REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. E021 OF 2021

INM.....APPELLANT

VERSUS

AJMN.....RESPONDENT

(Being an appeal from the ruling of Hon L.L. Gicheha CM in Nairobi Divorce Cause No. 828 of 2018 on 19th February 2021)

JUDGEMENT

1. In a ruling dated and delivered on 19th February 2021, the chief Magistrates Court at Milimani declined to set aside an ex-parte default judgment that had been entered in favour of the Respondent on 1st February 2019. The Court found that the Appellant was properly served with the petition as well as the decree nisi. In the same ruling the trial magistrate declined to grant the Appellant leave to file a response to the Respondent's original divorce petition. Consequently, the trial court found that the Appellant failed to raise any triable issues.

2. The Appellant being dissatisfied with the ruling of the lower court preferred this appeal. The memorandum of appeal raises 7 grounds which in sum allege that the learned trial Magistrate failed to appreciate the Appellant's right to fair hearing and in particular denied her an opportunity to be heard and to defend herself. Further that the learned Magistrate failed to properly evaluate the facts set out in the affidavit, or to appreciate **Article 159(1) (a)** of the Constitution and was in error for finding that the application lacked merit.

3. The appeal was disposed by way of written submissions, duly filed by each party. In her submissions, the Appellant relies on **Articles 50 and 159** of the Constitution of Kenya and contends that she was denied a right to fair hearing. She submits that she was not served with a hearing notice and was thus excluded from the proceedings, which infringed on her right to fair hearing. To buttress her assertion she relies on the case of **Adolf Gitonga Vs Mwangi Thiong'o (1982-1988) 1 KAR 1027**.

4. She asserts that the court ought to be guided by the principle of justice to all persons, irrespective of status and submits that **Order 10 rule 11** of the Civil procedure Rules 2010, allows the court to set aside a default judgment if there is demonstration of reasonable circumstances that may have caused the nonappearance. She places reliance on the cases of **PTK v JKN (2019) eKLR, Shah v Mbogo (1967)EA 116, Yamko Yadpaz Industries Limited v Kalka Flowers Limited (2013) eKLR**. She submits that the affidavit of service was untrue and was meant to paint her as a bad person. She also submits that her only concern is the order for shared custody with someone not domiciled in the country and the untrue grounds for divorce being cruelty and adultery.

5. With regard to setting aside ex parte judgments the Appellant urges the court to be guided by the principles enumerated in the cases of; **Trans Africa Assuarance Co ltd v Lincoln Mujuni, Patel V East Africa Cargo Handling Services, Richard Nchapai Leiyangu v IEBC & 2 Others.** She invokes **Order 5 of the Civil Procedure Rules** and states that she was not served even though an affidavit of service was filed. She cites the case of **Craig v Kanseen (1943) 1 ALL ER 113**. She further submits that the matter involves minors and she has beseeched the court to consider the findings in the cases of **GOO v LM (2018) eKLR** and **Article 53(2)** of the Constitution.

6. The Respondent submits that this court ought to make a determination whether the lower courts decision was regular or not. If the judgment was irregular this court would cease to have discretion and must set it aside. To assert this position the Respondent relies on the case of **Kenya Orient Insurance Limited v Cargo Stars Limited & 2 Others (2017) eKLR**. He also submits that the process server filed an affidavit of service, which is proof that the Appellant was served as was held in the case of **Shadrack Arap Baiywo v Bodi Bach (1987) eKLR**. The Respondent further contends that there are no valid grounds for setting aside the lower court judgment.

7. I have carefully considered the appeal and the submissions of the parties and find that the primary issue for determination is whether the trial magistrate erred in refusing to set aside the ex-parte judgment entered in favor of the Respondent, to give the Appellant the opportunity to ventilate this case.

8. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See ***Onyango Oloo v. Attorney General [1986-1989] EA 456).*** *There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. (See* ***Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711 – Supreme Court of India****)*

9. In **Ridge v Baldin (1964) AC (1963) 2 ALL ER 66** the court, while discussing the right to fair hearing observed as follows;

“The principle of fairness has an important place in the administration of justice and is also a good ground upon which courts ordinarily exercise discretion to intervene and quash the decisions of a tribunal or subordinate court made in violations of right to a fair hearing and due process.”

10. I am alive to the fact that setting aside of an ex parte judgment is the discretion of the court. Such discretion is unfettered but must be exercised judiciously on a case-to-case basis. The court in **Shah v Mbugo (1967) EA 166** held that;

“This 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 it’s not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.”

I will therefore consider the issues raised by the Appellant in her application as a basis for the request to set aside judgment

11. The record before court indicates that the Respondent filed a divorce petition against the Appellant and judgment was entered in favor of the Respondent, in default of appearance of the Appellant despite having been served with summons to enter appearance. The Appellant then made an application seeking to have the judgment to be set aside under **Article 50** and **159** of the Constitution**.** The Application was also premised on **Order 12 Rules 7, Order 51 rule 1** of the Civil Procedure Rules and **sections 1A, 1B, 3A** of the Civil Procedure Act, on the ground that she had not been served with the petition and was a stranger to the matter. Further, that the judgment involved custody of children, which she feared was prejudicial to her and the minors.

Order 12 rule 7 on hearing and consequences of non-attendance provides that, “***Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just***”

12. The trial magistrate however declined to set aside the judgment entered for the Respondent on 19th February 2019, and made a finding that the summons were duly served and the application did not raise any triable issues.

13. The purpose of summons to enter appearance is to inform a defendant of the institution of a suit. This court is guided by the decision in the case of **Equitorial Commercial Bank ltd v Mohan Sons (k) ltd (2012) eKLR** where the court of appeal in citing the decision in **Nanjibhai Prabhudas & Company ltd v Standard Bank ltd (1968) EA (k) 670** stated that:

"…….we definitely appreciate and agree that the object and scope of summons to enter appearance is to make the defendant aware of the suit filed against him and to afford him time to appear and follow the process of law."

14. In the present case, it is not in dispute that the Appellant did not enter appearance and the divorce petition before the lower court proceeded ex parte since the Appellant and her Counsel did not attend. The Appellant however contends that she did not attend the hearing or enter appearance because she was not served with summons, hence her right to fair hearing was infringed. The court has noted that a duly signed affidavit of service sworn by Amos Chege Kanoga dated 2nd November 2018 stating that he proceeded to the Appellant's residence with the Respondent whereupon, he served the Appellant with court documents, which she read through but declined to sign. She asserts that the affidavit of service filed in court is false. The learned magistrate in her ruling noted that the Appellant did not deny the contents of the affidavit of service including where she resided.

15. Section 20 Civil Procedure Act requires that upon the institution of a suit, the defendant should be served in the prescribed manner in order to enter appearance and answer the claim. **Order 5** provides the details regarding service. **Rule 1(1)** requires that "*when a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein*." **Rule 6**, on the mode of service provides that *"by delivering or tendering a duplicate thereof signed by the judge, or such officer as he appoints in this behalf, and sealed with the seal of the court.*" **Rule 13 and 15** requires a person who has been served to sign acknowledgement of service on the original summons and an affidavit of service must be consequently filed as proof that service has been effected. The affidavit must show the time and manner in which the service was effected and the name and address of the person if any, identifying the person served and witnessing the service.

16. As mentioned, there is a duly signed affidavit of service on record indicating that the Appellant was served at her home even though she allegedly declined to sign the summons. Further the affidavit of service states that the Respondent was present during service and identified the Appellant. Such affidavit ought to be proof of service.

17. Be that as it may, an avenue lies as for the rectification of mischief on the part of a process server as provided under **Order 5 Rule 16 Civil Procedure Rules**. If indeed there is doubt as to the authenticity of the contents of the affidavit of service, there was need to cross-examine the process server on the contents. Counsel for the Respondent submitted that the Appellant failed to advance such a prayer in her application. The Court in **Agigreen Consulting Corp Ltd v National Irrigation Board (2020) eKLR**, agreed with the finding in the case of ***Shadrack arap Baiywo vs. Bodi Bach*** **KSM CA Civil Appeal No. 122 of 1986 [1987]** eKLR, in which the Court of Appeal quoting ***Chitaley and Annaji Rao; The Code of Civil Procedure*** **Volume II page 1670** stated that:

"There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

18. It is trite that he who alleges must prove. In the present case, the appellant claims that she was not served with the summons; the burden therefore lies with her to prove that the service was irregular. The Appellant casts doubt on the authenticity of the divorce proceedings and service by pointing out to the Respondent's affidavit as proof that the respondent was not in Kenya at the time of the divorce petition and further states that someone was impersonating the Respondent in that trial. The record before the court seems to support the Appellants claim to an extent.

19. The Respondent in his own witness statement dated 1st December 2020 states that he travelled and relocated to the United States of America in 2015 and was only able to travel back to Kenya in August of 2019. The divorce petition was filed in late 2018 and completed in February of 2019. However, the learned magistrate in her ruling observed that the Appellant's dispute as to the location of the Respondent at the time of proceedings was not proved as the Respondent was duly sworn and testified in court.

20. The Respondent is bound by his pleadings and they raise sufficient doubt as to whether the Respondent was in Kenya at the time of service owing to his own stipulation in his witness statement that he was in the USA. It is not clear what the trial magistrate relied on in finding that service was properly effected in accordance with the contents of the Affidavit of service. From the foregoing there is doubt as to whether the service was regular and the Trial Magistrate ought, even on her own motion, to have summoned the process server to be cross-examined for the interest of justice to be served.

21. From the foregoing, I find that the Appellant's right to heard was violated and accordingly order as follows;

i. The appeal be and is hereby allowed.

ii. The decree issued on 19/2/2021 declining to set aside judgment and the decree issued on 1/2/2019 that dissolved the marriage between the Appellant and the Respondent are hereby set aside in their entirety.

iii. That the petition for divorce shall be heard afresh by any other magistrate other than Hon. E.K. Usui and Hon. L.L. Gicheha who were seized of the matter there before.

iv. Each party shall bear its own coast in this appeal.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 24TH DAY OF FEBRUARY, 2022

……..

L.A. ACHODE

HIGH COURT JUDGE