



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 389 OF 2014**

**CONSUMER CHOICE (K) LIMITED..... APPELLANT**

**V E R S U S –**

**KEVITA INTERNATIONAL LIMITED.....RESPONDENT**

*(Being an appeal from the whole order and ruling of Hon. Charles Obulutsa Ag. Chief magistrate delivered on 13<sup>th</sup> August 2014 in CMCC no. 1155 of 2014)*

**JUDGEMENT**

1) Kevita international Co. Ltd, the respondent herein, filed a suit before the chief magistrate's court vide the plaint dated 3<sup>rd</sup> March 2014 in which it sought for *inter alia* payment of USD.11,500(Ksh.1,023,500) plus interest and costs from Consumer's Choice (K) Ltd, the appellant herein. On 22<sup>nd</sup> April 2014, the respondent successfully applied for entry of judgment against the appellant in default of appearance and defence.

2) The respondent proceeded to execute the resultant decree leading to the attachment of the appellant's motor vehicle registration no. KAU 842Y.

3) Upon learning of the entry of judgement, the appellant took out the motion dated 25.6.2014 whereof it sought for *inter alia*, the setting aside of the exparte default judgment. Hon. Obulutsa heard the motion and on 18<sup>th</sup> August 2014, he had the same dismissed. Being aggrieved, the appellant preferred this appeal.

4) On appeal, the appellant put forward the following grounds:

***1. The learned magistrate misdirected himself as to the principles for the grant of orders of setting aside judgement injunction and thus improperly exercised his discretion by dismissing the application for setting aside judgment dated 25<sup>th</sup> June 2014.***

***2. The learned trial magistrate erred in law and in fact in failing to appreciate that service of summons upon the appellant was irregular.***

***3. The learned magistrate erred in law and in fact in holding that the storekeeper/manager was a principal officer who could be served with summons to enter appearance.***

***4. The learned magistrate erred in law and in fact in failing to appreciate that the proceedings by the respondent in the subordinate court were commenced without resolutions and under authority of the seal of the company.***

**5. The learned magistrate erred in law and in fact in disregarding the fact in disregarding the fact that the respondent had been issued cheques by an entity which was different from the appellant.**

**6. The learned trial magistrate erred in law and in fact in otherwise failing to exercise her discretion in the proper manner resulting in injustice to the appellant.**

**7. The learned magistrate erred in law and in fact in holding that the defence did not disclose triable issues.**

**8. That to learned magistrate decision was not supported in law and in fact by the evidence adduced by the 1<sup>st</sup> defendant.**

5) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

6) I have re-evaluated the submissions made before the trial court.

I have also considered the rival written submissions. A careful perusal of the ruling of Hon. Obulutsa delivered on 13.8.2014 will reveal that the honourable magistrate decided the application for setting aside the *ex parte* judgment on the basis of the following grounds. **First**, he concluded that he was satisfied that the process server visited the appellant's premises and effected service upon one Yvonne who presented herself as the appellant's manager and with authority to receive process. Consequently, the learned ag. Chief Magistrate formed the opinion that the default judgment was regularly entered. **Secondly**, the learned magistrate further opined that the documents presented to him showed that the appellant gave cheques to the respondent which meant it admitted the debt. In short the learned ag. Chief Magistrate was of the view that the appellant had no genuine defence with triable issues. On the basis of the above grounds the application was found to be without merit.

7) On appeal, the appellant put forward a total of 8 grounds of appeal. However, I think those grounds can be summarised to two main grounds.

First, is whether or not service was properly effected.

Secondly, whether or not the appellant has a defence with triable issues.

8) On the issue touching on service, the appellant is of the view that the learned ag. Chief Magistrate misdirected himself by failing to appreciate that a limited liability company can only be served as prescribed by Order 5 Rule 2 of the Civil Procedure Rules that is either upon the secretary or a director or other principal officer of the corporation. The appellant pointed out that the process server informed the trial court in cross examination that he effected service upon a storekeeper who told him she could receive summons. It was pointed out that the store keeper was not an authorised person to receive summons on behalf of the appellant.

9) On the other hand, the respondent is of the view that service was effected upon a lady by the name Yvonne who presented herself as the appellant's manager. The respondent further argued that the appellant should have provided a list of its employees instead of simply denying that Yvonne was not amongst its employees.

10) I have carefully considered the rival submissions over the issue on service. The appellant is emphatic that the person allegedly served was not authorised to receive summons on behalf of the appellant's company. The question which was left undetermined by the learned ag. Chief Magistrate is whether or not there was proof that the lady by the name Yvonne was authorised to receive process on behalf of the company. The trial magistrate simply stated that summons were served upon her in the appellant's premises and after she presented herself as the appellant's manager. In paragraph 7 of the of the affidavit of Jacob Mlingi, the managing director of the appellant company, it is expressly denied that an employee

by the name Yvonne existed. Again, the trial magistrate did not resolve the issue as to whether or not Yvonne was actually an employee of the appellant. Having failed to determine the above twin issues, I am constrained to hold that the learned ag. Chief Magistrate erred when he held that there was proper service.

11) The second ground which was ably argued by the parties is the question as to whether or not the appellant has a defence with triable issues. It is the submission of the appellant that its defence raised triable issues that can go for trial. The respondent on the other hand is of the view that the draft defence contains mere denials and does not raise triable issues. I have already stated that the trial magistrate formed the opinion that since the appellant issued cheques it admitted the claim hence there is nothing to go for trial. It would appear the learned ag. Chief Magistrate did not consider whether or not the draft defence raised triable issues. I have on my part examined the draft defence presented to the trial court. It is clear in paragraph 6 of the appellant's draft defence that the appellant avers that it stopped payments of some cheques because the goods supplied were not fit for the purposes for which they had been supplied. It is also alleged in paragraph 7 that the goods supplied had expired and that the respondent declined to accept the return of the same. In my view, the draft defence raises triable issues. The learned ag. Chief Magistrate therefore fell into error.

12) In the end and on the basis of the above grounds, the appeal is allowed. Consequently, the order dismissing the motion dated 25.6.2014 and issued on 13.8.2014 is set aside and is substituted with an order allowing the motion dated 25.6.2014 in terms of prayers 4, 6 and 7. Costs of this appeal and the motion before the trial court are awarded to the appellant.

Dated, Signed and Delivered in open court this 16<sup>th</sup> day of September, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent