REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 458 OF 2018

G.N. WAHOME.....APPELLANT

-VERSUS-

HKM (A minor suing through her next friend & mother MMN)...1ST RESPONDENT

PETER GITHINJI.....2ND RESPONDENT

(Being an appeal against the ruling and order of Honourable G.A. Mmasi (Mrs.)

(Senior Principal Magistrate) delivered on 28th September, 2018

in MILIMANI CMCC NO. 2750 of 2009)

JUDGMENT

1. The 1st respondent through her next friend & mother (MMN) instituted a suit before the Chief Magistrate's Court by way of the plaint dated 27th March, 2009 and sought for reliefs against the appellant and the 2nd respondent in the nature of general and special damages for injuries sustained in a road traffic accident which occurred sometime on or about 6th December, 2008 involving the motor vehicle registration KAQ 194T ("the subject motor vehicle").

2. The 1st respondent averred in her plaint that she was lawfully walking along Juja Road in Nairobi on the date of the accident when the subject motor vehicle, being at all material times owned by the appellant and driven by the 2nd respondent, knocked her down and caused her to suffer serious injuries. The 1st respondent attributed the accident to negligence of the appellant and the 2nd respondent, by setting out the particulars thereof in the plaint.

3. Thereafter, following an application by the 1st respondent, an ex parte/interlocutory judgment was entered against the appellant and the 2nd respondent on 30th August, 2011 in respect to liability, and the matter proceeded for formal proof. In the end, final judgment was entered on 17th April, 2012 in favour of the 1st respondent in the aggregate sum of Kshs.152,000/= plus costs of the suit and interest thereon.

4. Consequently, the appellant filed the application dated 12th September, 2018 seeking to set aside the ex parte judgment and further seeking leave to enter appearance and file his statement of defence. Upon hearing the parties orally, the trial court dismissed the application with costs in its ruling delivered on 28th September, 2018.

5. Aggrieved by that ruling, the appellant filed this appeal. Through the memorandum of appeal dated 1st October, 2018 the appellant put forth 10 grounds of appeal essentially challenging the dismissal order made by the trial court.

6. This court gave directions to the parties to file written submissions on the appeal. It is apparent from the record that the 2nd respondent did not participate at the hearing of the appeal.

7. On his part, the appellant argues that the application seeking to set aside the ex parte judgment was not opposed by the 1st respondent. The appellant also argues that he only came to learn of the ex parte judgment upon being served with a notice to show cause dated 21st March, 2018 and that he has never been served with the summons to enter appearance in the suit and that in the absence of service, the ex parte judgment ought to be set aside *ex debito justitiae*, as held by the Court of Appeal in the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**. It is equally the submission of the appellant that his draft statement of defence raises triable issues which ought to be determined on merit.

8. The 1st respondent on the other hand contended that there is evidence of service of the summons to enter appearance on record and which affidavit was not at all challenged by the appellant. She further went on to submit that the application seeking to set aside the ex parte judgment was brought after inordinate delay, hence the trial court acted correctly in dismissing it on that basis. For all the foregoing reasons, it is the view of the 1st respondent that the appeal must fail.

9. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. It is clear that the appeal fundamentally lies against the trial court's decision to dismiss the appellant's application seeking to set aside the ex parte judgment. I will therefore deal with the grounds of appeal contemporaneously under the following limbs.

10. The first limb has to do with whether the learned trial magistrate arrived at a correct finding that there was inordinate delay in bringing the application. Upon re-examination of the record, I noted that the ex parte judgment was delivered on 30th August, 2011 while final judgment was delivered on 17th April, 2012. It was therefore clear there had been inordinate delay of nine (9) years in bringing the application for setting aside of the ex parte judgment. To that extent, I agree with the finding of the learned trial magistrate.

11. The second limb of the appeal concerns itself with whether the learned trial magistrate in dismissing the application, considered all relevant facts/material, evidence and provisions of the law. In answering this, one key factor for consideration is whether the ex parte judgment entered on 30th August, 2011 is regular. In his supporting affidavit to the application dated 12th September, 2018 the appellant averred that the ex parte judgment is irregular for the reasons that he was never served with summons to enter appearance and that he did not own the subject motor vehicle; he has a strong and arguable defence; and that he ought to have been granted the opportunity to defend the suit on merit. According to the appellant, the person who was served with the summons according to the affidavit of service on record is different from the appellant, hence the appellant had no way of knowing of the existence of the suit.

12. In his oral arguments, the appellant's counsel Mr. Kimaru reiterated that the person who was purportedly served with the summons resides in Kitengela and is not one and the same person as the appellant. In response, Mr. Kaburu, advocate for the 1st respondent submitted that there is evidence of service of the summons upon the appellant and that the appellant has not proved that the person who was served bears a different identity from him. From the impugned ruling, I note that the learned trial magistrate did not touch on the issue of service.

13. The record shows that summons were issued to the 1st respondent and thereafter served upon one George Njoroge Wahome, according to the affidavit of service sworn by process server Mathias Mboya Maithya on 18th May, 2011. It is apparent that the appellant is claiming to bear a different name from the one above, namely Godfrey Njihia Wahome. It is therefore apparent that there exist two (2) separate persons sharing the same initial names and this could very well give rise to confusion. Suffice it to say from the record that, whereas the 1st respondent's advocate claimed to have applied for, and obtained a reissuance of summons to enter appearance upon discovering that George Njoroge Wahome was deceased, there is no affidavit of service or other credible evidence on record to show that service was effected upon the appellant herein (Godfrey Njihia Wahome). The appellant claims that he came to learn of the suit upon being served with the notice to show cause in 2018 and this averment was echoed by Evans Mwangi Gachomo in his affidavit also sworn in support of the application. I find this explanation to be reasonable in the circumstances.

14. From the foregoing, I find it more plausible than not that summons to enter appearance were not served upon the appellant, but upon an entirely different person bearing the same initials as the appellant.

15. This brings me to the issue on whether the appellant's draft statement of defence raises triable issues. I note that this issue was equally not addressed by the learned trial magistrate in her ruling.

16. In determining whether or not to set aside an ex parte/default judgment, a court is required to consider whether a party has a defence that raises triable issues, even where service of summons is found to be proper. In so saying, I find support in the case of **Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) IEA 324** relied upon in **M/S Jondu Enterprises Limited v Spectre International [2019] eKLR** thus:

"Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."

17. From the appellant's draft statement of defence which was annexed to the application dated 12th September, 2018 I observed that he is *inter alia*, denying ownership of the subject motor vehicle and further denying having any knowledge or association with the 2nd respondent. In my view, the foregoing consist of triable issues which can only be adequately ventilated at the hearing of the suit.

18. Upon taking into account all the foregoing factors, while I acknowledge that there has been an inordinate delay in moving both the trial court and inevitably, this court by way of an appeal since entry of the ex parte judgment, I am convinced that it would be in the interest of substantive justice to interfere with the impugned ruling and to grant the appellant the opportunity of defending the claim.

19. In the end, I allow the appeal in terms of prayers a), b), c) and d) giving rise to a granting of the following orders:

a) The ruling delivered on 28th September, 2018 be and is hereby set aside and is substituted with an order allowing the Motion dated 12th September, 2018.

b) The ex parte/default judgment entered on 30th August, 2011 and all consequential orders/proceedings are hereby set aside.

c) The appellant is granted leave to file and serve his statement of defence within 14 days from today.

d) The suit (MILIMANI CMCC NO. 2750 of 2009) shall be heard afresh and on priority basis given its age, before any other magistrate of competent jurisdiction other than Honourable G.A. Mmasi.

e) In the circumstances of this appeal, a fair order on costs is that each party shall bear their own costs.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JULY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF JULY 2021.

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J. K. SERGON

JUDGE

In the presence of:

Ms. Muriithi for appellant

Mrs. Kanana for Mr. Nelson Kaburu for respondent