



REPUBLIC OF KENYA



**Betterline Company Limited v Ogeto & 2 others (Civil Appeal 170 of 2017)
[2023] KEHC 1289 (KLR) (Civ) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1289 (KLR)

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

CIVIL

CIVIL APPEAL 170 OF 2017

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

BETTERLINE COMPANY LIMITED APPELLANT

AND

ZACHARY BOGONKO OGETO 1ST RESPONDENT

MBIRI JOSEPH 2ND RESPONDENT

THOMAS KINOBE 3RD RESPONDENT

(Being an appeal against the ruling and order of Honourable D.O. Mbeja (Mr.) (Senior Resident Magistrate) delivered on 18th April, 2017 in MILIMANI CMCC no. 6465 of 2014.)

JUDGMENT

1. The 1st respondent in this instance instituted a suit before the Chief Magistrate's Court by way of the plaint dated October 21, 2014 and sought for the sum of Kshs.282,444/= plus costs of the suit and interest thereon against the appellant on the one part, and the 2nd and 3rd respondents on the other part, arising out of a material damage claim involving damage occasioned to the 1st respondent's motor vehicle registration number KBD 987D.
2. The 2nd respondent entered appearance on being served with summons and filed the statement of defence dated January 30, 2015 to deny the averments made in the plaint.
3. Upon the request of the 1st respondent, an interlocutory judgment was entered against the appellant and the 3rd respondent by the trial court on June 3, 2016 for failure to enter appearance and/or file their respective statements of defence.



4. Consequently, the appellant filed the application dated December 2, 2016 and sought for the setting aside of the interlocutory judgment and for leave to file its statement of defence out of time. The application was opposed by the 1st respondent.
5. Upon hearing the parties on the abovementioned application, the trial court dismissed it with costs vide the ruling delivered on April 18, 2017.
6. Being aggrieved by the aforementioned ruling, the appellant sought to challenge the same by way of an appeal. Through its memorandum of appeal dated April 19, 2017 the appellants put a total of 11 grounds.
7. This court gave directions to the parties to file written submissions on the appeal. It is apparent from the record that the 3rd respondent did not avail his written submissions in the appeal.
8. The appellant vide its submissions dated November 3, 2022 argues that no proper service of the summons to enter appearance was made upon it, pursuant to the proviso of Order 5, Rule 3 of the [Civil Procedure Rules](#), 2010 which expresses the following:

“Subject to any other written law, where the suit is against a corporation the summons may be served –

- (a) on the secretary, director or other principal officer of the corporation; or
- (b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a) –
 - i. by leaving it at the registered office of the corporation;
 - ii. by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
 - iii. if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or
 - iv. by sending it by registered post to the last known postal address of the corporation.”

9. It is also the submission by the appellant that the affidavit of service on record contains untrue averments and cannot therefore be relied upon, placing reliance on the case of [Agigreen Consulting Corp Limited v National Irrigation Board](#) [2020] eKLR where the court held that:

“An affidavit of service must prima facie disclose proper and actual service for it is on the basis of this service that judgment is entered. In this case, the manner of service set out in the Affidavit of Service is insufficient and does not comply with Order 5 rule 3(a) of the [Civil Procedure Rules](#) hence no purpose will be served by calling the process server for examination as this would give the deponent an opportunity to make a case that is not in the affidavit of service upon which the judgment was entered.”

10. The appellant also submits that the trial court ought to have appreciated that its draft statement of defence raises triable issues which ought to be ventilated at the trial, and in failing to appreciate so, committed an error of law.



11. To buttress its point above, the appellant has quoted inter alia, the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 in which the court held that even where an ex parte judgment was regularly entered, the court will ordinarily set aside the judgment if satisfied that the defence on record raises a triable issue or triable issues.
12. It is the submission by the appellant that the 1st respondent does not stand to be prejudiced if the interlocutory judgment is set aside, and that any inconvenience which befalls the 1st respondent can adequately be compensated by an award of costs.
13. For the foregoing reasons, the appellant urges this court to allow the appeal and to set aside the impugned ruling.
14. In retort, the 1st respondent maintains that the trial court acted correctly in dismissing the appellant's application since despite having been properly served with summons to enter appearance, it neither entered appearance nor filed its statement of defence in good time.
15. The 1st respondent further maintains that the decision as to whether or not to set aside a default judgment is discretionary in nature and ought to be made on just terms, as laid out in the case of *Shanzu Investments Ltd v Commissioner of Lands*, CA No. 100 of 1983.
16. The 1st respondent is of the view that an order setting aside the default judgment will only serve to delay the course of justice and therefore urges this court to dismiss the appeal and uphold the decision by the trial court.
17. The 2nd respondent by way of his brief submissions contends that he has been wrongfully dragged into the proceedings since the outcome of the appeal has no bearing on him. He therefore sought for costs of the appeal.
18. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. It is clear that the appeal fundamentally lies against the trial court's decision to dismiss the appellant's application seeking to set aside the interlocutory judgment and to file its statement of defence out of time. I will therefore deal with the grounds of appeal contemporaneously under the following limbs.
19. The first limb of appeal concerns itself with whether the interlocutory judgment entered on June 3, 2016 is regular.
20. In the abovementioned application dated December 2, 2016 the appellant stated that the summons to enter appearance were neither served upon its registered office nor served upon any of its officials and/or employees.
21. The appellant stated that the affidavit of service on record contained falsehoods, and that the alleged summons bore the stamp of a purported sister company which is unknown to the appellant.
22. The appellant further stated that it only came to learn of the existence of the suit upon receiving the proclamation notices in execution of the decree by the 1st respondent.
23. In his replying affidavit to the Motion, the 1st respondent stated that investigations disclosed the details of the appellant and that Geoffrey Ngatia who was at all material times a duly registered process server effected service upon the appellant, before preparing a valid affidavit of service.
24. The 1st respondent also stated that at the time of acknowledgement of receipt of the summons to enter appearance, the representative of the appellant confirmed that one Powergen Technologies Limited who was the objector in the suit, was a sister company of the appellant.



25. Upon hearing the parties on the Motion, the learned trial magistrate analyzed that service had properly been effected upon the appellant and therefore found the interlocutory judgment in place to be regular.
26. Upon my study of the record, I am of the view that the issue of whether or not the appellant and Powergen Technologies Limited are related entities is neither here nor there.
27. Upon my further study of the record, I note that the 1st respondent had availed a copy of the affidavit of service sworn by Geoffrey Ngatia on January 21, 2015 whose contents support the averments made in the replying affidavit and indicated hereinabove regarding service of the summons to enter appearance and the pleadings.
28. The affidavit of service also bears the averments that the aforementioned documents were served upon one Njeri, who is said to have informed the process server that the 3rd respondent herein was equally an employee of the appellant at the time and therefore received the documents.
29. In view of the foregoing circumstances and in the absence of any credible evidence to the contrary, I find the averments made on behalf of the 1st respondent regarding service to be more believable than those made by the appellant. I am therefore satisfied that service was effected upon the appellant in line with the provisions of Order 5, Rule 3 of the Civil Procedure Rules, 2010 relating to the procedure of service upon corporations, and hence the interlocutory judgment entered is regular.
30. This brings me to second limb of the appeal touching on whether the appellant's draft statement of defence raises triable issues.
31. In the supporting affidavit to the application, Charles Gitau who is a Director of the appellant, stated that the defence raises triable issues since the collision which resulted in the material accident involved more than one (1) motor vehicle.
32. In reply, the 1st respondent stated that the draft statement of defence which was not filed in good time is not deserving of the court's consideration.
33. In his ruling, the learned trial magistrate pronounced that he was not satisfied in the circumstances to vary and/or set aside the interlocutory judgment. From my reading of the impugned ruling, it is apparent that the learned trial magistrate did not address his mind specifically on the subject of whether the defence raises triable issues.
34. In determining whether or not to set aside an ex parte/interlocutory judgment, a court is required to consider whether a party has a triable defence even where service of summons is deemed to be proper. In so saying, I cite with approval the rendition in the case of Tree Shade Motors Ltd v DT Dobie & another (1995-1998) IEA 324 relied upon in the case of M/S Jundu Enterprises Limited v Spectre International [2019] eKLR thus:

“ Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”
35. The above position is echoed in the case of Patel v East Africa Cargo Handling Services [1974] EA 75 cited in the submissions by the appellant.
36. Upon my study of the appellant's draft statement of defence, I observed that the same is essentially challenging the particulars of negligence made out against it, by claiming that the 1st respondent was



either solely or substantially to blame for the material accident, thereby giving rise to the subject of contributory negligence.

37. In my view, the foregoing consist of triable issues which can only be adequately ventilated at the hearing of the suit.
38. The third limb of appeal and condition for consideration in setting aside an interlocutory/default judgment has to do with whether the respondent stands to be prejudiced. Upon my perusal of the record, I observed that the learned trial magistrate did not address his mind to this condition specifically.
39. Going by the record, it is apparent that the respondent indicated that it would not serve the interest of justice for the interlocutory judgment to be set aside.
40. However, from my study of the record I observed that the 1st respondent did not place any credible evidence before the trial court to show that the prejudice suffered would be so irreparable as to constitute a grave injustice to him, or that any prejudice suffered cannot be adequately compensated by way of an award of costs.
41. Upon taking into account all the foregoing factors hereinabove, I am convinced that it would be a proper exercise of my discretion to interfere with the impugned ruling and to grant the appellant the opportunity of defending the claim.
42. In the end, I will allow the appeal. Resultantly:
 - i. The ruling/order made on April 18, 2017 is hereby set aside and is substituted with an order allowing the Notice of Motion dated December 2, 2016 but with costs to the 1st respondent.
 - ii. The interlocutory/default judgment entered on June 3, 2016 as against the appellant and all consequential orders/proceedings are hereby set aside.
 - iii. The appellant is granted leave to file and serve its statement of defence within 14 days from today.
 - iv. In the circumstances of this appeal, a fair order on costs is to order each party to bear its own costs of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
24TH DAY OF FEBRUARY, 2023.**

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the 1st Respondent

.....for the 2nd Respondent

.....for the 3rd Respondent

