is no review on the said consent. We submit that the appeal by the application lacks merits and urge the court to dismiss it with costs.”**

The Court has considered all the material on record and the parties' respective submissions and finds as follows.

First, the respondent did not file a replying affidavit to dispute that the summons and the plaint had not been served at all as the affidavit of service referred to offices and one Mr. Zubeda being strangers to the appellant. The Court finds that the appellant by paragraph 6 of the supporting affidavit of Zuber Osman Elias sworn on 28.03.2011 and annexed on the application has established that the summons and the plaint, even belatedly, had not been served at all and the summons as purportedly served had already lapsed as at the time of the service as submitted for the appellant. Now, Order 5 Rule 1(6) of the Civil Procedure Rules states that every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate. The Court finds that as at the time the interlocutory judgment was entered, the suit heard *ex-parte* and judgment and decree entered, the parties recorded consent to set aside the judgment and decree and the defence to be filed, the suit had already abated in terms of rule Order 5 Rule 1(6) of the Civil Procedure Rules. The Court therefore returns that the learned trial Magistrate erred when it was ruled that the appellant had failed to file a defence and the application therefore was liable for dismissal. In any event, the respondent had provided no alleged reason for the belated alleged and purported service of summons over four-years after the summons had been issued and the Court finds that in the circumstances, the trial court erred in failing to consider the applicable provisions of Order 5 Rule 2 (7) of the Civil Procedure Rules thus, **“Where no application has been made under sub-rule (2) the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons.”** The Court returns that in view that the suit had been liable for abatement or dismissal as found, but in further view of the consent to file the defence, the appellant was entitled to apply that the suit is dismissed or struck out in the circumstances. The Court finds that the consent order to file a defence did not in any manner impair the fact that the suit was so liable to abatement or dismissal. The appeal will therefore succeed but in view of the appellant's mix-up in recording the consent then realising the

summons had lapsed and not been properly served, each party will bear own costs of the suit below and the appeal.

In conclusion the appeal is hereby allowed with orders:

- 1) The learned Senior Resident Magistrate's ruling and order dated 26.07.2011 and all processes flowing therefrom are hereby set aside.
- 2) The appellant's notice of motion dated 28.03.2011 in the Senior Resident Magistrate's Court Civil Case No. 540 of 2006 at Mombasa is hereby allowed with orders that the respondent's suit therein is struck out and the suit dismissed.
- 3) Parties to bear own costs of the suit below and the appeal.

Signed, dated and delivered by video-link and in court at **Mombasa** this **Friday 26th November, 2021**.

BYRAM ONGAYA

JUDGE