Pius v Wambulwa (Insolvency Petition 1 of 2021)
[2023] KEHC 19398 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19398 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

INSOLVENCY PETITION 1 OF 2021

SC CHIRCHIR, J

JUNE 29, 2023

BETWEEN

BARLEX SAMUEL JUMA PIUS ..... APPLICANT

AND

GODFREY BARASA WAMBULWA ..... RESPONDENT

RULING

1. The applicant/debtor through a Notice of motion dated September 22, 2021 seeks for the following orders;

    i. Spent

    ii. Spent

    iii. That the statutory Demand dated January 19, 2020 be and is hereby set aside.

    iv. That equally the Bankrupt Order flowing from the statutory Demand Notice be set-aside

    v. That the process server, David Imo, be ordered to attend court for cross examination.

2. The Application is supported by affidavit of the Applicant and on the grounds appearing on the face of the Application.

The Applicant's Case

3. It is the Applicant's case that the bankruptcy order dated July 21, 2021 was given exparte and that he was not served with either the statutory Notice or the petition itself. He further states that he only came to know about the case from an email sent to him by the official receiver on August 5, 2021.That he was away from home when both the statutory Notice and the Insolvency petition were served.

4. The Applicant further points out that the costs of the election petition in the lower Court was reduced to Kshs 500,000 while that of the Election Appeal was taxed at Kshs 1,158,477. He also states that the statutory demand is an aggregate of the sums as contained in the 3 certificates of costs and which amount is inclusive of the one that had been set aside by the High Court. The Applicant further contends that the respondent has failed to disclose the fact that he had paid sum of Kshs 50,000 and that he is ready to enter into an arrangement of how to pay the balance. He believes that the bankruptcy petition is only meant to bar him from contesting in the forthcoming by- elections.

The Respondent's case

5. The Application was opposed by the Respondent/ creditor. It is the respondent's case that both the statutory Notice and the Insolvency petition were served on the Applicant. He has attached the Affidavit of service by the process server. He admits that Kshs 50,000 was paid. The respondent further asserts that the Applicant owes him Kshs 3,442,971 and denies that the bankruptcy proceedings are motivated by ill- will.

The Applicant's submissions

6. At the request of the Applicant, the court ordered the cross-examination of the process server. On May 2, 2023, David Imo the process server was cross- examined. He told the court that the Applicant refused to sign both the Notice and the petition but insisted that he effected service of each document. He gave a detailed description of the Applicant's home, including the fact that the compound is fenced off with Cyprus fence and that a motor vehicle going by the registration No xxxx was parked in the compound. He disagreed with the Applicant assertion that he was away in Kisumu on the day that the statutory Notice was allegedly served, and in hospital when the petition was served. On being shown a proclamation Notice showing that the vehicle xxxx was proclaimed in the year 2019, he insisted that he saw the vehicle parked in the compound during the day of service. He further told the court that he also served the in-solvency petition. On being shown documents that showed that the Applicant had gone to hospital on the material date, he refuted it, insisting that he served.

Determination

7. The parties informed the court that they had filed written submissions .However the same are not on record. In the circumstances I will proceed to determine the Application on the basis of the Affidavits and the oral testimony of the process server.

8. The following issues arise for determination:

    a). Whether the Applicant was served with the Statutory Notice and the petition.

    b). whether the – statutory Notice and the Bankruptcy order should be set aside.

Whether the Applicant was served

9. The Applicant's case is that he was not served with both the statutory demand and the insolvency petition. He insists that he was out of home on both occasions. During the service of the Notice he alleges that he was away in Kisumu and that he was in the hospital when the Insolvency Notice is alleged to have been served.

10. In the case of *Shadrack Arap Baiywo – Vs – Bodi Bach [1987] eKLR*, the Court of Appeal held as follows: -

> 'There is a presumption of services 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.'

11. I believe it was in line with the above decision , interalia , that the process server was summoned for cross- examination.

12. The Rules governing service are as provided under Order 5 of the *Civil Procedure Rules*. I have considered the process server's Affidavit and his oral testimony in the light of the aforementioned provisions and the case law.One of the requirements under Order 5 of the civil procedure Rules is that the process server must name the person who identified the person to be served.(see Form 4 of Appendix A of the civil procedure Rues). The Process server's affidavit is silent on this. The process server has also mentioned that a Boda boda Rider took him to the Applicant's home but he has not provided the name of the said Rider.

13. Despite his insistence that he served the Applicant on both occasions, there was no serious contest on the fact that the Applicant was away from home on the two occasions.

14. Further, despite accepting that the motor vehicle which he allegedly found parked in the Applicant's house was proclaimed in the year 2019 and was presumably sold, he still insist that the vehicle was there. It is common ground that the Applicant's goods were attached in 2019. There is a proclamation Notice dated April 24, 2019 attached to the Applicant's Application. It is also admitted by the Respondent that he realized Kshs 50,000 from the proceeds of the sale of the attached items. One of the items proclaimed was the subject motor vehicle. The Auctioneer who proclaimed the motor vehicle was an Agent of the respondent herein, and as such it is expected that the knowledge of how the vehicle made its way back to the Applicant's yard should be with the respondent, if indeed the vehicle was there at the time of service. Save for his insistence that the motor vehicle was in the compound, the process server could not explain how it found its way back in the light of the earlier proclamation.

15. In view of the aforegoing, am not satisfied that both the Statutory Notice and the Insolvency petition was served.

Whether the Bankruptcy order should be set aside

16. Setting aside of exparte orders is an Act of discretion. In the case of *Maina v Mugiria (1983)* the court of Appeal held:

    a. First there are no limits or restrictions on the Judges' discretion except that it should be based on such terms as may be just because the main concern for for the court is to do justice to the parties.

    b. Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist the person who has deliberately sought , whether by evasion or otherwise to obstruct or delay the course of justice(Shah Vs Mbogo(1976)EA)

c. The court has no discretion where it appears there has been no proper service(kanji Karan v Velji Ramji(1954)21 EACA20)

17. In the light of the above decision , It follows that having found that the service was not affected , this court has no discretion in the matter. The Applicant is entitled to the setting aside of the exparte order as a matter of right. In this regard I find further reliance on the case of *James Kanyiita Nderitu & Another [2016] eKLR*, where the court stated:

> From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another -vs- Shah (1968) EA 98, Patel -vs- EA Cargo Handling services Ltd (1975) EA 75, Chemwolo & Another -vs- Kubende (1986) KLR 492 and CMC Holdings -vs- Nzioka [2004] I KLR 173.
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> 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 justiae, 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 issue or whether there has been inordinate delay in applying to set aside the 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.'

18. In conclusion I find that the Application is merited, and I consequently make the the following orders:

a). The Bankruptcy order dated June 21, 2021 is hereby set aside

b). The Statutory Demand dated January 19, 2020 is hereby set aside.

c). Each party to meet their own costs.

DATED , SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 29TH DAY OF JUNE 2023

S. CHIRCHIR