



**Githegi v Kondala Limited-Nestle (Civil Appeal 175 of 2019)
[2022] KEHC 12577 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 175 OF 2019
MM KASANGO, J
JULY 27, 2022**

BETWEEN

SAMUEL WARARI GITHEGI APPELLANT

AND

KONDALA LIMITED-NESTLE RESPONDENT

JUDGMENT

1. The issue in this appeal is whether the Thika Magistrate's court (the trial court) correctly exercised discretion in declining to set aside default judgment entered against Samuel Warari Githegi, the appellant.
2. The respondent, Kondala Limited-nestle is a Limited Liability Company that carries on the business of supplying Nestle products under a specific territory which territory comprises of Nairobi County, Kiambu County and other environs.
3. The respondent employed the appellant as a salesman. The appellant's duties were, inter alia, to receive Nestle products from the respondent's Thika Depot. The appellant duties were to supply those products to the respondent's customers and thereafter he would collect payment on each delivery.
4. The respondent alleged in the claim filed before the Thika Magistrate's court, that while the appellant was in the respondent's employment, between March and May, 2016 he committed fraud and/or converted proceeds of the respondent to the value of Kshs.385,779. The respondent sought for judgment against appellant for the stated amount plus judgment in general damages for breach of contract.
5. Default judgment was entered in favour of the respondent on 22nd October, 2018. As evidenced by the extracted decree default judgment was entered for Kshs.385,779.



6. Appellant filed before the trial court, an application, a notice of motion dated 6th March, 2019. The prayer thereof was for the court to set aside the ex parte default judgment. The application was heard by the trial court, by written submissions. The trial court by its ruling dated 6th November, 2019 dismissed that application. That dismissal aggrieved the appellant and hence this appeal.

Analysis

7. The appellant has presented nine grounds of appeal. Those grounds arise from what the appellant stated was his denial by the trial court of an opportunity to be heard and what he stated was erroneous exercise of discretion by the trial court.
8. The sole issue for determination is whether the trial court erred in declining to set aside the default judgment.
9. This appeal was heard through written submissions.
10. In the application for setting aside default judgment, the courts would consider whether the default judgment was regular or irregular. A regular default judgment is where the defendant in an action is served with a plaint and summons but fails to file an appearance and/or defence. That default results in judgment being entered. Such a defendant has a right to move the court by an application to set aside default judgment under Order 10 Rule 11 of the *Civil Procedure Rules*. The court in considering such an application exercises unfettered discretion to set aside judgment. In the case where default judgment is entered against a defendant who was not served with the plaint and summons, such a judgment is termed as irregular judgment. In such a case the defendant is entitled to have such default judgment set aside as of right (ex debitor justitiae).
11. The distinction between a regular and irregular default judgment and their different treatment by the courts was well appreciated by the trial magistrate. The trial magistrate on analyzing the submissions and evidence determined that the default judgment entered against the appellant was regular. The trial court after analyzing decided cases such as *Shah v Mbogo* [1967] EA 116 And *Philip Kiptoo Chemwolo And Mumias Sugar Company Ltd v Augustine Kubede* [1982-1988] KAR page 1036 and also having perused the draft defence filed by the appellant declined to exercise its unfettered discretion in favour of the appellant.
12. The summons were served, according to the affidavit of service dated 17th October, 2018, at Thika Magistrates' court. That affidavit of service shows that the appellant was attending his criminal trial which was in Thika Chief Magistrate's Court when he was served. That service, according to the respondent, was effected by the respondent's advocate who was attending that criminal trial while watching brief for the respondent. The appellant had the onus of disproving that service. There is a presumption in favour of service effected. The presumption is that service as stated in the affidavit of service. The learned authors Chitale and Annaji Rao in the *Code of Civil Procedure Volume 11 page 160* stated thus:-

“There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.”



13. The Court of Appeal in the case *Shadrack Arap Baiywo v Bodi Bach* [1987] eKLR restated the above publication and held:-

“There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.”

14. The appellant did not seek to cross examine the process server. That affidavit of service was therefore not impeached and therefore the trial court correctly found that the service of the summon on the appellant was regular.

15. The appellant did not give reason for his failure to file memorandum of appearance within the requisite period. He however presented a draft defence, that draft defence was filed only after the respondent deposed in its replying affidavit that there was not draft defence annexed to the application. It would therefore seem the draft defence was an afterthought.

16. In the draft defence in response to the very detailed pleading of fraud and/or conversion in the plaint, the appellant stated thus:-

“The content of paragraph 8,9,10 and 11 including the particulars of conversation, fraud and breach of contract therein are denied and in rebuttal, the defendant wishes to state that the plaintiff only intends to paint the defendant in bad picture and thus the defendant puts the plaintiff to strict proof.”

17. The trial magistrate by his ruling, in respect to that pleading in the draft defence, stated:-

“I have carefully perused the draft statement of defence. The defendant merely denies giving evasive generalities. I find ex facie that the defence does to raise a reasonable defence with cogent triable issues to warrant meritorious consideration by the court.”

18. I concur with that finding by the trial magistrate, the appellant’s draft defence is not a defence on merit. It does not raise prima facie defence which could have gone to trial for adjudication.

19. There is therefore no basis to interfere with the trial court’s decision declining to set aside the default judgment.

20. Beside the above discussion the appeal will fail because the appellant on 8th October, 2020 entered into consent, before the trial court by which consent he undertook to pay the decretal sum by instalments. By that consent, the appellant accepted the very judgment he seeks to challenge by this appeal. In other words, the appellant by this appeal seeks to challenge that consent. Appellant can only seek to set aside that consent on grounds of fraud or collusion or on the basis on which one would rescind a contract: See the case of *Intercountries Importers And Exportes Limited v Teleposta Pension Scheme Registered Trustees & 5 Others* [2019] eKLR thus:-

“The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig v Mallya* [1975] EA 266 where Mustafa Ag. VP stated thus:-



“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

Disposition

21. The judgment of this Court is that the trial court did not err and in view of the foregoing discussion, this appeal is hereby dismissed with costs.

JUDGMENT DATED and DELIVERED at KIAMBU this 27TH JULY, 2022.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

Court Assistant:- Mourice

For Appellant:- Ms. Weyimi HB Mr. Waweru Nyambura

For Respondent:- N/A

Court

Judgment delivered virtually,

MARY KASANGO

JUDGE

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