



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwangi v Nyaruai (Civil Appeal 39 of 2019)
[2022] KEHC 16471 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL 39 OF 2019
CM KARIUKI, J
DECEMBER 20, 2022**

BETWEEN

RUTH WANJIKU MWANGI APPELLANT

AND

NANCY MUTHONI NYARUAI RESPONDENT

JUDGMENT

1. The Appellant filed a Memorandum of Appeal dated 24th September 2019, raising the following grounds of appeal in urging the court to set aside the ruling delivered on 17th September 2019: -
 - i. That the learned trial magistrate erred in law and in fact in holding that despite there being no evidence of service of hearing notice upon the Appellant, it should be presumed that the Appellant was duly served with hearing notice.
 - ii. That the learned magistrate erred in law and fact in holding that despite there being no affidavit of service on record, the Appellant ought to have applied for cross examination of the process server.
 - iii. That the learned magistrate erred in law and fact in holding that the judgement entered was a regular judgement.
 - iv. That the learned magistrate erred in law and fact in holding that the Appellant's defence did not have triable issues.
 - v. That the learned trial magistrate erred in law and fact in holding that in dismissing the Appellant's application of 19th March 2019 with costs.
2. Reasons wherefore the Appellant prayed for: -



- a. The appeal be allowed and the ruling delivered on 19th September 2019 in Nyahururu CMCC No. 83 of 2015 be set aside.
 - b. The judgement entered in Nyahururu CMCC No. 83 of 2015 be set aside and the Appellant be granted leave to defend herself.
 - c. The Respondent be ordered to pay the costs of this appeal.
3. Parties were directed appeal canvass via submissions.

Appellant's Submissions

4. On the issue of service, the Appellant submitted that she was never served with any hearing notice notifying her about the hearing date of the suit and that she only came to learn about it when she was arrested. That the Respondent did not exhibit a copy of the hearing notice that was served for the hearing date that took place in early 2017.
5. The Appellant stated that she was not made aware of the hearing date and as such was not given a chance to ventilate her defence on record. That the trial court did not have the benefit of seeing a copy of the affidavit of service that was used to prove service of hearing notice upon the Appellant. She asserted that there was no evidence on record before the trial court to show that the Appellant had participated in the fixing of the hearing date of the main suit so as to do away with personal service of a hearing notice.
6. Reliance was placed on *Royal Parcel Services Limited v Boniface Shibusse Shibunyanga* [2020] eKLR, *Peter Ndeti Ndolo v William Mutisya Muindi* [2021] eKLR & *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* eKLR
7. It was the Appellant's argument that the Respondent had contended in her replying affidavit that a hearing notice was served on 27th September 2018 as per the affidavit of service filed on 2nd October 2018 and that this service was made way after the judgement was delivered and by extension the hearing if the suit therefore this was not meant to prove service of the hearing notice for the hearing of the main suit that lead to judgement on 28th March 2017.
8. The Appellant submitted that she could have not shown any intention of cross examining a process server on an affidavit of service that was non-existent in the court-record. It was her averment that the trial court misdirected itself when it applied the presumption on the process server averments as being correct. Reliance was placed on *Gulf Fabricators v County Government of Siaya* [2020] eKLR
9. It was their submission that failure to serve hearing notice was fatal to the subsequent proceedings that took place as the Appellant was denied her constitutional right to be heard in a case that she had exhibited her intention to defend by filing a statement of defence. They cited the case of *Dorcas Mbathi v Kenya Power & Lighting Co. Limited* [2016] eKLR & *Burhani Decorators & Contractors v Morning Foods Ltd & Ano* [2014] eKLR
10. The Appellant asserted that a regular judgement is available when parties to the suit are notified of the hearing date and proof of such notification is filed in court. If a party does not appear on the hearing date and upon prove of service, the court may direct the matter to proceed and the judgement that will be realized from such proceedings would be a regular judgement. However, this was not the case in the suit as they had demonstrated that the suit proceeded *ex parte* as there was no prove of service of the hearing notice as such the judgement that resulted from such proceedings was an irregular judgement.



11. Further, it was averred that the Appellant had pleaded that she was not bound to pay the Respondent any amount in excess of the principle sum which was Kshs. 30,000/- and as such the Respondent did not have any claim against the Appellant for any other amount in exceeded of the amount borrowed.
12. The Appellant submitted that the friendly agreement was illegal. That the Respondents had commercialized the loan that she had advanced. That the terms were unconscionable against the rules of commercial engagement and it is oppressive and against public policy for a loan of Kshs. 30,000/- which was advanced in 2015 to sky rocket to a figure of Kshs. 1,117,387 in 2019. Reliance was placed on Section 3 (1) (a) of the *Banking Act* Cap 488, *Leposo Ole Koila & Another v Isaac Kireu* [2018] eKLR and *Amwel Bosire v Gladys Monyangi Omosa & Another* [2010] eKLR.
13. In conclusion, the Appellant submitted that she had a defence that raised triable ad arguable issues and as such it was in the interest of justice for the trial court to have afforded her an opportunity to participate in the hearing.

Respondent's Submissions

14. The Respondent submitted that the Appellant was duly served with a hearing notice dated 6/12/2016 by a process server namely Edward Maina Wachira and he swore an affidavit of service on 28/2/2017. That on 28/2/2017, the Respondent testified s PW1 after the trial court satisfied itself that there was indeed proper service upon the Appellant but they failed to attend court.
15. That they supplied the affidavit of service by Edward Maina Wachira sworn on 28/2/2017 which was omitted from the Appellant's record of appeal dated 26/5/2022. That the affidavit in paragraph 3 explains how the Appellant was served and she accepted service by retaining a copy of the hearing notice but she declined to sign the process server's copy which was returned to court as duly served.
16. The Respondent argued that the Appellant did not in the application before the lower court deny operating the business described by the process server in his affidavit and did not seek for the process server to be called for cross examination on the truthfulness of the affidavit of service. Reliance was placed on *David Koome Matugi v APA Insurance Limited* [2021] eKLR.
17. The Respondent urged this court to find that the Appellant was served and that the judgement entered was regular. That the Appellant was prior to her arrest served with a copy of a notice to show cause dated 17/12/2018 which came up for hearing on 19/2/2019 by the same process server but she again failed to attend court and a warrant if arrest was issued against her.
18. It was stated that the trial magistrate considered the Appellant's defence in page 10 of her ruling dated 17/9/2019 where he found that the Appellant had admitted to being the 1st defendant's guarantor and her defence was thus an after thought and the court cannot be faulted for so doing.
19. Reliance was placed on *Shah Mbogo & Another* [1976] E.A
20. Analysis & Determination
21. The main issue arising from the appeal herein is whether the ruling delivered on 19th September 2019 in Nyahururu CMCC No. 83 of 2015 should be set aside and whether the judgment entered in Nyahururu CMCC No. 83 of 2015 should be set aside and the Appellant be granted leave to defend herself.
22. The Appellant vehemently denied the fact that she was served the hearing notice notifying her about the hearing date of the main suit and that she only came to learn about it when she was arrested. She



- stated that the Respondent did not exhibit a copy of the hearing notice that was served for the hearing date that took place in early 2017.
23. Additionally, she hinged her case on the fact that she was denied her day in court due to the aforementioned lack of service, and she was, therefore, not able to present her defence despite her intention to do so.
 24. On the other hand, the Respondent asserted that the Respondent was served with the hearing notice dated 6/12/2016 by a process server Edward Maina Wachira named, who swore an affidavit of service dated 28/2/2017. Further, it was stated that the trial magistrate considered the Appellant's defense on page 10 of her ruling dated 17/9/2019, where she found that the Appellant had admitted to being the 1st defendant's guarantor and her defense was thus an afterthought.
 25. According to the Respondent, the impugned hearing notice was attached in the supplementary record of appeal filed by the Respondent on 26th September 2022. The same is dated February 28, 2017 and sworn by Edward Maina Wachira. He deponed that on 1/2/2017, he received copies of the hearing notice dated 6/12/2016 from the firm of Waichungo Martin & Co. Advocates with instructions to effect service to the defendants.
 26. In para 3 of the affidavit of service, he deponed that on the same day, in the company of the plaintiff (the Respondent herein), he proceeded to the place of business of Ruth Wanjiku Mwangi situated outside Nyahururu Bookshop. Next to Nyahururu Stadium Main Gate Koinange Road, Nyahururu Town within Laikipia County, where he met the said Ruth Wanjiku Mwangi, the 2nd defendant. He introduced himself as a court process server and the purpose of his visit. At about 10.45 am, he served the said Ruth Wanjiku Mwangi with the aforesaid document, which service she accepted and retained a copy thereof but declined to sign at the back of this copy of the hearing notice.
 27. A copy of the impugned hearing notice was attached to the affidavit of service, and it is dated 6th December 2016. The same is addressed to Eunice Wanjiku Wanyoike, who was the 1st defendant requiring her to attend a hearing on 28th February 2017 at 8.30 am.
 28. In the trial magistrate's ruling dated September 17, 2019, she stated as follows in pages 2-3: -

“The plaintiff/Respondent opposed this application and filed a replying affidavit deponed on 2nd April 2019 in which she stated that the applicant was not truthful in her statements for she was on 27th September 2018 served with a hearing notice by one Edward Maina Wachira as evidenced by the affidavit service dated 2nd October 2018 as the applicant was known to the process server before service and is ready to be cross-examined in court on the correctness of the contents of the affidavit of service.....”
 29. I have thoroughly perused the trial record, albeit a reconstructed version, and the submissions of the parties herein, and I gather that the learned trial magistrate delivered her judgment on 28th March 2017 after the hearing that took place on 28th February 2017. It is this hearing date that the Respondent alleges that she was not aware of.
 30. I am therefore as perturbed as the Appellant herein that the learned trial magistrate, in her ruling dated 17th September 2019, as cited above, made reference to the Respondent's replying affidavit that a hearing notice was served on 27th September 2018 as per the affidavit of service filed on 2nd October 2018 for a hearing that was to take place in 2017. How, then, could the Respondent have purported to serve the Appellant with a hearing notice in 2018 for a hearing scheduled to take place in 2017? By that time hearing of the main suit had already happened, and judgment had already been delivered on 28th March 2017. Further, I could not trace the said documents that the trial magistrate was relying on.



31. In addition, the Respondent, in their supplementary record of appeal dated 26th September 2022, introduced an affidavit of service dated 28th February 2017, sworn by Edward Maina Wachira. He deponed that on 1/2/2017, he received copies of the hearing notice dated 6/12/2016 from the firm of Waichungo Martin & Co. Advocates with instructions to effect service to the defendant, and he proceeded to serve the Appellant on the same day. If we are to go by this affidavit of service, the Appellant was served on 1/2/2017; this would align with the hearing date for the main suit, which took place on 28th February 2017. Nevertheless, I took note that the attached alleged hearing notice was not addressed to the Appellant but to the 1st defendant in the main suit, Eunice Wanjiru Wanyoike. Additionally, these are not the documents that the trial magistrate was relying on when she made her ruling.
32. The issue of regular judgment was addressed in the case *Mwala -v- Kenya Bureau of Standards EA LR (2001) 1 EA 148*, where the court stated;
- “to all that, I should add my own views that 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 considerations 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 an appearance or when there is a memorandum of appearance or defense on record but the same was in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justice for a court should never countenance an irregular judgment on its record.”
33. In the case of, *Patel -v- EA Cargo Handling Services Ltd (1974) EA 75*, the Court held that:
- “There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself or fetter wide discretion given to it by the rules. The principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have the power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”
34. Accordingly, the fact that what is presented to this court in the instant matter and what seems to have been available to the trial court is very different as to service of the impugned hearing notice is very sinister. I have doubts as to whether the hearing notice for the main suit that culminated in the judgment dated 28th March 2017 was served upon the Appellant. Although the affidavit of service attached to the Respondent’s supplementary record of appeal indicate that she would have been served, I doubt that the Appellant was aware of the same or that the trial magistrate had a chance to consider the same in her ruling as these documents, i.e., affidavit of service dated February 28, 2017. The same seems to have cropped up right now. That affidavit is also non-existent in the trial record. This is evidenced by the trial magistrate’s reliance on documents dated 2018 in her ruling dated September 17, 2019.
35. I agree with the Appellant that the trial magistrate completely erred in law and, in fact, in presuming that the Appellant was duly served despite the lack of evidence of the same. Having established the same, it is my opinion that the Appellant was condemned unheard in the main suit as she was not able to present her defence due to lack of proper service. This was a denial of her constitutional right to be heard.



36. I find that regular judgment was not entered into as the Appellant was not notified of the hearing date, and her failure to attend the same was not her fault. There is no proof whatsoever that she was served and/or notified of the hearing date. The court is tasked with exercising its mandate to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.
37. Despite the Respondent's assertion that the trial magistrate considered the Appellant's defence in page 10 of her ruling dated 17/9/2019, where he found that the Appellant had admitted to being the 1st defendant's guarantor and the Appellant deserved to have her day in court on the material date of hearing. I find that there was no defence on merit, and therefore, the judgment entered into was irregular. The Appellant also delved into issues raised in her defence in this appeal, but I am hesitant to delve into the same at this stage.
38. In the resultant, it is my view that the appeal herein is meritorious, and I make the orders to the effect that;
- i. I allow the same in the terms that the ruling delivered on 19th September 2019 in Nyahururu CMCC No. 83 of 2015 be and is hereby set aside, and the judgment entered in Nyahururu CMCC No. 83 of 2015 is set aside, and the Appellant is granted leave to defend herself.
 - ii. Costs in the main cause

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20TH DAY OF DECEMBER 2022.

.....

CHARLES KARIUKI

JUDGE

