



**Kabucho t/a Nyahururu Service Station v National Government Constituencies Development Board & another (Civil Case 3 of 2023) [2024] KEHC 9827 (KLR) (Civ) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9827 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA**

**CIVIL  
CIVIL CASE 3 OF 2023**

**CM KARIUKI, J  
JULY 26, 2024**

**BETWEEN**

**EDWARD MUIGAI KABUCHO T/A NYAHURURU SERVICE  
STATION ..... PLAINTIFF**

**AND**

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT  
BOARD ..... 1<sup>ST</sup> DEFENDANT**

**NDARAGWA CONSTITUENCIES FUND DEVELOPMENT FUND  
COMMITTEE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before the court is the 2<sup>nd</sup> defendant/applicant application dated June 27, 2023 seeking to set aside the ex parte judgement in this suit entered on 7<sup>th</sup> December 2022 and a declaration that the execution proceedings against it are unlawful in view of the provisions under Section 2 (4) of Government Proceedings Act Cap 40 Laws of Kenya. Applicant/2<sup>nd</sup> Defendant's Submissions
2. The applicant stated that they were not served with plaint and summons. In the affidavit of service sworn by the process server and annexed to the respondent's replying affidavit, the process server depones on oath that he effected service upon one Monicah at the applicant's offices in Gwa Kungu Trading Centre. The applicant in the replying affidavit denies service and one Monicah Wangechi Ndirangu through her affidavit annexed to supporting affidavit denounced any service upon her. It is deponed that the 1<sup>st</sup> defendant's offices are not in Gwa Kungu Trading Centre where the process server allegedly effected service but are in Mutanga Trading Centre.
3. It was submitted that there were contradictions in the process server's initial affidavit of service and his further affidavit of service in that this time round conceding that indeed the location of the office is



- Mutanga Trading Centre and that he proceeded to the respondent's offices in Mutanga Trading Centre but was allegedly referred to Monicah Wangechi. There was also no mention of Gwa Kungu Trading Centre.
4. The applicant asserted that these contradictions in an affidavit sworn on oath leaves doubt that the process server is untruthful who without qualms commit perjury. Reliance was placed on [Swaleh Gbeithan Saanun vs. Commissioner of Lands & Others](#) [2002] eKLR.
  5. On the issue of service the applicant stated that they have sufficiently demonstrated that there was no service of summons in this case and therefore where judgement is entered without service, such ex parte judgement ought to be set aside as a matter of right ex debito justiae. Reliance was placed on [James Kanyita Nderitu & Another vs. Marios Philotas Ghikas & Another](#) [2016] eKLR.
  6. It was contended that no prejudice will be suffered by the Plaintiff if the ex parte judgment is set aside. The respondent will still have a chance to prosecute his case and adduce evidence during trial. Any prejudice that he may suffer if any can be adequately remedied through an award of throw-away costs.
  7. The applicant pointed out that the draft defence annexed to their supporting affidavit raises triable issues, which include the issue of the Plaintiff's suit being statutorily time-barred and that the Plaintiff did not supply the alleged goods. Reliance was placed on [Job Kilach vs. Nation Media Group Ltd, Salaba Agencies & Michael Rono](#) [2015] eKLR.
  8. In the interest of justice, it was the applicant's averment that the broader interest of justice dictates that no litigant should be shut out from the course of justice. The right to hearing is so fundamental that any other interest by the Plaintiff in this case has to fall by the wayside.
  9. Lastly, it was argued that the 2<sup>nd</sup> defendant unlike the 1<sup>st</sup> defendant which is not a body corporate and is a government entity. All assets belong to the Government of Kenya. The logbook shows that the only motor vehicle belonging to the 2<sup>nd</sup> defendant is owned by the government of Kenya GKA 127V and that these assets are protected from attachment and under provisions of Section 2 (4) of [Government Proceedings Act](#) and Order 29 Rule 2(2) of the [Civil Procedure Rules](#).
  10. Respondent/Plaintiff's Submissions
  11. The respondent asserted that the application is premised under order 11 of the [civil procedure rules, 2010](#). The provision grants the court unfettered discretion to set aside the judgement entered against a party in default of appearance. The applicant has relied on the above provision and to that end has called upon this court to exercise its unfettered discretion thereby affirming the regularity of the court's judgement against it. It was stated that if the service was not properly effected upon the applicant, the judgement entered is deemed irregular and is set aside as a matter of right without invoking the court's discretion. Reliance was placed on [James Kanyita Nderitu & Another vs. Marios Pholatas Ghikas & Another](#) [2006] eKLR.
  12. The respondent asserted that the applicant was duly served with the summons to enter appearance as well as accompanying pleadings on 14<sup>th</sup> June 2021/. The service was effected by a court process server who swore an affidavit to that effect. A copy of the said affidavit was annexed to the replying affidavit and marked 'EMK1'. The court process server did not give a highlight of all the events which transpired pm the said he effected service upon the applicant in the initial affidavit service. In the further affidavit of service, the process server gave an exposition of the events which took place on the day he effected service.
  13. The respondent stated that they are aware that the respondent's offices are located at Mutanga Trading Centre and the only reason why the process server effected service at a different location other than



at the known physical location of the applicant is simply because that is where the officer who was authorized to accept court process was situated at the time.

14. It was asserted that tremendous amount of time has lapsed since judgement against the applicant was entered and until when the instant application was filed. That the Plaintiff filed a request of entry of judgement vide an application dated 21<sup>st</sup> July 2021 and the court entered the judgement against the applicant on 12<sup>th</sup> August 2021. It was averred that it was not until 27<sup>th</sup> June 2023 that the application for setting aside the judgement was brought which is over a period of almost one and a half years had lapsed. The stated that the time period is quite inordinate and no sufficient explanation has been given by the applicant in view of the delay.
15. The respondent stated that they sent the applicant a copy of the notice of entry of judgment vide registered post and the applicant has not denied receipt of the same. The notice of entry of judgment was sent on 25<sup>th</sup> January 2023. The instant application was filed 6 months later which amounts to inordinate delay.
16. It was contended that the applicant's defence constitutes mere denials to the Plaintiff's claims. That the Plaintiff's claim against the applicant is for payment of the amount owed to it on account of fuel consumed by its motor vehicles. They urged the court to find the applicant's draft statement of defence as unmerited and undeserving of a full trial. It was stated that it was in the interest of justice that the respondent be allowed to proceed with the execution of the court's judgement.
17. The respondent stated that the applicant's allegation that the execution proceedings against it are unlawful in view of the provisions under Section 2(4) of the *Government Proceedings Act* is misleading as the logbook which has been annexed to the supporting affidavit shows that the motor vehicle belongs to the applicant. That the execution proceedings against the applicant were commenced after conclusion of the suit and the respondent made an application for execution by way of attachment of the applicant's property.
18. The respondent stated that should the court grant leave as sought, strict conditions be issued to safeguard the interest of the respondent who stands to suffer great prejudice if the judgement is set aside. That the applicant be ordered to deposit the entire decretal sum plus costs and interest as contained in the application for execution and decree and also pay three away costs of Kshs. 300,000/- within 21 days from the date when the ruling shall be delivered failure to which execution will proceed. Reliance was placed on *Paradise Safari Park Limited vs The Honourable Attorney General & Another* [2011] eKLR, *Richard Mwangi Mwaniki & Another vs Jason Muita Thangari* [2022] eKLR.
19. Lastly, the respondent prayed that costs for this application be granted to them.
200. Analysis and Determination
21. Order 10<sup>1</sup> addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. Order 10, rule 4<sup>2</sup> empowers courts to enter interlocutory judgment in cases where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. On the other hand, rule 9 gives the Plaintiff the leeway to set down a suit for hearing where no appearance is entered for other suits not provided for by this Order. Order 10, rule 10 provides that in cases where a defendant has failed to file a defence, rules 4 to 9 shall apply with any necessary modification. While Rule 11 empowers the court to set aside or vary a judgment that has been entered under Order 10.

<sup>1</sup> Civil Procedure Rules, 2010

<sup>2</sup> Ibid



22. Courts have the discretionary power to set aside ex parte judgment with the main aim being that justice should prevail. The courts are not required to consider the merits of a defence in an application of this nature. Therefore, courts ought to look at the draft defence to the plaint and accompanying witness statements before proceeding to give its ruling as to whether the applicant's defence raises triable issues.
23. In *Patel -v- E.A. Handling Services Ltd*<sup>3</sup> and *Tree Shade Motor Ltd -v- D.T. Dobie Co. Ltd*<sup>4</sup> and in *Mania -v- Muriuki*<sup>5</sup> the courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error. Further, in *Shah vs. Mbogo & Another*,<sup>6</sup> where the court while addressing the subject of discretion stated that:
- “The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
24. I have considered the grounds relied on by the 2<sup>nd</sup> Defendant/Applicant in this case. The 2<sup>nd</sup> Defendant/Applicant disputes service. Looking at the Affidavit of Service and the Further Affidavit of Service both sworn on 21<sup>st</sup> July, 2021 by Edward Maina Wachira, it is apparent to this court, and I am satisfied on the basis of the said affidavits that summons and pleadings in this case were duly served upon the 2<sup>nd</sup> Defendant/Applicant. In my considered view, whilst the 2<sup>nd</sup> Defendant/Applicant would want this court to believe that service on it was not duly effected, the Plaintiff/Respondent has gone to great detail to demonstrate that service was indeed duly effected upon the 2<sup>nd</sup> Defendant/Applicant. Therefore, I find the explanation proffered by the 2<sup>nd</sup> Defendant/Applicant is flimsy and has no merit, in view of the fact that it only appears to have been raised as an afterthought when the 2<sup>nd</sup> Defendant/Applicant was clearly indolent in defending the suit.
25. On whether the execution of the decree by way of attachment and sale of the 2<sup>nd</sup> Defendant/Applicant's assets is unlawful for offending Section 2(4) of the *Government Proceedings Act* and Order 29 Rule 2 (2)(c) of the *Civil Procedure Rules*, 2010, I find that the said execution is not unlawful since the 2<sup>nd</sup> Defendant/Applicant is not a government department within the meaning of section 2(4) of the *Government Proceedings Act* and Order 29 Rule 2 (2)(c) of the *Civil Procedure Rules*, 2010.
26. The upshot of the foregoing therefore, is that I find no merit in the 2<sup>nd</sup> Defendant/Applicant's application dated 27<sup>th</sup> June, 2023. Accordingly, I dismiss the said application with costs to the Plaintiff/Respondent.

I. The application dated 27.6.2023 is hereby dismissed with costs to the respondent.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 26TH DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

.....  
**CHARLES KARIUKI**

<sup>3</sup> (1974) EZ 75

<sup>4</sup> CA 38 of 1998

<sup>5</sup> (1984) KLR 407

<sup>6</sup> (1967) EA 116



**JUDGE**

