



Koba Capital Limited v Okoth; Kenya Commercial Bank (Garnishee) (Civil Appeal E011 of 2022) [2023] KEHC 21082 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21082 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E011 OF 2022**

KW KIARIE, J

JULY 31, 2023

BETWEEN

KOBA CAPITAL LIMITED APPELLANT

AND

SYLVANUS RACHUONYO OKOTH RESPONDENT

AND

KENYA COMMERCIAL BANK GARNISHEE

(Being an Appeal from the ruling in Oyugis Senior Principal Magistrate's SPMC Succession Cause No. 18 of 2021 by Hon. Celesa Okore – Principal Magistrate)

JUDGMENT

1. Koba Capital Limited, the appellant herein, was aggrieved by the ruling of the trial court dated 27th January 2022. The impugned ruling addressed itself to two applications. The first application was dated 18th November 2021 and was seeking for an order for the garnishee to appear before court to show cause why it should not pay to the decree holder to satisfy the judgment of 28th October 2021. The second application was dated 24th November 2021 and was seeking a stay of execution of the judgment dated 28th October 2021 for want of service. Both applications were dismissed.
2. The appellant was aggrieved and filed this appeal through the firm of Ngeri, Omiti & Bush Advocates LLP. The following grounds of appeal were raised:
 - a. That the learned trial magistrate erred in fact and in law by failing to appreciate the well settled principles applied by a court in consideration of an application seeking setting aside of ex parte judgment entered in default of appearance.



- b. That the learned magistrate erred in fact and in law by failing to find that the appellant has an arguable case and should have thus been granted leave to defend the suit and have the honorable trial court determine the suit on merit.
 - c. That the leaned magistrate erred in fact and in law by failing to appreciate the prejudice occasioned against the appellant by the ex parte judgment especially since the 1st respondent has been and is in actual loan arrears.
 - d. That the learned magistrate erred in fact and in law by allowing the mistakes and illegalities of the 2nd respondent to be visited upon the appellant and to the appellant's utter prejudice by failing to consider the appellant's draft defense and counterclaim.
 - e. That the learned magistrate erred in fact and in law by failing to stay execution of the irregular ex parte judgment entered against the appellant and the resultant orders thereon.
 - f. That the learned magistrate erred in fact and in law by wrongly applying the principle of law of evidence and wrongfully shifting the burden of proof to the appellant thereby arriving at the wrong decision.
3. The appeal was opposed by the respondent through the firm of Kisaka & Associates Advocates who argued that it lacked merits.
 4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
 5. Both applications revolved on whether the appellant had been served with the suit and Notice to Enter Appearance. I have perused the affidavit of service dated 26th February 2021 sworn by Sytanslauce Weche. The attached copy Summons to Enter Appearance is signed and bears a stamp of Koba Capital limited. 28th October 2021 the default judgment was entered on 28th October 2021.
 6. The argument by the appellant that they were not served was mere denial and the learned trial magistrate arrived at the conclusion that they were served.
 7. It was not until November 2021, after 8 months of service, that the appellant sought the court's intervention to set aside of the default judgment.
 8. The appellant has cited several cases that speak to the setting aside a default judgment. One the requirement is for the court to satisfy itself that there is a defence raises triable issues. In *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR the Court of Appeal stated:

It is primarily important to ascertain whether there are merits which ought to be tried. At the same time this Court will not lightly interfere with the discretion of the trial judge unless it is satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision, or unless it is manifest on the case as a whole that the judge was clearly wrong in the exercise of his discretion, and that as a result there has been a miscarriage of justice. (See *Mbogo v Shah* [1968] EA 93.
 9. It emerged from the record that the appellant instructed an illegal entity to effect execution contrary to the provisions of the *Auctioneers Act*. Section 9 (1) provides:



1. No person shall, in Kenya, carry on the business of an auctioneer unless he holds a valid license issued by the Board under this Act.

This coupled with the failure to explain the reasons for delay did not persuade the trial court to set aside the default judgment. Had the trial magistrate set aside the default judgment, the court's discretion could not be described as having been exercised judiciously.

10. The upshot of the foregoing is that the appeal lacks merit and the same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF JULY, 2023

KIARIE WAWERU KIARIE

JUDGE

