



REPUBLIC OF KENYA



**Arech Petroleum Limited v Wainaina & another (Civil Appeal
23 of 2018) [2023] KEHC 2915 (KLR) (Civ) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2915 (KLR)

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

CIVIL

CIVIL APPEAL 23 OF 2018

JK SERGON, J

MARCH 28, 2023

BETWEEN

ARECH PETROLEUM LIMITED APPELLANT

AND

PETER WAINAINA 1ST RESPONDENT

TAJ LOGISTICS LIMITED 2ND RESPONDENT

(Being an appeal against the ruling and order of Honourable E. Wanjala (Miss.) (Senior Resident Magistrate) delivered on 17th January, 2018 in MILIMANI CMCC NO. 2316 of 2016.)

JUDGMENT

1. The 1st respondent in this instance lodged a suit before the Chief Magistrate's Court by way of the plaint dated 18th April, 2016 and sought for the sum of Kshs.2,160,000/= and general damages, costs of the suit and interest thereon against the appellant on the one part, and the 2nd respondent on the other part, being the expenses allegedly incurred by the 1st respondent in the course of undertaking deliveries to the 2nd respondent and on behalf of the appellant.
2. Upon the request of the 1st respondent, an interlocutory judgment was entered against the appellant and the 2nd respondent by the trial court for failure to enter appearance and/or file their respective statements of defence. Consequently, the matter proceeded for formal proof, with the 1st respondent testifying before closing his case and filing written submissions.
3. The record shows that the trial court delivered its final judgment on 5th October, 2017 by granting the reliefs sought in the plaint.



4. Consequently, the appellant filed the Notice of Motion dated 23rd October, 2017 (“the application”) and sought for the setting aside of the interlocutory judgment and decree, 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 17th January, 2018, thereby causing the appellant who is aggrieved by the aforesaid ruling to institute the instant appeal against it by way of the memorandum of appeal dated 18th January, 2018 containing several grounds.
6. This court gave directions to the parties to file written submissions on the appeal. It is apparent from the record that the 2nd respondent did not participate in the appeal.
7. The appellant vide its submissions dated 3rd November, 2022 argues that the trial court erred in finding that service of summons had been properly effected and yet no summons were issued to the 1st respondent bearing the appellant’s name.
8. The appellant has referred this court to the judicial authority of *Wanjau Charles Wilson & another v Christine Anyango Auma* [2022] eKLR where the High Court sitting on appeal determined that:

“From that record, on the first sub-issue, whether there any summons was ever issued for service on the 1st appellant, I have not seen a copy of any summons to enter appearance issued in the name of the 1st appellant. What I can see are copies of a summons issued in the name of the 2nd appellant. The affidavit of service sworn on 2nd December 2016, returns a summons to enter appearance dated 9th January 2016, which is in the name of the 2nd appellant; and, during cross-examination, the process server conceded that the summons that he served did not bear the name of the person he allegedly served, the 1st appellant herein. Clearly, therefore, going by that record, no summons was ever issued by the court registry for service on the 1st appellant, and what was purportedly served on the 1st appellant was summons for appearance intended for another party. A summons to enter appearance invites a party to file an appearance, and a party cannot enter appearance on a summons that is not in their name. As the summons that was allegedly served on the 1st appellant was not in his name, it cannot be said that the same summoned him to appear, and, therefore, there was no proper service upon him at all.”

9. The appellant further 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.”
10. The appellant also submits that by concluding that the draft defence contained an admission of the 1st respondent’s claim, the trial court did not appreciate that the draft statement of defence raises triable issues which ought to be ventilated at the trial, thus committing an error of law and fact.
 11. To buttress its point above, the appellant has quoted the case of *Express Automobile Kenya Limited v Kenya Farmers Association Limited & another* [2020] eKLR in which the court held that unless the admission in question is clearly and unambiguously made, a party is entitled to exercise his or her right to contest a claim.
 12. It is the submission by the appellant that while the 1st respondent’s claim rides on a contract, he did not adduce any evidence to show the existence of a written contract between him and the appellant.
 13. For the foregoing reasons, the appellant urges this court to allow the appeal and to set aside the impugned ruling and resulting decree.
 14. The 1st respondent retorts by submitting that the appellant’s arguments on lack of service are misguided since there is evidence on record to show that it was served with the summons and pleadings through its offices.
 15. On the subject of the draft statement of defence, the 1st respondent submits that the same consists of mere denials and did not raise any triable issues for consideration, borrowing from the case of *Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & another* [2009] eKLR in which the Court of Appeal reasoned thus:

“It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.”
 16. Ultimately, it is the contention by the 1st respondent that the decision on whether to set aside an ex parte or interlocutory judgment lies purely at the discretion of the court and upon considering the following circumstances, laid out in the case of *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others* [2021] eKLR:

“The discretion of a court to set aside or vary ex-parte judgment entered in default of appearance or defence is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. This was the position in *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR. In the exercise of this discretion the Court will consider inter alia if:

 - i) the defendant has a real prospect of successfully defending the claim; or
 - ii) it appears to the court that there is some other good reason why;
 - iii) the judgment should be set aside or varied; or
 - iv) the defendant should be allowed to defend the claim.”



17. For all the foregoing reasons, the 1st respondent urges this court to dismiss the appeal with costs, in the absence of any valid reasons for setting aside the interlocutory judgment.
18. I have considered the contending submissions and authorities cited on appeal. I have equally 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 by the trial court is regular.
20. In the application dated 23rd October, 2017 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 it came to learn of the judgment in the suit upon being notified through the operators of its virtual office situated at Eden Square Business Complex, 7th floor, Block 1 and which virtual office is solely used for the purpose of receiving mail.
22. In the replying affidavit to the Motion, the 1st respondent through his advocate Samuel Nyambane, stated that service of the summons was duly effected upon the appellant on 25th May, 2016 at its offices referenced in the application and through its receptionist, thereby causing the interlocutory judgment to be regular; to which the appellant retorted by stating that the summons bore the name of the 2nd respondent herein and could not therefore have properly been served upon the appellant.
23. Upon hearing the rival positions, 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.
24. Upon my study of the record, I note that the 1st respondent availed a copy of the affidavit of service sworn by advocate Samuel Nyambane on 26th October, 2016 to support the averments made in the replying affidavit and indicated hereinabove regarding service of the summons to enter appearance and the pleadings.
25. The deponent of the affidavit of service avers that the aforementioned documents were served upon the address referenced by the appellant as constituting its virtual offices.
26. From my study of a copy of the summons which form part of the record of appeal, it is apparent that the same bears a stamp which matches the office details associated with the appellant.
27. Upon my further study of the record; particularly the lower court file; it is also apparent that the 1st respondent took out separate summons to enter appearance in the names of the appellant and the 2nd respondent, which contradicts the position taken by the appellant that the summons issued were solely in the name of the 2nd respondent.
28. In view of the foregoing circumstances and in the absence of any credible evidence to the contrary, I am satisfied that service was effected upon the appellant and hence the interlocutory judgment entered is regular.
29. This brings me to second limb of the appeal touching on whether the appellant's draft statement of defence raises triable issues.
30. In the supporting affidavit to the application, Monica Barrera who is a Director of the appellant, stated that both the 1st and 2nd respondents are unknown to the appellant.



31. The deponent further states that the appellant had contracted a different company to undertake delivery of its goods and it is plausible that the company sub-contracted its services to the 1st respondent, and hence the appellant does not owe any of the sums claimed by the 1st respondent.
32. In reply, advocate Samuel Nyambane deponed that the draft statement of defence is an admission on the claim and is intended to delay the course of justice due to the 1st respondent.
33. In rejoinder, Monica Barrera stated that the appellant is not a party to any agreement with the 1st respondent in relation to the claim and further stated that the appellant was equally not an agent of the 2nd respondent.
34. In her ruling, the learned trial magistrate pronounced that by admitting to the delivery notes which constitute the 1st respondent's list and bundle of documents, the appellant was essentially admitting to its indebtedness and hence the draft statement of defence does not raise any triable issues.
35. 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 D.T. Dobie & Another* (1995-1998) IEA 324 relied upon in the case of *M/S Jondu 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.”
36. Upon my study of the appellant's draft statement of defence, I observed that the appellant is; among others; denying the existence of an agreement between itself and the 1st and/or the 2nd respondents, and further raises the averments that there could possibly have been a sub-contractual arrangement entered into and to which it was not privy.
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 her mind to this specific condition.
39. Going by the record, it is apparent that the 1st 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, the appeal is found to be meritorious. It is allowed thus giving rise to issuance of the following orders:



- i. The ruling delivered on 17th January, 2018 is hereby set aside and is substituted with an order allowing the Notice of Motion dated 23rd October, 2017 but with costs to the 1st respondent.
- ii. The interlocutory judgment entered against the appellant and all consequential orders/ decrees/ proceedings are hereby set aside, and the suit is reinstated.
- iii. The appellant is granted leave to file and serve its statement of defence within 14 days from today. Upon service of the defence, the 1st respondent shall have corresponding leave of 7 days to put in a reply if need be.
- iv. In the interest of justice, I hereby direct that the file be placed before any other magistrate of competent jurisdiction other than Honourable E. Wanjala (Senior Resident Magistrate) for disposal.
- v. In the circumstances of this appeal, a fair order on costs is to order which I hereby do that each party to bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28TH DAY OF MARCH, 2023.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

