



Nairobi City County v Koceyo t/a Koceyo & Company Advocates (Civil Appeal 225 of 2015) [2024] KEHC 13040 (KLR) (Civ) (28 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13040 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 225 OF 2015

JM NANG'EA, J

OCTOBER 28, 2024

BETWEEN

NAIROBI CITY COUNTY APPELLANT

AND

**TITUS OTIENO KOCEYO T/A KOCEYO & COMPANY
ADVOCATES RESPONDENT**

(Being an appeal from ruling and order of the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts (Hon. C. Obulutsa – SPM) given on 17/4/2015 in CMCC NO. 1395 of 2014)

RULING

Background to the appeal

1. This appeal follows the decision of the trial court by which the appellant's Notice of Motion dated 22/1/2015 seeking inter alia an order setting aside the court's judgement and decree as well as leave to file defence out of time was dismissed with costs. By affidavit in support of the Motion the appellant had argued inter alia that it was not served with Summons to enter Appearance in the suit leading to irregular entry of default judgement against it, for purported failure to enter appearance and/or file defence within the period prescribed by the law. On advice of their legal Counsel, the appellant further deposed through its County Secretary and Head of the County Public Service that being a government institution judgement cannot be entered against it without the leave of the court and further that execution cannot be levied against it. The appellant was also advised that no execution by payment, attachment or eviction can occur unless at least 10 days notice of entry of judgement has been given. The court was further told that the appellant had limited resources with which to execute its mandate of providing various services including health, water and sanitation to its over 4 million residents, the situation being exacerbated by the fact that appellant was yet to receive financial support from the



National Government. It is averred that as a result the appellant was weighed down by many debts including those owed for procured legal services such as the respondent herein claims.

2. The deponent of the appellant's affidavit therefore laments that it would be against public interest and policy to commit him to civil jail for failure to liquidate the judgement debt herein in the circumstances. Transition to the devolved government as per the then new Constitution of Kenya 2010 was allegedly still ongoing at the material time and thus assets and liabilities were yet to be transferred to appellant from the defunct City Council of Nairobi.
3. The respondent swore and filed an affidavit in reply inter alia attacking the application as disclosing no triable issues for the reason that a draft defence is not exhibited. He further maintains that execution of the default judgement was lawfully undertaken as the County Government Act has no provisions prohibiting execution of decrees or orders against a County Government. The application is therefore dismissed as lacking in merit, the respondent pointing out that the appellant has not even attempted to explain why it didn't file defence to the suit within the period prescribed by law or at all.
4. In his brief ruling, the learned trial magistrate rejected the appellant's contention that he was not served with the suit documents and dismissed the application with costs as lacking in merit. Purportedly to avoid "duplicity", the trial court referred the parties to reasons given in a similar application in Civil Case No. 1778 of 2014 between the same parties. The court nevertheless observed that the debt herein is admitted and there is no draft defence brought to the court's attention for consideration if it raises triable issues.

Guiding Principles

5. It is trite law that the appellate court can only interfere with the findings and /or award of the trial court if the court misdirects itself on matters of fact and /or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of *Ocean Freight Shipping Co. Ltd V. Oakdale Commodities Ltd (1997) eKLR Civil Appeal No. 198 of 1995*). The appellate court also has the duty of analysing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle V. Associated Motor Boat Co. (1968) EA 123* among other decided cases. The Court of Appeal for East Africa in *Peters V. Sunday Post Limited [1958] EA 424* underscored the same principles delivering itself thus;-

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

Grounds of appeal

6. The appellant's grounds of appeal as per Memorandum of Appeal dated 15/5/2015 may be condensed into four grounds as hereunder;-
 - (a) That the learned trial magistrate erred in law and fact by failing to consider that the appellant was not served with the suit documents before the impugned judgement was entered.



- (b) That the learned trial magistrate erred in law and fact in failing to consider the appellant's submissions and seeking guidance from cited superior courts' decisions.
 - (c) That the learned trial magistrate erred in both law and fact by failing to appreciate that the appellant is a government against which execution cannot issue.
and
 - (d) That the learned trial magistrate erred in law and fact in failing to consider the appellant's affidavit evidence placed before him and dismissing the appellant's application without giving reasons for the order.
7. The appellant prays for these reliefs: That the impugned ruling of the trial court be set aside and that the costs of this appeal be borne by the respondent.

Analysis and determination.

8. It would appear that only Counsel for the appellant filed Written Submissions which I have perused against the record of this appeal. Counsel submit that there is no evidence proving service of Summons to Enter Appearance upon the appellant as return of service of the suit documents was not filed. It is therefore contended that the default judgement was irregular and ought to have been set aside *ex debito justitiae*. Consequently, it was not necessary for the appellant to exhibit its proposed defence for the court's consideration, argue Counsel. In support of this submission, reference is made to judicial determinations in *Mwala V. Kenya Bureau of Standards EA LR (2001) 1 EA 148* and *Nakuru HCCC NO. 82 of 2002 (Kabutha V. Mucheru)* which took the position that in the circumstances such an application should be granted as a matter of course.
9. The respondent has not filed submissions.
10. The issues for determination herein are:
- (a) Whether the impugned default judgement is a regular one.
 - (b) If the *ex-parte* judgement is regular, whether the appellant has otherwise shown that it has a defence on the merits.
 - (c) The orders commending themselves to the court.
11. Whereas the respondent avers that the suit documents were served upon the appellant, the Process Server's affidavit of service is not exhibited in proof of the fact. The original record of the trial court has not also been availed for the court to establish if indeed an affidavit of service of the suit documents was put in. It was necessary to offer such crucial evidence so that if the appellant still disputed receipt of the suit documents it could seek to cross-examine the Process Server to clear any doubts (see Order 5 Rule 16 of the Civil Procedure Rules 2010 and the Court of Appeal decision in *Kisumu CACA NO. 15 of 2010 (Amayi Okumu Kasiaka & 2 Others V. Moses Okware Opari)*).
12. It is noted that the learned magistrate observed that the debt in issue is, in any event, admitted apparently in a similar suit No. 1778 of 2014 involving the same parties. That suit does not form part of the record of this appeal and the respondent himself has not alluded to admission of the debt in his affidavit in reply to the appellant's application in question seeking to set aside the default judgement.
13. The learned trial magistrate is further to be faulted for failing to consider the appellant's submissions on the application before him and give reasons for his decision rather than referring the parties to a different suit, even if that suit be between the same parties.



Determination

14. The upshot is that the default judgement in the suit before the trial court was irregularly entered there being no proof of service of Summons to Appearance and other suit documents. I agree with the appellant that in the circumstances it was not obligated to exhibit a proposed defence as the ex-parte judgement was liable to be set aside ex debito justitiae. Besides, there is no evidence of service of notice of entry of the default judgement upon the appellant as required by Order 22 Rule (6) of the Civil Procedure Rules 2010. In the result, the trial court's order dismissing the appellant's application dated 22/1/2015 is set aside and substituted with an order setting aside the ex-parte judgment entered on and all consequential orders flowing therefrom. The costs of the appeal are granted to the appellant.
15. All the grounds of appeal above set out therefore succeed save Ground (c). The appellant has not specifically sought an order or declaration that execution cannot issue against the appellant being a County Government. It is also unnecessary to consider the issue in light of the court's decision in favour of the appellant that the ex-parte judgement was irregular.
16. Ruling accordingly.

J. M. NANG'EA, JUDGE.

RULING DELIVERED VIRTUALLY THIS 28TH DAY OF OCTOBER 2024 IN THE PRESENCE OF;

The appellant's advocate, Ms Ojienda

The respondent's advocate, Ms Otieno

J.M NANG'EA, JUDGE.

