



Wamka Supplies Limited & 2 others v Ga Life Assurance Limited (Environment and Land Appeal E001 of 2022) [2023] KEELC 17861 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17861 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E001 OF 2022**

JG KEMEI, J

JUNE 8, 2023

BETWEEN

WAMKA SUPPLIES LIMITED 1ST APPELLANT

CHARITY MUTHONI MURAGE 2ND APPELLANT

JAMES WAHOME KARIUKI 3RD APPELLANT

AND

GA LIFE ASSURANCE LIMITED RESPONDENT

(Being an appeal from the Ruling of the Hon J A Agonda SPM delivered on the 9/12/2022 at the Ruiru SPM Court in SPMCC No 423 of 2020)

RULING

1. On the October 8, 2021 the Appellants, then Defendants, in the trial Court filed a Notice of Motion seeking the following orders;
 - a. .
 - b. That pending the hearing and determination of this application, this Honourable Court be pleased to order interim stay of execution of Judgment of the Hon JA Agonda (PM) delivered on the September 23, 2021 against the Applicants.
 - c. That this Honourable Court be pleased to set aside the Judgment of the Hon JA Agonda (PM) delivered on the September 23, 2021 herein, the proceedings of August 19, 2021, and all consequential orders entered against the Applicants herein and thereafter the suit be set down for hearing de novo.



- d. That upon grant of orders (c) above the Court be pleased to grant leave to the Plaintiff and the Defendants in the Counterclaim to file their Reply to Defence and Defence to the Counterclaim out of time.
 - e. That the costs of this application be provided for.
2. Upon hearing the application, the trial Court in its Ruling delivered on the December 9, 2021 dismissed the Motion as being unmerited.
 3. Aggrieved by the said Ruling the Appellants mounted this appeal on the grounds set out in the Memorandum of Appeal as follows;
 - a. That the learned trial Magistrate erred in law and fact by failing to find that Judgment on the counterclaim was wrongfully entered against the 2nd and 3rd Appellants who had not been served with summons enter appearance and the said counterclaim.
 - b. That the learned trial Magistrate erred in law and fact in failing to set aside the proceedings of August 19, 2021 and the Judgment delivered on September 23, 2021 as of right as there was no proof of service of Summons and the counterclaim upon the 2nd and 3rd Appellants.
 - c. That the learned trial Magistrate erred in law and fact in failing to find that the 1st Appellant had distinct legal personality from the 2nd and 3rd Appellants and therefore the 2nd and 3rd Appellant were entitled to defend the counterclaim upon personal service on them.
 - d. That the learned trial Magistrate erred in law and fact by failing to find that the 2nd and 3rd Appellant were not represented in the suit and the counterclaim and therefore the Judgment entered on September 23, 2021 could not stand.
 - e. That the learned trial Magistrate erred in law and fact in failing to find that failure to attend Court on August 19, 2021 on the part of the 1st Appellant and its Counsel was inadvertent and excusable.
 - f. That the learned trial Magistrate erred in law and fact in failing to find that failure to attend Court on August 19, 2021 on the part of the Appellants was attributable to Counsel's mistake which should not be visited upon innocent litigants particularly when proceedings were taking place during peculiar and difficult circumstances brought about by the Covid 19 Pandemic.
 - g. That the trial Magistrate erred in law and fact in making a finding that the Appellants' application was an afterthought and that they were aware of the hearing date when the proceedings of August 19, 2021 took place.
 - h. That the Learned trial Magistrate erred in law and fact by dismissing the Appellants application and thereby denying them the right to be heard.
 - i. That the learned trial Magistrate erred in law and fact in finding that the Appellants did not have a defense to the counterclaim and/or that they had not availed a draft statement of defense whereas the same had been produced.
 - j. That the learned trial Magistrate erred in law and fact in finding that the Appellants' application lacked in merit.
 - k. That the learned trial Magistrate erred in law and fact by failing to exercise his discretion judiciously and further by applying the wrong principles of the law in arriving at his decision.



1. That the learned trial Magistrate erred in law and fact by failing to do substantive justice to the parties contrary to known principles of law, the Civil Procedure Act and the Constitution of Kenya.
4. The Appellants sought the following orders;
 - a. To set aside and or vary the ruling of the trial Court
 - b. The Plaintiffs suit before the trial Court be reinstated for trial before a different judicial officer and the Appellants be granted leave to file defense to the counterclaim
 - c. Costs of the appeal
5. The appeal was canvassed by written submissions. The firm of Khalayi & Kairu Advocates filed submissions for the Appellants.
6. It was submitted that the 1st Appellant filed suit against the Respondent seeking various reliefs. The Respondent filed a statement of defence and counterclaim against the Appellants, which defence and counterclaim was served upon the Advocate of the 1st Appellant on the June 21, 2021. That no summons were extracted and served upon the 2nd and 3rd Appellants in person. The suit proceeded for hearing exparte whereupon the suit was dismissed and the counterclaim of the Respondent was allowed against the Appellants. Their attempt to set aside the Judgement hit a snag triggering this appeal.
7. On grounds 1 - 4 of the appeal, the Appellants faulted the Respondent for failing to serve the 2nd and 3rd Appellants with the defence and counterclaim and instead served the same on the Advocate of the 1st Appellant without regard to the principle that the 1st Appellant had a distinct and separate legal personality from the 2nd and 3rd Appellants. The 2nd and 3rd Defendants were therefore not represented and they were condemned unheard.
8. On grounds 5-8 of the appeal, it was submitted that Court access in the year 2021 was impeded by the COVID -19 pandemic forcing the Courts in Kenya to adopt online hearings. Resultantly, on the material date, the Advocate for the 1st Appellant had challenges accessing the Court's online link and the Advocate for the Respondent was not helpful as she kept misrepresenting the mention/ hearing dates to the Appellants Counsel. That she was never served with the said hearing dates and the Appellants Advocate proceeded to assume that the matter had fallen inactive and it was not until the September 14, 2021 that she realized that her emails were being directed to spam, a technical hitch, which was outside her control and for which the Court has been urged to consider as reasonable ground to set aside the Ruling.
9. The Appellants relied on the case of Belinda Murai & Anor Vs Amoi Wainaina (1978) KLR on the proposition that a mistake of Counsel should not be visited on innocent litigants.
10. On grounds Nos 9-12 of the appeal, the Appellants submitted that they annexed a draft defence to the counterclaim contrary to the finding of the Court that there was none on record. That in the said defence the Appellants contend that the jurisdiction of the Court had been expressly excluded by the lease agreement dated the September 8, 2018. Further the defence raised triable issues that warranted a trial on merit.
11. The Respondent failed to file written submissions.
12. The key issue for determination is whether the appeal is merited.



13. Order 12 Rule 7 of the *Civil Procedure Rules, 2010*, provides that 'where under this order Judgment has been entered or the suit has been dismissed, the Court on an application, may set aside or vary the Judgment or order upon such terms as may be just.'
14. The Civil Procedure Rules donate the power to the Court to set aside Judgments / Rulings. The Court has unfettered discretion to do so but under certain principles. Order 12 Rule 7 of the Civil Procedure Rules states that where Judgment has been entered or the suit has been dismissed, the Court, may set aside or vary the Judgement or order upon such terms as may be just.
15. It is not in dispute that the Appellants Counsel was served with the defence and counterclaim and the argument that the 2nd and 3rd Appellants were not served with the summons in my view amounts to splitting hairs. I say so because at page 42 of the Lease agreement between the parties the said 2nd and 3rd Appellants executed the lease as Directors of the Company, the 1st Appellant. They being the instructing human face behind the 1st Appellant they cannot turn around and say that they were not served. The Court has taken judicial notice that this was during the Covid Pandemic period and personal service was not possible given the risk posed by the said global pandemic. Interalia the Hon The Chief Justice had issued directions with respect to service of documents online. The Court finds that proper service was effected upon the 2nd and 3rd Appellants.
16. The Court has also noted and lauded the trial Court in its diligence in sending the access online links every time the matter was scheduled for mention and or hearing to the Appellants' Counsel.
17. Thirdly the Court finds that the same Counsel who acted for the 1st Appellant is the same Counsel acting for all the Appellants todate. The email address of the Appellants Counsel is the same one that the Respondents Counsel sent emails as well as the Court. It is the same email that the Appellants Counsel used to requisition for the copy of the Judgment from the Court.
18. It is also instructive to note that the Appellants have not given any sufficient reason for failing to attend the hearing. The Appellants Counsel has lamented that the Respondents Counsel misrepresented to her as to the hearing dates. Surely the case belongs to the Plaintiffs. The Appellants were obligated to prosecute their case and take charge of the activities towards the expedient prosecution of their suit.
19. The overriding objectives of the Court set out under Section 1A (3) provides that a party to civil proceedings or an Advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
20. The Court finds that the Appellants conduct in failing to attend the hearing despite service and without any justiciable reasons cannot be said to be aiding the achievement of the overriding objectives of the Court and the overall administration of justice.
21. I find that the appeal does not turn on the reasons advanced by the Appellants this far. I shall make the final orders to this end.
22. The Court of Appeal in the case of *James Kanyita Nderitu & Another [2016]eKLR* stated thus:

' From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgement that is regularly entered and one which is irregularly entered. In a regular default Judgement, the Defendant will have been duly served with summons to enter appearance or to file defence, resulting in default Judgment. Such a Defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the Court to set aside the default Judgement and to grant him leave to defend the suit. In such a scenario, the Court has unfettered



discretion in determining whether or not to set aside default Judgment, and will take into account such factors as the reason for failure of the Defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default Judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default Judgment, among others.'

23. I have already considered that the Judgment was a regular Judgment given that the Appellants were duly served with the defence and counterclaim. The Respondents suit therefore was undefended as the Appellants failed to file any defence to the counterclaim.
24. I have perused the draft defence to counterclaim marked JWK-1 annexed to the Notice of Motion dated the October 8, 2021 wherein the Appellants state that they have paid all rent and service charge; deposit was used to settle the rent arrears; the deposit was sufficient to cover the rent; and the question of the jurisdiction of the Court in entertaining the suit.
25. In the case of *Tree Shade Motors Limited Vs DT Dobie 7 Company (K) Limited and Joseph Rading Wasambo CA 38 of 1998*, it was observed that the Court must satisfy itself that the Applicant has a defence that raises triable issues to warrant the setting aside of an ex parte Judgment. It is on record that the Applicant has attached a draft defence and counterclaim.
26. In the case of *Patel v Cargo Handling Services* the Court of Appeal considered the meaning of a triable defence and held that;

 ' In this respect, defence on the merits does not mean in my view a defence that must succeed. It means, as Sherridan J put it, a 'triable issue.'
27. The Court is satisfied that there is a defence which raises triable issues. That said the question as to whether it will succeed or otherwise, is best left to the trial Court to determine. The Court finds that the appeal succeeds on this ground.

Final orders for disposal

28. To serve substantive justice, the Court finds the appeal succeeds on the following terms;
 - a. The Ruling dated the December 9, 2021 and the Judgment delivered on the September 23, 2021 and all its consequent orders be and are hereby set aside in their entirety.
 - b. The parties are directed to take steps to fix the matter for hearing on a priority basis.
 - c. The Appellants shall pay throw away costs in the sum of Kshs 20,000/- payable to the Respondent within a period of 15 days in default the orders shall automatically lapse.
 - d. I make no orders as to costs.
29. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 8TH DAY OF JUNE, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of



Maina for 1st, 2nd and 3rd Appellants

Kendi for Respondent

Court Assistants – Kevin & Lilian

