



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**CIVIL APPEAL NO 40 OF 2019**

**NOVATECH LIMITED.....APPELLANT**

**VERSUS**

**WILLIAM YIDDAH ANZENZE.....1<sup>ST</sup> RESPONDENT**

**KENVAH CONSTRUCTION LIMITED.....2<sup>ND</sup> RESPONDENT**

**(Being an Appeal from the Ruling and order of Hon J. Wambilyanga (PM) delivered at Kisumu in Chief Magistrate's Court Case No 598 of 2017 on 21<sup>st</sup> March 2019)**

**JUDGMENT**

**INTRODUCTION**

1. In her decision of 21<sup>st</sup> March 2019, the Learned Magistrate, Hon J. Wambilyanga, Principal Magistrate, dismissed the Appellant's Notice of Motion application dated 16<sup>th</sup> August 2018 in which it had sought that the interlocutory judgment that had been entered against it be set aside and it be granted leave to file a statement of defence.
2. Being aggrieved with the said decision, on 28<sup>th</sup> March 2019, the Appellant filed a Memorandum of Appeal of even date. It relied on thirteen (13) grounds of appeal.
3. The Appellant's Written Submissions were dated 26<sup>th</sup> July 2021 and filed on 27<sup>th</sup> July 2021 while those of the Respondent were dated 5<sup>th</sup> August 2021 and filed on 6<sup>th</sup> August 2021. The Judgment herein is therefore based on the said Written Submissions which both parties relied upon in their entirety.

**LEGAL ANALYSIS**

4. Having looked at the Memorandum of Appeal, the Appellant's and Respondent's Submissions, it was the considered view of this court that the issues that had been placed before it for determination were:-

**a. whether or not the Appellant was duly served with Summons to Enter Appearance leading to entry of interlocutory judgment against it as provided by the law; and**

**b. whether execution against the Appellant was unlawful.**

5. This court nonetheless found it prudent to deal with the aforesaid issues under the following distinct and separate heads.

**I. INTERLOCUTORY JUDGMENT**

6. Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (9), (10), (11), (12) and (13) were dealt with under this head because they were all related.

7. The Appellant relied on the provisions of Order 11 of the Civil Procedure Rules, 2010 that provides that where judgment had been entered under the said Rule, the court could set it aside and/or vary such judgment and any consequential decree or order upon such terms as are just.

8. It submitted that before the deputy registrar could enter interlocutory judgment, he had to satisfy himself that the person who ought to be served with summons to enter appearance could not be traced to be served personally. It pointed out that the Affidavit of Service of the Process Server, Lucas Maingi Kimani was clear that it was only the 1<sup>st</sup> Respondent herein who had been served with the Summons to Enter Appearance.

9. It was categorical that the 1<sup>st</sup> Respondent had never been its director, manager or shareholder and averred that any representation that the 1<sup>st</sup> Respondent was its Project Manager was fraudulent. It added that the question of whether or not the 1<sup>st</sup> Respondent was its officer ought to have been determined during trial.

10. It was its submission that where there had been no proper service of summons, then there could not be regular default judgment as was held in the case of **Total Kenya Ltd vs Supa Hauliers Ltd** (eKLR citation not given).

11. It argued that it had a *bona fide* defence which ought to guide the court to exercise its discretion in its favour. It placed reliance on the cases of **AAT Holdings Ltd vs Diamond Shields International Ltd [2014] eKLR** and **Philip Keipto Chemwolo & Another vs Augustine Kubende [1986] eKLR** where the courts therein held that the applicant had to demonstrate at least a triable issue and a *prima facie* case respectively before a court could exercise its discretion to set aside an interlocutory judgment.

12. It also relied on the case of **Pithon Waweru Maina vs Thuka Mugiria [1983] eKLR** where the court cited with approval the case of **Patel vs E.A Cargo Handling Services Ltd [1974] EA 75** where it was held that the court could exercise its discretion to avoid injustice, hardship resulting from accident, inadvertence or excusable mistake or error but not to assist the person to obstruct or delay the course of justice.

13. On its part, the 2<sup>nd</sup> Respondent was emphatic that there was on record the Appellant's Stationery where the 1<sup>st</sup> Respondent had signed as the Appellant's Project Manager and Project Administrator and that he received Summons to Enter Appearance on behalf of the Appellant herein.

14. It relied on the provisions of Order 5 Rule 3 of the Civil Procedure Rules that provides that subject to any other written law, summons to enter appearance where the suit is against a corporation, may be served on the secretary, director or other principal office of the corporation. It referred to the definition of a principal officer in Section 2 of the Companies Act as the same was not provided in the Civil Procedure Rules and pointed out that principal officer therein was defined as any director, manager or secretary of the corporation or the body.

15. This court looked at the Process Server's Affidavit of Service that was sworn on 22<sup>nd</sup> December 2017 and noted that he had averred as follows:-

**“4. ...I was informed that the offices of the 1<sup>st</sup> Defendant had not been opened for more than three months...**

**5. ....I immediately called the 2<sup>nd</sup> Defendant and introduced myself and stated the purpose of calling. He stated that the 1<sup>st</sup> Defendant had moved offices to Busia road but informed me that he was planning to come to the CBD ...**

**6....I tendered to him the said documents which he perused and acknowledged receipt by signing at the bottom... ”**

16. The Appellant's submissions that the 1<sup>st</sup> Respondent was not its director or shareholder and could not therefore have received Summons to Enter Appearance on its behalf were neither here nor there because persons who were not directors or shareholders of a company could still receive court process on behalf of a corporation. Indeed, Order 5 Rule 3(a) of the Civil Procedure Rules provides that:-

**“Subject to any other written law, where the suit is against a corporation the summons may be served on the secretary, director or other principal officer of the corporation (emphasis court)”**

17. Further, Section 2 of the Companies Act states that:-

**“officer”, in relation to a company or other body corporate, means any director, manager or secretary of the company or body”**

18. Having said so, the pertinent question that faced this court was in respect of the relationship of the Appellant and the 1<sup>st</sup> Respondent herein. In its Complaint dated 9<sup>th</sup> November 2017 and filed on 20<sup>th</sup> November 2017, the 2<sup>nd</sup> Respondent described the 1<sup>st</sup> Respondent as the Appellant's director and guarantor. In its letter dated 18<sup>th</sup> August 2017 and 12<sup>th</sup> January 2018, the 1<sup>st</sup> Respondent described himself as the Appellant's Project Manager and Project Assistant respectively. As was correctly pointed out by the 2<sup>nd</sup> Respondent, both communication was written in letters bearing the Appellant's letter heads.

19. For all purposes and intent therefore, this court agreed with the 2<sup>nd</sup> Respondent and the Learned Magistrate that the 1<sup>st</sup> Respondent was the Appellant's officer and was a person who was envisaged by Order 5 Rule 3 of the Civil Procedure Rules and Section 2 of the Companies Act as being a person who could be served with court process on behalf of a corporation.

20. Be that as it may, it was not clear from the Process Server's Affidavit of Service whether the 1<sup>st</sup> Respondent accepted the Summons to Enter Appearance on his own behalf and on behalf of the Appellant herein. If he did, then there was an omission on the part of the Process Server to have stated as much. He merely stated as follows:-

**“I tendered to him the said documents which he perused and acknowledged receipt by signing at the bottom...”**

21. It is trite law that a director and a company are different legal entities and must be served separately. In the absence of water tight proof as to whether the Appellant herein was duly served with the Summons to Enter Appearance, this court was persuaded that it should give the Appellant benefit of doubt.

22. Going further, assuming that the Appellant had been served, this court would still have been inclined to give it an opportunity to have its case heard and determined fairly in a competent court as contemplated in Article 50 (1) of the Constitution of Kenya, 2010.

23. Notably, the court can vary and/or set aside an interlocutory judgment under Order 10 Rule 11 of the Civil Procedure Rules. The circumstances under which a court can vary and/or set aside interlocutory judgment and consequential orders therein are, however, not set out. The court can set aside and/or vary such interlocutory judgment if it is satisfied that there is good reason to grant such orders on such terms as are just. The reasons could range from a mistake, error on the part of advocates, omissions, demonstration of a *prima facie* case or *bona fide* or triable issue amongst many other reasons.

24. The said Order 10 Rule 11 of the Civil Procedure Rules states that:-

**“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.”**

25. A perusal of the Appellant’s draft Statement of Defence showed that it had particularised fraud on the part of the 1<sup>st</sup> Respondent herein. This was a triable issue for which the Appellant ought to have been allowed to prosecute and/or ventilate its case on merit. It was best to give it an opportunity to have its day in court whereat the 2<sup>nd</sup> Respondent would also have an opportunity to demonstrate that the 1<sup>st</sup> Respondent was the Appellant’s Director and they were therefore jointly and severally liable for the debt that was due and outstanding to it. These were matters of fact that were best determined in a full trial.

26. Despite the Learned Magistrate having applied the correct principles, this court nonetheless assumed its original jurisdiction while sitting on appeal to give the Appellant a second bite at the cherry by prosecuting its case to its logical conclusion. Indeed, Section 78(2) of the Civil Procedure Act states that:-

**“Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”**

27. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (9), (10), (11), (12) and (13) were merited and the same be and are hereby upheld.

## **II. EXECUTION PROCEEDINGS**

28. Ground of Appeal No (8) was dealt with under this head.

29. Although this court had found that the 1<sup>st</sup> Respondent was the Appellant’s officer who could accept service on its behalf, it could not for a fact ascertain from the documents on record whether indeed the Appellant received the said Notice to Execute.

30. Notably, the Affidavit of Service of Jeji Edgar that was sworn on 19<sup>th</sup> February 2018 and filed on 21<sup>st</sup> February 2021 showed that only the 1<sup>st</sup> Respondent was served with the Notice of Execution dated 20<sup>th</sup> January 2018. There was no indication that he had accepted the same on his own behalf and on behalf of the Appellant herein. It had only merely stated as follows:-

**“I tendered the documents to the 2<sup>nd</sup> Defendant and he acknowledged receipt by signing and indicating the date on the front page of my copies.”**

31. To avoid any ambiguity, it is critical to indicate in an affidavit of service who has received court process and if the same has been received on behalf of another, the same should be clearly stated. Failure to indicate on whose behalf summons have been served may persuade a court to exercise its discretion in favour of a party against whom adverse orders are sought to be made on the basis of such affidavit of service.

32. The above notwithstanding, as this court had found and held that there was merit in setting aside the interlocutory judgment, it followed that all consequential orders therein ought to be set aside and/or vacated. The question of whether the Notice to Execute was lawful or not had been rendered moot by the aforesaid determination relating to the setting aside of the interlocutory judgment that had been entered against the Appellant herein.

## **III. COSTS**

33. An order under Order 10 Rule 11 of the Civil Procedure Rules cannot be given without any conditions being imposed. The 2<sup>nd</sup> Respondent therefore ought to be compensated by way of costs for having been taken back in time in this matter. In view of the delays that will be caused by having this matter heard on merit, this court found and held that a sum of Kshs 50,000/= thrown away costs would be reasonable compensation herein for the reason that the Appellant had made an effort to set aside the interlocutory judgment in the first

instance in the lower court.

**DISPOSITION**

34. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal lodged on 1<sup>st</sup> February 2019 was merited and the same be and is hereby allowed. The effect of this decision is that the Ruling of Hon J. Wambilyanga (PM) that was delivered in **CMCC No 598 of 2017 Kenvah Construction Limited vs Novatech Limited** be and is hereby vacated and/or set aside and replaced with the order that the Appellant's Notice of Motion application dated 16<sup>th</sup> April 2018 and filed on 17<sup>th</sup> April 2018 be and is hereby allowed in terms of Prayer No (4) and (5) therein on the following conditions:-

- 1. THAT the Appellant shall file and serve its Statement of Defence within fourteen (14) days from the date of this Ruling.**
- 2. THAT the Appellant shall pay to the 2<sup>nd</sup> Respondent thrown away costs in the sum of Kshs 50,000/= within fourteen (14) days from the date of this Ruling.**
- 3. In default of Paragraph 34(1) hereinabove, the 2<sup>nd</sup> Respondent shall be at liberty to apply for interlocutory judgment as provided by the law and proceed accordingly.**
- 4. In default of Paragraph 34(2) hereinabove, the 2<sup>nd</sup> Respondent will be at liberty to pursue recovery of the thrown away costs in the manner provided by the law.**
- 5. Either party is at liberty to apply.**
- 6. Costs of the application in the lower court will be in the cause. Each party will bear its own costs of the Appeal herein.**

35. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 26<sup>TH</sup> DAY OF JANUARY, 2022**

**J. KAMAU**

**JUDGE**