



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mucheke v Limukii & 2 others (Civil Appeal 104 of 2019)  
[2022] KEHC 16663 (KLR) (21 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16663 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL 104 OF 2019  
TW CHERERE, J  
DECEMBER 21, 2022**

**BETWEEN**

**JOHN MBAYA MUCHEKE ..... APPELLANT**

**AND**

**KABERIA E. LIMUKII ..... 1<sup>ST</sup> RESPONDENT**

**FELIX MUTUA MAILU ..... 2<sup>ND</sup> RESPONDENT**

**EQUITY BANK LTD ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling in Meru CMCC NO. 121 OF  
2017 by Hon. T.M. Mwangi (SPM) dated 22nd August, 2019)*

**JUDGMENT**

1. This appeal arises from the ruling delivered on August 22, 2019 in Meru CMCC No. 121 of 2017 in which Appellant's application dated 18<sup>th</sup> June, 2019 to set aside the interlocutory judgment against him on the ground that he was not served with summons.
2. By a ruling dated August 22, 2019, the application was dismissed and Appellant being aggrieved filed this appeal setting six grounds mainly but mainly that he was not served with summons he has a good defence to 1<sup>st</sup> Respondent's claim.

**Analysis and determination**

3. I have considered the appeal in the light of the evidence on record and submissions on behalf of Appellant and 1<sup>st</sup> Respondent and the issues for determination are firstly whether Appellant was served with summons and secondly whether Appellant was represented by the firm of Mithega and Kariuki Advocates



4. It is trite law that "whoever alleges must prove. Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya states as follows:
  1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
5. With respect to service of summons, I would have expected the process server that served the summons to swear an affidavit to controvert Appellant's contention that he was not served. In the absence of the process server's affidavit, Appellant's averment that he was not served was unchallenged and ought to have been accepted by the trial court.
6. Whereas there is evidence that the firm of Mithega and Kariuki Advocates entered appearance for all the defendants, the fact that it filed a defence and submissions only for the 3<sup>rd</sup> Respondent taken together with Appellant's contention that he had not instructed the said firm to appear for him was in my considered view well explained and ought not to have been rejected by the trial court.
7. It should be the court's last resort to deny a party a chance to be heard. Judicial authority to do justice to all, vested on this court by article 159 of *the Constitution* cannot be said and be seen to be exercised if the courts were to deny a party a chance to be heard on merit especially one that has demonstrated, as did the Appellant, that he was not served with summons and has a defence that cannot be dismissed as a mere denial.
8. In conclusion, I find that a case has been made out for allowing the appeal and it is therefore hereby ordered:
  1. The order dated August 22, 2019 dismissing the Appellant's notice of motion dated 18<sup>th</sup> June, 2019 is set aside and substituted with an order allowing the application to set aside the decree dated March 11, 2019 and all consequential orders and granting the Appellant unconditional leave to defend by a defence to be filed and served within 45 days from today's date.
  2. The suit shall be heard by any other magistrate other than Hon. T.M. Mwangi
  3. Flowing from the foregoing, this court's judgment dated 15<sup>th</sup> December, 2022 confirming the trial court's judgment against the Appellant herein ceases to have effect.
  4. Each party shall bear its own costs

**DELIVERED IN MERU THIS 21<sup>st</sup> DAY OF December 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

**Court Assistant - Morris Kinoti**

For Appellant - Muia Mwanzia & Co. Advocates

For 1<sup>st</sup> Respondent - Ms. Waswani for Maitai Rimita & Co. Advocates

For 2<sup>nd</sup> Respondent - N/A

For 3<sup>rd</sup> Respondent - Ms. Masamba for Mithega & Kariuki Advocates

