



REPUBLIC OF KENYA



Milly Glass Works Limited v Load Gate Company Limited (Civil Case 98 of 2019) [2024] KEHC 16971 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 98 OF 2019
F WANGARI, J
DECEMBER 19, 2024**

BETWEEN

MILLY GLASS WORKS LIMITED PLAINTIFF

AND

LOAD GATE COMPANY LIMITED DEFENDANT

RULING

1. For ruling is the Defendant's (hereinafter 'Applicant's') Notice of Motion Application dated 2nd April, 2024. The application is brought pursuant to the provisions of Articles 50 and 159 of the [Constitution of Kenya](#), sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#), Orders 10 Rule 11 of the [Civil Procedure Rules](#), 22 Rule 22, 51 Rule 1 of the [Civil Procedure Rules](#) and all other enabling provisions of the law. It seeks the following orders: -
 - a. Spent;
 - b. Pending the hearing and determination of this application interpartes, the Court be pleased to order stay of execution arising from the judgement and decree of 28/2/2020 the subsequent decree;
 - c. The Honourable Court be pleased to set aside the interlocutory judgement delivered on 28/2/2020 and the Defendant be granted unconditional leave to file its defence and defend the matter on merits;
 - d. The Honourable Court be pleased to set aside all the execution proceedings commenced and arising from the judgement of 28/2/2020 and its subsequent decree; and
 - e. The costs of this application be in the cause.



2. The grounds in support of the application are briefly that the Plaintiff irregularly obtained ex parte judgement against the Defendant in the sum of Kshs. 98,026,432.38/=, that is decretal sum plus interests and a further Kshs. 1,596.458.20/= as taxed costs.
3. It is stated that the Plaintiff has threatened to execute against the Defendant by lifting the veil of incorporation and going for the directors personally. It is also alleged that there is a threat of prosecution of the Defendant's directors for offences of fraudulent trading which allegations are unsubstantiated. Furthermore, the Defendant contends that it was never served with summons, pleadings and notice of entry of judgement and it was thus not aware of the suit.
4. It therefore prays for the application to be allowed so as to defend the suit on merits. The application is supported by the affidavit of even date sworn by one Martin Mwathi, its director. It attaches a draft defence to buttress its averment that it raises triable issues. I need not to rehash the averments therein as they are a reproduction of the grounds in support.
5. The application is strenuously opposed. Through a replying affidavit dated 6th May, 2024 and sworn by one Mohamed Yusuf Khandwalla, the Plaintiff's financial controller, the Plaintiff among other reasons states that the application is made in bad faith to obstruct the course of justice. The Plaintiff avers that the Defendant was duly served with summons to enter appearance and it places reliance on the affidavit of service sworn by the process server one Patrick M. Mutuma.
6. On the issue of service, the Plaintiff places its reliance on the provisions of Order 5 Rule 3 of the *Civil Procedure Rules*. The Plaintiff states that when execution commenced, it took out garnishee proceedings which the Defendant did not challenge. It avers that the Defendant is not candid since there was partial execution of the decree through attachment of funds held at Equity Bank. In conclusion, it prayed that the application be dismissed with costs.
7. Directions were taken to have the application canvassed by way of written submissions. Both parties duly complied with the directions. The Applicant's submissions are dated 5th November, 2024 while those of the Respondent are dated 4th December, 2024. I am grateful for the parties' industry and compliance with the court's directions. They have filed detailed submissions and cited various authorities urging their respective rival positions which the court has duly appreciated.
8. They are a useful guide to the court in crafting a just decision in respect to the parties. The tragedy of the adversarial system is that it is not possible to please all the parties in the case. A decision will please one of the divide while the other walks away sad. However, it is the duty of this court to render a decision that is just, not that pleases a party. I shall endeavor to do so in the present matter and all other matters.

Analysis & Determination

9. This Court has carefully considered the application dated 2nd April, 2024, the response, the parties rival submissions, the authorities cited as well as the law and the following issues falls for this Court's determination: -
 - a. Whether the application is merited; and
 - b. Who bears the costs?
10. It is not in doubt that the suit was not defended from the onset. This being the case, the provisions of Order 10 of the *Civil Procedure Rules* come into place. However, Order 10 Rule 11 of the *Civil*



Procedure Rules gives the court discretion to have the judgement entered therein to be set aside. It states as follows: -

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

11. Just like any other discretion, the power herein must be exercised judiciously and not whimsically or capriciously. I note that among the grounds the Applicant cites is that the matter required to proceed for formal proof. However, having perused the plaint dated 29th November, 2019, I do not agree with the Applicant’s position. The matter was a liquidated claim and judgement was properly entered.
12. Having stated as above, was the judgement entered therein regular? In answering this question, the issue of service of summons is the key consideration. This is so because service of summons is not optional but a mandatory requirement as this is what informs the Defendant of the suit. In the present case, it is not in dispute that the Applicant is a corporation and as search, Order 5 Rule 3 of the Civil Procedure Rules come in to play.
13. According to the affidavit of service of Patrick M. Mutuma dated 4th February, 2020, his first mode of service was in terms Order 5 Rule 3 (b) (iii). However, I cannot deem that this mode of service can pass muster since from the process server’s own averment, he confirms that he was told that the Applicant’s operations had been suspended and/or closed. That being the case, if indeed the Applicant had suspended or closed its operations, affixing the summons at the main gate would obviously serve no purpose.
14. The process server then sent the summons by sending it to the Applicant’s last known address. This is averred at paragraphs 10 to 12 of the affidavit of service. Though Order 5 Rule 3 allows service of summons on a Defendant through registered post, if the Defendant had ceased its operations as averred, such service equally does not meet the threshold of being said that a party was duly served.
15. Service is so critical that if a party cannot authoritatively state that he or she served party A or B, then the core of the matter has to be reconsidered. In Yalwala v Indumuli & Another [1989] eKLR, the Court of Appeal succinctly stated as follows: -

“...Service of process is so crucial a matter in litigation that courts including Deputy Registrars must encourage the best of service; i.e. personal service. It may not always be possible for the contents of the summons to be translated or explained to defendants. A defendant who is served personally has an opportunity to put questions to and seek clarification from the Court Process Server about the summons. The Return of Service under Order 5 rule 6 (1) of the Rules enjoins court process servers to make service on defendants or respondents. That is the primary task. It is not expecting too much of court process servers to try and try again to serve the defendant before embarking on the other means of service...”
16. Though the above matter was service as under Order 5 Rule 9, the principles therein aptly captures this court’s position on the issue of service whether the Defendant is a natural or artificial person. I am not convinced that service was proper and having found as herein, I find that the application is merited. Even if service was proper, the amount in issue and the provisions of Article 50 of the Constitution who still have compelled this court to allow the application. I need not to consider whether the draft defence raises triable issue (s).
17. On the issue of costs, though the service has been found wanting, I take note that the Respondent has been in court since late 2019. There is an averment by the Respondent that there was partial



execution through garnishing proceedings. This averment has not been controverted. This being the case, I allow the application on condition that the Applicant pays the Respondent a sum of Kshs. 200,000/= being throw away costs within thirty (30) days from the date hereof excluding the period between 21st December and 13th January.

18. The upshot of the foregoing is that the court renders itself as hereunder: -

- a. The Notice of Motion Application dated 2nd April, 2024 is allowed on the following conditions: -
 - i. The Defendant/Applicant to pay the Plaintiff/Respondent's Counsel a sum of Kshs. 200,000/= being throw away costs within the next thirty (30) days excluding the period between 21st December and 13th January;
 - ii. The attached draft defence be deemed as properly filed upon payment of the requisite fees within the next seven (7) days excluding the dates mention in (i) above;
- b. Costs to abide the outcome of the suit; and
- c. Case Management Conference on 24th March, 2025.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF DECEMBER, 2024.

F. WANGARI

JUDGE

In the presence of;

Ms. Ngumba h/b for Ms. Takah for the Defendant/Applicant

Mr. Nyamu Advocate h/b for Ms. Kageni Advocate for the Plaintiff/Respondent

Ms. Salwa, Court Assistant

