



Gumo t/a Endebes Transporters & another v Chemutai & another (Civil Appeal E067 of 2023) [2024] KEHC 11348 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E067 OF 2023
AC MRIMA, J
SEPTEMBER 30, 2024**

BETWEEN

ALBERT GUMO T/A ENDEBES TRANSPORTERS 1ST APPELLANT

ROBIN KOSGEY 2ND APPELLANT

AND

WINNY CHEMUTAI 1ST RESPONDENT

WILSON KIPKOECH SAMBU 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. S. K. Mutai (S.P.M.) in Kitale Chief Magistrate Civil Case No. 83 of 2013 delivered on 9th October, 2023.)

JUDGMENT

Background:

1. The appeal subject of this judgment was necessitated by the dismissal of an application by way of Notice of Motion dated 14th July, 2023 in Kitale Chief Magistrates Civil Case No. 83 of 2013 (hereinafter referred to as ‘the suit’).
2. The application was filed by the Appellants herein, who were the Defendants in the suit. It was dismissed vide the ruling delivered on 9th October, 2023. The application sought to set-aside Exparte judgments against the Appellants.
3. The foregoing dismissal instigated the instant appeal.

The Appeal:

6. Through the Memorandum of Appeal dated 18th October 2023, the Appellants urged this Court to set aside the impugned Ruling on the following grounds;



1. That the learned magistrate erred in law and fact when he held that the ex-parte judgment entered against the defendants was proper and regular.
 2. That the learned magistrate erred in law and fact when he held that the draft defence failed to raise any triable issues.
 3. That the learned magistrate erred in law and in fact when he failed to appreciate a valid aspect of the court lacking territorial jurisdiction to entertain the matter.
 4. That the learned magistrate erred in law and in fact when he dismissed the appellants' application dated 14/7/2023.
7. The appeal was heard by way of written submissions. Both parties duly complied and filed their respective submissions. Various decisions were referred to in support of the parties' rival positions.

Analysis:

8. Having appreciated the parties' respective positions, the two following issues arise for determination: -
 - i. Whether the Appellants were properly served with Summons to Enter Appearance and the Plaint.
 - ii. Depending on (i) above, whether the interlocutory judgment was properly entered against the Appellants.
 - iii. Depending on (ii) above, whether in the circumstances of the suit, the Learned Magistrate rightly exercised discretion in dismissing the application seeking to set-aside the ex-parte judgment.
9. This being a first appeal, this Court must remind itself that its duty as was observed by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* [2013] eKLR is to re-look and re-analyse the evidence presented before the trial court all-over again. The Court observed: -

... As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.
10. Further, in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR the Court set out the role of the first appellate Court in the following terms: -

... This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.
11. The Court will, hence, consider the two issues.

Service of the Summons to enter appearance:

12. This issue is quite crucial in this appeal as its determination has far reaching impact. For instance, if it is found that the Appellants were not served with the Summons as required in law, then the ex-parte judgment ought to have been set-aside ex debito justitiae [as of right].



13. The Court of Appeal in *Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022)* [2023] KECA 872 (KLR) (7 July 2023) (Judgment) affirmed the foregoing position in the following words: -
 26. What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise.
 27. However, even where the judgement is regular, the court still retains the wide discretion to set the same aside though if the Court decides to set aside the judgement, depending on the circumstances, it may do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the Plaintiff and the Defendant.
14. Expounding on the above, the Court of Appeal in *CMC Holdings Ltd vs. Nzioki* [2004] KLR 173 observed as follows: -

... In an application for setting aside ex parte judgement, 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 others 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.....
15. Speaking to setting aside a regular judgment, the Court of Appeal in *Bouchard International (Services) Ltd v M'mwereria* [1987] KLR 193, held that:

The basis of approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgment by default) is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the Court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial...
16. The Court went on to state that: -

... A Judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed....
17. Returning to the matter at hand, the initial Plaint was dated 21st February, 2013. It was against three Defendants; the Appellants herein and one Endebes Enterprises. Vide a Request for Judgment dated 22nd May 2013, the Respondents applied for interlocutory judgment. On 31st May, 2013 the Court declined to enter any judgment on the basis that there was no evidence of proper service.



18. The Respondents then amended the Complaint and filed an Amended Complaint dated 6th August, 2014. The amended Complaint had two Defendants being Albert Gumo trading as Endebes Transporters and Robin Kosgei.
19. Another request for judgment dated 1st September, 2014 was thereafter filed. It sought for interlocutory judgment against the then two Defendants. The request was premised on two Affidavits of service sworn by one Asha Nekesa, a Court Process server on 11th August, 2014.
20. On consideration of the request for judgment, the Court, on 5th September 2014, entered an interlocutory judgment against only Albert Gumo trading as Endebes Transporters. The Court ordered the suit to be set down for assessment of damages.
21. This Court has carefully considered the request for judgment dated 1st September, 2014 together with the two similar Affidavits of service.
22. The request for interlocutory judgment was against two Defendants. The Defendants were clearly named in the title of the request and judgment was specifically sought against both Defendants in the body of the request.
23. The Court did not state any reasons for entering judgment against Albert Gumo trading as Endebes Transporters and declining similar entry against Robin Kosgei. As a result, the matter was, presumably, to proceed for assessment of damages against only Albert Gumo trading as Endebes Transporters since there was no judgment against Robin Kosgei.
24. Be that as it may, Albert Gumo vehemently denied service of Summons and any of the Complaints. As such, the focus now turns to the Affidavit of service upon which the interlocutory judgment was entered.
25. The two Affidavits of service on record allegedly proving service on Albert Gumo and Robin Kosgei bear similar contents. Even the signatures of the recipients allegedly served are similar.
26. The Process server stated that she served Albert Gumo, whom she knew, on 8th August, 2014 at 3:40pm at Kitale town. That was the same content in respect of the Affidavit affirming service on Robin Kosgei.
27. From the Affidavits of service, severally questions beg answers. They include: -
 - i. How did the Process server know or identify the Defendants prior to service?
 - ii. Where in Kitale town were the Defendants served;
 - iii. Were the Defendants at the same place given that they were both served at the same time?
 - iv. Did the Defendants share similar signatures or did one of them receive the Summons on behalf of the other?
 - v. On the basis of similar Affidavits of service, why was judgment entered against one of the Defendants and declined against the other?
28. As demonstrated above, no judgment was ever entered against Robin Kosgei, the 2nd Appellant herein. Therefore, the Exparte judgment entered against him cannot stand and must be set aside ex-debito justitiae.
29. The interlocutory judgment against Albert Gumo also seems to be problematic. The Affidavit of service did not satisfy two cardinal issues to ensure that proper service was effected on the 1st Appellant. It remains unclear how the Process server knew or identified the 1st Appellant prior to service and more importantly, where in Kitale town was the 1st Appellant served.



30. With no answers to the two issues at the heart of any meaningful service of Court process and given that the 1st Appellant denied any such alleged service, this Court is not satisfied that, on the basis of the Affidavit of service on record, that the 1st Appellant was properly served with summons or at all.
31. As such, this Court finds and holds that none of the Appellants herein were ever served with Summons and the Plaints.
32. The first issue is, hence, answered in the negative.

Regularity of the interlocutory judgment:

33. The first issue has settled the fact that, based on the record, the Appellants were not served with the Summons and the Plaints.
34. As such, the interlocutory judgment was irregularly and unlawfully entered. Such judgment, therefore, cannot be a basis of any legal execution processes.
35. The second issue is, as well, answered in the negative.

Whether the application was correctly dismissed:

36. In view of the manner in which the above two issues have been settled, the application to set-aside the Exparte judgment was to be allowed unconditionally and/or as of right.
37. The rejection of the application was thus contrary to settled law and was a further contravention of the Appellants' right to a fair hearing as guaranteed under Article 50(1) of *the Constitution*.
38. The application was, therefore, wrongly dismissed.
39. On the basis of the foregoing, this Court finds that the appeal is merited.

Disposition:

40. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
41. In the end, the following final orders hereby issue: -
 - a. The appeal wholly succeeds.
 - b. The ruling dated 9th October 2023 dismissing the Notice of Motion dated 14th July 2023 is hereby set-aside.
 - c. The Notice of Motion dated 14th July 2023 is hereby allowed in terms of prayers 2 and 3.
 - d. The Appellants are hereby granted leave to defend the suit. They will file and serve their Statement(s) of Defence within 14 days of this judgment.
 - e. For clarity, the Exparte judgments in Kitale Chief Magistrates Court Civil Suit No. 83 of 2013 are hereby unconditionally set-aside.
 - f. The Respondents shall bear the costs of the appeal.



42. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2024.

A. C. MRIMA

JUDGE

JUDGMENT DELIVERED VIRTUALLY AND IN THE PRESENCE OF: -

No appearance for Miss. Arunga, Counsel for the Appellants.

Mr. Chepkwony, Counsel for the Respondents.

Chemosop/Duke – Court Assistants.

