



**Omeriye Limited t/a Light International Schools v Hinesh Trading Limited (Civil Appeal E018 of 2022) [2022] KEHC 12209 (KLR) (Commercial and Tax) (22 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12209 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E018 OF 2022**

**DAS MAJANJA, J**

**AUGUST 22, 2022**

**BETWEEN**

**OMERIYE LIMITED T/A LIGHT INTERNATIONAL SCHOOLS .. APPELLANT**

**AND**

**HINESH TRADING LIMITED ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. E. Kagoni, PM dated 16th February 2022 at the Magistrates Court at Nairobi, Milimani in Civil Case No. E083 of 2021)*

**JUDGMENT**

**Introduction and Background**

1. On January 27, 2021, the respondent filed suit in the subordinate court against the appellant claiming KES 5,226,626.50 citing breach of a contract for the supply of books by the respondent to the appellant. From the record, the appellant filed a memorandum of appearance on or about March 1, 2021. The respondent requested for default judgment on the ground that the appellant had not filed its defence within 14 days as provided for by Order 10 Rule 4 of the *Civil Procedure Rules, 2010* (“the Rules”). The court obliged and entered default judgment in favour of the respondent on April 9, 2021. The court issued a decree on April 16, 2021 whereupon the respondent proceeded to levy execution thus precipitating an application to set aside judgment.
2. The appellant then filed an application dated May 6, 2021 as amended on October 18, 2021 under Order 10 Rule 11 of the Rules seeking, *inter alia*, to set aside the default judgment entered on April 9, 2021. The subordinate court considered the application and by a ruling dated February 16, 2022, dismissed the application with costs to the respondent.



3. The trial magistrate held that the default judgment was regular. The court blamed the appellant for being indolent and the author of its misfortune as it had not demonstrated that it had issued instructions to its previous advocate to file its defence on time. The court further held that the application was fatally defective as the appellant had not sought leave to file the defence, which was already on record, out of time. It also faulted the appellant for failing to file a draft defence which rendered the application fatal.
4. Dissatisfied with the ruling, the appellant has not filed this appeal grounded on the memorandum of appeal dated February 24, 2022. It seeks to set aside the order dismissing its application and to be allowed to defend the suit.

### **Analysis and Determination**

5. The issue in this appeal, which was argued by oral submissions by counsel, is whether the learned trial magistrate erred in the exercise of his discretion to set aside the default judgment. In an appeal against the exercise of discretion by the trial court, the appellate court will not interfere with the decision of the trial court unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been an injustice (see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co Ltd and Others v East African Underwriters (Kenya) Ltd* NRB CA Civil Appeal No 36 of 1983 [1985] eKLR).
6. As stated in the introductory part, the subordinate court entered default judgment in favour of the respondent for the reason that the appellant did not enter appearance and file its defence on time. From the record, by the time the judgment was entered on April 9, 2021, the appellant had already filed a statement of defence on April 6, 2021.
7. The case before the subordinate court was grounded on the fact that the statement of defence was filed out of time in line with Order 6 Rule 1 of the Rules provides that:

Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons.

Also Order 7 Rule 1 of the Rules which provides that:

Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.
8. What the trial court appears to have overlooked is Order 9 rule 1 of the Rules which allows a defendant to file its defence at any time before judgment is entered against it. It states:

A defendant may appear at any time before final judgment, and may file a defence at any time before interlocutory judgement is entered against him, or, if no interlocutory judgement is so entered, at any time before final judgement.
9. As the court explained in *Magonjwa v Attorney General* MSA HCCC No 125 of 1999 [2000] eKLR, this provision means that, “ that a defendant is at liberty to appear and file a defence if there is no interlocutory or final judgment on record without seeking leave of court. A defence so filed cannot be ignored or declared a nullity.”



10. The court has unfettered discretion under Order 10 rule 11 of the Rules to set aside default judgment. This discretion 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. However, where there the judgment is irregular, the court does not have discretion to set aside the judgment, it must set it aside. In *Mwala v Kenya Bureau of Standards EALR* [2001] 1 EA 148, the court explained this position as follows:

[A] distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but *ex debito justitiae* for a court should never countenance an irregular judgment on its record. [Emphasis mine]

11. I have no hesitation in finding that the default judgment entered against the Appellant was irregular as there was a statement of defence on record at the time the judgment was entered. It ought to have been set aside *ex-debito justitiae*.
12. Before I conclude the matter, I would be remiss if I did not comment on two issues dealt with by the trial magistrate. First, the trial magistrate held that a party who seeks to set aside judgment must ask for leave to file its defence. There is no basis for this conclusion. It is sufficient for a party to seek to set aside the judgment. Once the judgment is set aside, it follows that a party is entitled to file its defence there being no judgment. It is however proper that the court gives directions on the time for filing and service of the defence. After all, the court has discretion to set aside the default judgment on such terms as are just.
13. Second, the learned magistrate held that failure to attach a draft defence to the application to set aside default judgment is fatal. This is a misdirection. While it is desirable, failure to do so is not fatal as the nature of the defence may be outlined in the affidavits and documents in support of the application. I would only quote the decision of the Court of Appeal in *Kingsway Tyres and Automart Ltd v Rafiki Enterprises Ltd* NRB CA Civil Appeal No 220 of 1995 [1996] eKLR where it observed as follows:

To our minds, the onus was on the respondent to fault the service. Having failed to do so, and in the absence of evidence on record to lead us to hold that the service was improper, it is our view and so hold that *ex parte* judgment was a regular judgment. It would only, if at all, be properly, vacated on grounds other than non-service of summons.

There are ample authorities to the effect that, notwithstanding regularity of it, a court may set aside an *ex parte* judgment if a defendant shows he has a reasonable defence on the merits. The respondent did not annex to its application in the lower court a draft defence. A director of the company did, however, swear an affidavit to state that the appellants's claim was based on certain LPOs which had been stolen from it (the respondent) by its employees. Too, that the employees had been arraigned in court on criminal charges relating thereto. In view of that, it did not think the claim, properly, lay against it. It was desirable, we think for the respondent to annex to its application a draft defence to include all that and any other defences it may have had to the appellant's claim. Be that as it may, the defences, above, were not such as would have properly, influenced the court below to exercise its discretion



in favour of setting aside. That is the more so considering the manner the parties conducted business between themselves.

### **Disposition**

14. For the reason that default judgment was entered while there was a statement of defence on record, I hold that the judgment was irregular. The trial magistrate therefore erred in failing to set aside the judgment. In the circumstances, I allow the appeal on the following terms:
1. The amended notice of motion dated October 18, 2021 is allowed and the judgment entered on April 9, 2021 is set aside.
  2. The appellant's statement of defence filed on April 6, 2021 is deemed as duly filed and served.
  3. The respondent shall bear the costs of the application and the appeal all assessed at KES 20,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2022.**

**D. S. MAJANJA**

**JUDGE**

**Court Assistant: Mr M. Onyango.**

Ms Mangla instructed by Rachier and Amollo Advocates LLP for the Appellant.

Mr Wafula instructed by Walker Kontos Advocates for the Respondent.

