Saroya v Dass (Civil Appeal E041 of 2023) [2024] KEHC 9953 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 9953 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E041 OF 2023

DKN MAGARE, J

JUNE 27, 2024

BETWEEN

ANAM BASHIR SAROYA ..... APPELLANT

AND

RUKIYA DASS ..... RESPONDENT

JUDGMENT

1. This is an appeal from the ruling and order of the Hon. J.B. Kalo given on 26/1/2023. The Appellant was the defendant in the lower court.
2. The appellant filed a Memorandum of Appeal setting the following grounds:-
    a. The trial court erred in law and fact in finding that the Appellant was served with the summons to enter appearance.
    b. The trial court erred in law and fact in misapprehending the testimony of the Process Server.
    c. The trial court erred in law and fact in disregarding the materials filed to the effect that the lower court matter ought to have been considered settled.

Pleadings

3. The impugned ruling arose from an application dated 14th December, 2021 that sought to set aside the proceedings and ex-parte judgment dated 8th October, 2021.
4. The grounds of the application were that the Appellant was not properly served with the summons to enter appearance.
5. The Respondent filed suit on 17/7/2020 claiming for damages for defamation and paid Kshs.3,350/-. Summons were signed and issued. There was a request for judgment on 28/8/2020 on the basis of an affidavit of service dated 18/8/2020. The appellant was allegedly served at 6.30 p.m. on 24/7/2020.

6. There was an amendment made after filing of the request for judgment introducing particulars. The Appellant sought to set aside the judgment entered herein and be granted leave to defend. The same was opposed.

7. It was also contended that the Appellant was condemned without a hearing having not been served with the summons to enter appearance.

8. The Appellant consequently sought stay of execution of the said judgment and leave to defend the suit.

9. Vide the Ruling of the trial court dated 26th January, 2023 the court found that the summons were properly served and dismissed the application.

10. Aggrieved, the Appellant who was defendant lodged this appeal.

Submissions

11. The Appellant submitted that the court erred in finding proper service of summons to enter appearance when the Process Server admitted to having no prior knowledge of the defendant's whereabouts for the purposes of personal service.

12. It was the case of the Appellant that in dismissing the application dated 14th December 2021, the court denied the right to a fair hearing to the Appellant in the main suit.

13. It was submitted that the court ought to have set aside the proceedings and allowed the Appellant a chance to defend the suit now that the summons to enter appearance were not properly served.

14. On the part of the Respondent, it was submitted that the court was correct in dismissing the application since there was evidence that the summons to enter appearance were properly served following which the Appellant failed to enter appearance or file defence within the stipulated time.

15. The parties cited a number of authorities which I have considered in sufficient detail.

Analysis

16. The issue that falls for this court's determination is whether the trial court erred in dismissing the Appellant's application dated 14th December 2021.

17. This being a first appeal, the court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy.

18. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

19. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the judges in their usual gusto, held as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

20. The court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR , the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

21. Therefore, the trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial court are consistent with the evidence generally, this court should not interfere with the same.

22. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

23. The court notes that the Amended Plaint was filed on 23/3/2021, 8 months after receipt and entry of judgment. The new claim introduced major details that were not in the plaint. Witness statements were also filed on 23/3/2021 containing the new claim. These documents were not served upon the Appellant.

24. A list of documents were filed on 23/3/2021. They appear to be downloads from internet or phone. None of them comply with Section 106(B)(4) of the *Evidence Act*. The Section provides as follows.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following-

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection(2)relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate).shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities."

25. The submissions filed on 19/7/2021 are not based on the amended plaint. Thereafter Hon. Kyambia F, Chief Magistrate heard the matter and delivered judgment on 8/10/2021 awarding Kshs.2,000,000/- to the Respondent.

26. On 14/12/2021 the appellant filed a notice of appointment. They filed an application dated 14/12/2021 seeking to set aside the warrants and proceedings and judgment and leave to defend. The Respondent's advocates were served.

27. The appellant filed a Supplementary Affidavit annexing a copy of the draft defence. He stated that he filed a defence being that: -

a. He is Anam Farua Raza

b. His name on Facebook is Anam Fanuz not Samara Khan.

28. The Respondent filed submissions on 18/3/22. The Appellant filed submissions on 4/3/2022. The Appellant filed submissions on 9/12/22 subsequent to cross-examination. There was extension of time to file documents. Subsequently, the court extended time for complying with conditions for stay. This resulted in another appeal being filed by the Respondent as No. 207 of 2023 in which I am delivering judgment simultaneously with this one.

29. The question in my mind is what blinded everyone to the time that was before their very own eyes. The Process Server did not serve process despite the protestations. Secondly even if he had served, the documents he served were not the basis of entry of judgment. The documents filed and purportedly served did not have particulars that are mandatory. Ex-parte judgment had been entered on 28/8/2020. There was no leave to amend the plaint after judgment had been entered. Once the amendment was done, then service of the same should have been effected.

30. The document dated 23/3/2021 purporting to be an amended plaint was thus a nullity. It cannot form basis for a judgment. There could be no judgment on the basis of this document. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

31. Therefore, it is the finding of this court that the earlier plaint which was purporting to be served did not meet standards for defamation. There is no judgment on the basis of the plaint that is alleged to have been served. The plaint filed did not disclose any cause of action.

32. The plaint as filed contravened Order 2 rule 7. The same provides as follows:-

> "7.
>
> (1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.
>
> (2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.
>
> (3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his plaint give particulars of the facts on which he relies in support of the allegation of malice; but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he shall file a reply giving particulars of the facts and matters from which the malice is to be inferred.
>
> (4) This rule shall apply in relation to a counterclaim for libel or slander as if the party making the counterclaim were the plaintiff and the party against whom it is made the defendant

33. Therefore, there was no case to defend in the first place. It was their case that The Respondent was under duty to apply to set aside ex-parte judgment and leave to amend the plaint after entry of judgment. Once the amendment was effected, it should have been served. Given that it was not served, the judgment entered therein is a nullity. Consequently, the court below was plainly wrong in refusing to set aside the judgment that was irregularly obtained.

34. There was no need to annex any defence given that the appellant was entitled to defend the suit as of right given that the judgment was not only irregular but a nullity.

35. The court of appeal in CMC Holdings Ltd vs. Nzioki [2004] KLR 173 stated as forth.

> "In an application for setting aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or

hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle."

36. Further the issues raised in the supporting affidavit raised a prima facie evidence of a good defence to the claim. The service purported to be effected was not regular. The Appellant was entitled to defend.

Determination

37. In the circumstances, I make the following orders: -

a. The appeal herein is allowed and the Judgment entered by F. Kyambia, Chief Magistrate and the ex-parte Judgment are set aside.

b. The application dated 14/12/2024 is merited and is allowed with costs.

c. There was no service of process on the Appellant. The Respondent therefore shall apply to extend summons to enter appearance and serve the same on the Appellant's advocates on record who shall enter appearance within 15 days of service and file defence within 15 days of entering appearance.

d. For avoidance of doubt, given that there was no attempt to serve the amended plaint, the amendment lapsed within 14 days of amendment and as such the operative plaint is the one dated 16/7/2020.

e. Given that there was no service and the proceedings were a nullity, the Respondent shall bear the costs and any auctioneer's costs.

f. The costs of the application shall be borne by the Respondent, that is a sum of Kshs. 35,000/ = which shall be paid within 30 days.

g. The Appellant shall have costs of the appeal of Kshs.145,000/- payable within 30 days in default execution to issue.

h. The matter shall be heard before another court other than Hon. J. Kalo and Hon. F. Kyambia.

i. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF JUNE, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Odindiko & Co. Advocates for the Appellant

J. O. Magolo & Co. Advocates for the Respondent

Court Assistant – Jedidah/Jerusha