Nyainda v Bolt EU (Formerly Taxify OU) & 2 others (Civil Appeal E1247 of 2023) [2025] KEHC 635 (KLR) (Civ) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 635 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1247 OF 2023

LP KASSAN, J

JANUARY 23, 2025

BETWEEN

WANKIO NYAINDA .... APPELLANT

AND

BOLT EU (FORMERLY TAXIFY OU) .... 1ST RESPONDENT

BOLT KENYA (TAXIFY) .... 2ND RESPONDENT

DANIEL MWITI .... 3RD RESPONDENT

(Being an appeal against the ruling and order of Honourable H.M. Ng'ang'a (Mr.), PM delivered on 24th January, 2023 in Nairobi CMCC No. 5217 of 2019)

JUDGMENT

1. This appeal derives from the ruling delivered on 24th January, 2023 in Nairobi CMCC No. 5217 of 2019. At the onset, Wankio Nyainda (hereafter the Appellant) lodged a suit by way of the plaint dated 15th July, 2019 and sought for general, exemplary, aggravated and punitive damages plus costs of the suit and interest thereon against Bolt EU (Formerly Taxify OU), Bolt Kenya (Taxify) and Daniel Mwiti (hereafter the 1st, 2nd and 3rd Respondents) arising out of a claim founded inter alia, on fraudulent misrepresentation, intimidation and extortion and breach of contract.
2. Initially, the 2nd Respondent entered appearance through the firm of Mumia and Njiru Advocates, who filed a statement of defence on its behalf and dated 7th October, 2019 denying the key averments in the plaint and liability.
3. Subsequently, the 1st and 2nd Defendants jointly instructed the firm of Murage Juma & Co. Advocates to act for them in the matter, thereby resulting in the filing of a notice of change of advocates dated

13th August, 2020 which firm of advocates was later substituted with the firm of M/S Echessa & Bwire Advocates vide a notice of change of advocates dated 22nd November, 2022.

4. The 1st and 2nd Respondents therefore filed a joint statement of defence dated 30th November, 2020 denying the key averments in the plaint and liability.

5. Thereafter, upon the request of the Appellant, an interlocutory judgment was entered against the 1st and 3rd Respondents on 13th July, 2022 for their alleged failure to enter appearance and/or file their statements of defence.

6. Consequently, the 1st and 2nd Respondents filed the Notice of Motion dated 6th October, 2022 ("the application") and sought for an order setting aside the interlocutory judgment; a further order to the effect that process server, Peter Odhiambo, be summoned to attend the trial court for purposes of cross-examination on the contents of his affidavit of service sworn on 19th May, 2020; and a subsequent order that the statement of defence by the 1st and 2nd Respondents be deemed as having been duly filed.

7. The grounds on the face of the application were amplified in the supporting affidavit of the Appellant's Head of Legal Services, Kerubo Ombati, who averred that by the time the Appellant made an application for entry of an interlocutory judgment sometime on or about 19th October, 2021 the 1st and 2nd Respondents had already filed their joint statement of defence. That consequently, the interlocutory judgment entered was erroneously entered against the 1st Respondent.

8. The deponent further averred that the interlocutory judgment entered as against the 3rd Respondent is likewise defective, as the same was premised on purported service of the summons to enter appearance upon the aforesaid Respondent through the email addresses belonging to the 1st and 2nd Respondents and yet the 3rd Respondent is neither an employee or agent of the latter Respondents. That furthermore, the Appellant ought to have sought leave of the trial court to serve the 3rd Respondent by way of substituted service, in the absence of personal service. That when the parties attended court on 26th August, 2021 for purposes of taking pre-trial directions, counsel for the Appellant was directed to apply for judgment solely against the 3rd Respondent. That in the premises, it was of necessity that the interlocutory judgment in place be set aside accordingly.

9. The Appellant opposed the application through a replying affidavit sworn on 1st November, 2022 by her advocate, Donald B. Kipkorir. Therein, the advocate stated that contrary to the averments being made in the application, the 3rd Respondent was at all material times an agent of the 1st and 2nd Respondents. The advocate further stated that in any event, a party cannot purport to argue a case on behalf of another party, as the 1st and 2nd Respondents are doing with respect to the 3rd Respondent. The advocate equally faulted the 1st Respondent in particular for filing two (2) separate statements of defence without regularizing the record.

10. The Appellant similarly filed a notice of preliminary objection on 28th October, 2023 arguing that the application is founded on hearsay evidence and hence the trial court lacks jurisdiction to entertain it.

11. Upon close of submissions, the trial court by way of the ruling delivered on 24th January, 2023 reasoned that the preliminary objection did not contain any legal grounds and was thus lacking in merit. The trial court further reasoned that the interlocutory judgment having been entered after the 1st and 2nd Respondents filed their joint statement of defence, the same is irregular. The trial court went on to reason that there may be nothing on the record to indicate that counsel for the 1st and 2nd Respondents had been instructed to appear on behalf of the 3rd Respondent, upon perusal of the affidavit of service by Peter Odhiambo, there was no proof of actual service of the requisite documents upon

the 3rd Respondent. Consequently, the trial court allowed the application and therefore set aside the interlocutory judgment and ordered the Appellant to serve the 3rd Respondent with summons afresh.

12. The aforesaid decision has triggered the instant appeal which is premised on the following grounds:

> "1. That the Learned Magistrate misdirected himself and erred both in fact and in law by setting aside the interlocutory judgment entered on 13.01.2022 against the 1st and 3rd Respondents following the application made by the 1st and 2nd Respondents Advocates on record.
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> 2. That the Learned Magistrate misdirected himself and erred both in fact and in law by failing to appreciate the fact that the Respondents' Advocates on record only entered appearance on behalf of the 1st and 2nd Respondents and that the 3rd Respondent was therefore unrepresented by any advocate.
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> 3. That the Learned Magistrate misdirected himself and erred both in fact and in law by failing to appreciate the fact that 1st and 2nd Respondents' Advocates on record did not have instructions to act on behalf of the 3rd Respondent herein.
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> 4. That the Learned Magistrate misdirected himself and erred both in fact and in law by totally ignoring the Preliminary Objection that was raised by the Appellant.
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> 5. That the ruling contravenes and contradicts established case law." (sic)

13. The appeal was canvassed by way of written submissions. Going by the record, it is apparent that the 3rd Respondent did not participate in the proceedings.

14. The court has perused and considered together with the original record and the record of appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See Kenya Ports Authority v Kusthon (Kenya) Limited (2000) 2EA 212, Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; William Diamonds Ltd v Brown [1970] EA 11 and Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278.

15. The Court of Appeal stated in Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

16. From a glance at the memorandum of appeal, it is apparent that the issues raised on appeal are two (2)-fold in nature. The first limb of the appeal touches on whether the learned trial magistrate considered the Appellant's preliminary objection.

17. As earlier mentioned, the Appellant raised a preliminary objection challenging the jurisdiction of the trial court to entertain the application on grounds that it was based on hearsay evidence.

18. The court in the renowned case of Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696 defined what constitutes a preliminary objection in the manner hereunder:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion."

19. The above definition was advanced by the Supreme Court in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR when it rendered itself thus:

> " It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law."

20. From the just-cited authorities, it is elaborated that a preliminary objection ought to be founded on pure points of law. Upon considering the nature of the Appellant's preliminary objection, while it is apparent that the same is challenging the jurisdiction of the trial court, the jurisdictional ground is based on the allegation that the material averred to in the application is hearsay in nature. This court is doubtful that the above ground would constitute a pure point of law based on undisputed facts, so as to fall within the ambit of a preliminary objection. Furthermore, upon perusing the impugned ruling, this court noted the learned trial magistrate's reasoning that the preliminary objection did not raise any legal grounds to support the challenge to its jurisdiction. In the premises, this court is satisfied that the learned trial magistrate considered the Appellant's preliminary objection.

21. The second and final limb of the appeal concerns itself with whether the learned trial magistrate correctly exercised his discretion based on the facts presented before him.

22. It is trite law that the grant or refusal to set aside or vary a judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, it must be emphasized that like all judicial discretion it must be exercised judicially. The Court of Appeal in Mashreq Bank P.S.C v Kuguru Food Complex Limited [2018] eKLR stated:

> " This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of Mbogo v Shah, (supra):
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> "A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this 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 as a result there has been injustice".
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> See; United India Insurance Co. Ltd v. East African Underwriters (K) Ltd [1985] E.A 898.

23. The object of the discretion conferred on the court to set aside was enunciated in the case of Shah v Mbogo and Another [1967] E.A 116:

> " The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

24. Distinguishing regular and irregular exparte orders or judgments, Platt JA (as he then was) stated in Bouchard International (Services) Ltd vs. M'Mwereria [1987] KLR 193 (as cited with approval in Miarage Co Ltd v Mwichuiri Co Ltd [2016] eKLR) that:

> " The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. .....It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction".

25. The record of the lower court reveals that the Appellant on the one part averred and argued that the statement of defence purportedly relied on by the 1st and 2nd Respondents is irregular, the same having been filed without leave of the court being sought and granted, and in the absence of any indication that the statement of defence originally filed by the 1st Respondent had been withdrawn. On the other part, the 1st and 2nd Respondents maintained that at the time interlocutory judgment was sought and consequently entered, they had already filed a joint statement of defence and hence the interlocutory judgment was irregular.

26. From the court's re-examination of the record and as set out hereinabove, the 1st Respondent initially filed a statement of defence independently on 7th October, 2019. Thereafter, a notice of change of advocates dated 13th August, 2020 was filed by the firm of Murage Juma & Co. Advocates on behalf of the 1st and 2nd Respondents, followed by a joint statement of defence dated 30th November, 2020 by the said Respondents.

27. From the court's further re-examination of the record, it is apparent that the interlocutory judgment in question was entered against the 1st and 3rd Respondents on 13th July, 2022 upon the request of the Appellant made sometime on or about 19th October, 2021.

28. Upon consideration of the foregoing circumstances, it is apparent that the entry of appearance on behalf of the 1st and 2nd Respondents as well as the filing of the joint statement of defence preceded the request for judgment and consequently, the interlocutory judgment. As pertains to the question whether the statement of defence being relied on by the 1st and 2nd Respondents is proper or not, the court is of the view that the Appellant is at liberty to challenge the regularity thereof in the proper forum. Be that as it may, it is clear that as at the time of entry of the interlocutory judgment, there was a statement of defence on record on behalf of both the 1st and 2nd Respondents.

29. In view of the foregoing circumstances, the court is satisfied that the learned trial magistrate acted reasonably in setting aside the interlocutory judgment as against the 1st Respondent.

30. As concerns the interlocutory judgment against the 3rd Respondent, upon perusal of the record, the court did not come across any material to indicate that the 3rd Respondent had instructed counsel representing the 1st and 2nd Respondents to act for him in the matter. A party cannot be heard to argue on behalf of another party, in the absence of clear instructions and the requisite authority. In the premises, the said Respondents' counsel had no locus standi as relates to the 3rd Respondent.

31. Be that as it may, the pertinent question remains whether the 3rd Respondent was properly served, if at all, in order to enable him enter appearance accordingly and which question would in effect ascertain the validity of the interlocutory judgment in question.

32. Upon re-examination of the record and in particular, the affidavit of service sworn by process server, Peter Odhiambo on 19th May, 2020, mention was made that the 3rd Respondent's physical address was unknown at the time. Resultantly, the process server purported to effect service upon the 3rd Respondent through the email address: nairobi@bolt.eu which address is said to belong to the 2nd Respondent.

33. The law as pertains to service of summons to enter appearance is well settled. The same is provided for under Order 5 of the Civil Procedure Rules with the following Rules proving relevant to the present matter:

Rule 8:

(1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.

(2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.

Rule 14:

Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with an affidavit of service.

Rule 17:

(1) Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.

(3) Where the court makes an order for substituted service it shall fix such time for the appearance of the defendant as the case may require.

(4) Unless otherwise directed, where substituted service of a summons is ordered under this rule to be by advertisement, the advertisement shall be in Form No. 5 of Appendix A with such variations as the circumstances require.

34. From a reading of the above-cited provisions, it is clear that service of summons ought to be effected in person, at the first instance. In the event that personal or any other form of service provided under the Rules becomes difficult or impossible, a plaintiff is at liberty to seek leave of the court to enable him or her effect service through substituted means.

35. In the present instance, it is apparent that the Appellant purported to serve summons upon the 3rd Respondent through the email address of the 1st and 2nd Respondents, in total contravention of the rules and procedure for service. There is also nothing on the record to indicate an attempt by the Appellant at seeking leave to effect substituted service despite provision having been made for the same in the Rules.

36. That being the position, the court concurs with the reasoning by the trial court, that the Appellant failed to establish proof of service upon the 3rd Respondent.

37. In view of all the foregoing circumstances, the court is convinced that the trial court arrived at a proper and reasonable finding in the matter. There is no reason for the said finding to be disturbed.

38. The upshot therefore is that the appeal is hereby dismissed for want of merit, with costs to the 1st and 2nd Respondents. The ruling delivered by the trial court on 24th January, 2023 in Nairobi CMCC No. 5217 of 2019 is hereby upheld.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE