



**Ngeti & another v Joseph (Civil Appeal E244 of 2023)
[2023] KEHC 27597 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 27597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E244 OF 2023
F WANGARI, J
NOVEMBER 24, 2023**

BETWEEN

SALIM IBRAHIM NGETI 1ST APPELLANT

HASSAN SALIM MZERA T/A VURIA LINKS 2ND APPELLANT

AND

VICTORIA NACHIRO JOSEPH RESPONDENT

*(Being an Appeal from the Ruling of Honourable Gatambia
on 31st August, 2023 in Mombasa SCCC No. E109 of 2023)*

JUDGMENT

1. This is an appeal from the ruling of the Learned Adjudicator Hon. Gatambia in Mombasa SCCC No E109 of 2023 given on 31st August, 2023.
2. The Appellants being dissatisfied with the said ruling preferred the present appeal and raised six (6) grounds of appeal which are set out as follows: -
 - a. That the Honourable Trial Court erred and misdirected itself in Law and in fact by dismissing the Appellant's application dated 3rd July, 2023 without considering in totality the grounds in the application and supporting affidavit thereof;
 - b. That the Honourable Trial Court erred and misdirected itself in Law by misapplying the decision in Mombasa High Court Miscellaneous Application 185 of 2023, *Biosystems Consultants v Nyali Links Arcade* [2023] KEHC 21068 (KLR) that the Appellants' application seeking stay of execution and setting aside the *ex parte* judgement stood dismissed without appreciating its context;



- c. That the Honourable Trial Court erred and misdirected itself in Law by failing to appreciate that the decision in Mombasa High Court Miscellaneous Application 185 of 2023, *Biosystems Consultants v Nyali Links Arcade* [2023] KEHC 21068 (KLR) related to applications on jurisdiction of the Small Claims Court to make a determination after lapse of the statutory 60 days and not applications to set aside *ex parte* judgement;
 - d. That the Honourable Trial Court erred and misdirected itself in Law and in fact by failing to issue an order staying execution of the *ex parte* judgement/decreed delivered on 9th May, 2023;
 - e. That the Honourable Trial Court erred and misdirected itself in Law and in fact by failing to exercise its discretion judiciously and failing to take into account that the Appellants' right to be heard and right to a fair hearing as enshrined in Article 47 and 50 of the *Constitution* of Kenya, 2010 are so fundamental that they cannot be fettered by an exercise of discretion and cannot be limited as in accordance to Article 25 of the *Constitution* of Kenya, 2010;
 - f. That the Honourable Trial Court's ruling was therefore untenable in law and should be nullified by the Appellate Court.
3. The Appellants thus prayed that the Honourable Court be pleased to set aside, vary and/or review the Ruling of the Trial Court delivered on 31st August, 2023 and that costs of the appeal be borne by the Respondent.
 4. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses if any, and hearing their evidence first hand.
 5. This was aptly stated in the cases of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters v Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

6. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that:

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”



7. Directions were taken that the appeal be canvassed by way of written submissions. Both parties duly complied by filing detailed submissions together with citing various decided cases in support of their rival positions. The Appellants' submissions are dated 25th September, 2023 while Respondent's are dated 6th November, 2023. I am grateful to Counsel for complying with the court's directions as the submissions filed are a useful guide to the court in arriving at a decision either way.

Analysis and Determination

8. I have considered the appeal lodged, the submissions for and against, the authorities cited as well as the law and I discern the following issues for determination: -
- a. Whether the Trial Magistrate erred in failing to grant the orders sought in the application dated 3rd July, 2023;
 - b. If the answer to (a) is in the affirmative, what reliefs and/or remedies should the court issue?
 - c. Who bears the cost?
9. On the first issue, the application dated 3rd July, 2023 sought a raft of reliefs among them stay of execution of the *ex parte* judgement made on 9th May, 2023, setting aside of the interlocutory judgment, proceedings and the default judgment and leave to file response to claim. The application was opposed. In its ruling, the Small Claims Court dismissed the application for two reasons. First, the court found that there was evidence that the summons were served upon the Appellants. Secondly, the court relied on the decision in *Biosystems Consultants v Nyalı Links Arcade* (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling) where this court issued a raft of orders among them that: -
- “All pending applications and preliminary objections filed in the Small Claims Court stood dismissed.”
10. At the onset, this was a misdirection on the part of the Trial Court as what this court's ordered in *Biosystems Consultants* (*supra*) were strictly applicable to that case. It was not a one-fit for all decision. It was not to the effect that any applications or preliminary objections filed in the Small Claims Court all over the country were to be considered dismissed.
11. In *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment), it was held as follows: -

“...The ratio of any decision must be understood in the background of the facts of the particular case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches...”



12. The Trial Court was therefore in error to apply the decision in Biosystems Consultants to the case before it without considering the applicability thereof. This being a rectifiable error, the court proceeds to rectify the same by holding that the decision in Biosystems Consultants was not applicable for reasons that the orders issued therein were tailor-made for that matter and not for all other matters before the Small Claims Court.
13. Can the Small Claims Court issue the orders as sought in the application dated 3rd July, 2023? Section 12 of the [Small Claims Act](#) sets out the jurisdiction of the court. As per the provisions of section 27 of the Act, the Trial Court was in order to enter default judgement.
14. The court concurs with the Trial Court's decision to fix the matter for formal proof as it was not an entirely liquidated claim. There is a regular judgement on record and as such, the Trial Court's findings on this aspect more so, on the issue of service of summons upon the Appellants cannot be impeached.
15. Having entered judgement in favour of the Respondent, section 41 of the Act empowered the court to review its judgement and section 42 thereof gave the court jurisdiction to issue stay orders. The court is equally empowered to set aside any of its orders as per section 43 of the Act. Though it is true that the [Civil Procedure Act](#) and Rules thereunder are not applicable to proceedings in the Small Claims Court, the provisions of section 3 of the Act mirrors sections 1A and 1B of the [Civil Procedure Act](#). For this reason, the decisions that have crystallized from the application of sections 1A and 1B of the [Civil Procedure Act](#) are applicable in the present case.
16. In *Shah v Mbogo & another* [1967] EA 116, it was held thus the decision whether or not to set aside *ex parte* judgement is discretionary and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
17. In [CMC Holdings Ltd v Nzioki](#) [2004] KLR 173, the Court of Appeal held as follows: -

“...In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error...”
18. This court agrees with the Trial Court's finding on service. Be that as it may, the Trial Court ought to have applied its powers as set out under Rules 11 and 28 of the [Small Claims Court Rules, 2019](#) in granting stay and setting aside the default judgement.
19. In [Wachira Karani v Bildad Wachira](#) (2016) eKLR as was quoted in the case of [David Gicheru v Gicheba Farms Limited & another](#) [2020] eKLR the Court held that: -

“...The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter...”
20. On the first issue, I return a finding that the Trial Court erred in failing to grant the orders sought in the application dated 3rd July, 2023 for the reasons already highlighted.



21. Having found as above, the application dated 3rd July, 2023 sought principally to set aside the interlocutory as well as the default *ex parte* judgement and the Appellants to be granted leave to file their response to the claim. Stay was already granted by this court on 20th September, 2023.
22. The Appellants attached a draft response to the statement of claim. This being the case, I exercise my discretion by setting aside the judgement delivered on 9th May, 2023 and granting leave to the Appellants to file their response to the claim.
23. To adhere to the timelines stipulated under the Act, the response to the claim shall be done within seven (7) days from the date hereof. In default, the judgement delivered on 9th May, 2023 shall be reinstated.
24. On the issue of costs, a careful reading of Section 27 indicates that it is trite law that they follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540. It is, that costs must follow the event unless the court, for some good reasons, orders otherwise.
25. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party. The court exercises its discretion by directing that the costs shall abide the outcome of the claim before the Small Claims Court.
26. Flowing from the above, I proceed to make the following orders and/or directions: -
 - a. The appeal is hereby allowed on terms that the Trial Court's decision dismissing the application dated 3rd July, 2023 is hereby set aside, varied and/or reviewed to an order allowing the same;
 - b. The Appellants are granted seven (7) days within which they are to file and serve response to the statement of claim, list of witnesses, witness statements, list of documents and copies thereof;
 - c. The Respondent is at liberty to file any other documents or statements, if need be, within seven (7) days from the date of service;
 - d. The matter be fixed for hearing within twenty-eight (28) days from the date hereof;
 - e. The matter be heard before any other adjudicator other than Honourable Gatambia;
 - f. In default of (b) above, the judgement dated 9th May, 2023 shall be reinstated and that the Respondent shall be at liberty to commence execution process;
 - g. To ensure compliance, it is directed that the parties fix the matter for mention within seven (7) days from the date hereof and in any event, not later than 4th December, 2023;
 - h. Costs to abide the outcome of the claim.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 24TH DAY OF NOVEMBER, 2023.

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F. WANGARI

JUDGE

In the presence of:

Mr. Mutinda Advocate h/b for Mr. Amani Advocate for the Appellants



Ms. Wanjiku Advocate for the Respondent

Mr. Barille, Court Assistant

