



**Wainaina t/a Boviqiun Suppliers v Highchem Marketing Limited (Civil Appeal E251 of 2023) [2025] KEHC 253 (KLR) (Commercial and Tax) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 253 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E251 OF 2023  
H NAMISI, J  
JANUARY 23, 2025**

**BETWEEN**

**VIRGINIA NUNGARI WAINAINA T/A BOVIQIUN SUPPLIERS .. APPELLANT**

**AND**

**HIGHCHEM MARKETING LIMITED ..... RESPONDENT**

*(Being an appeal against the Ruling and Orders of Hon. Okumu, Adjudicator delivered on 22 September 2023 in Nairobi SCCCOMM No. E3090 of 2023 at Milimani Small Claims Court)*

**JUDGMENT**

1. In the Small Claims Court, the Respondent instituted proceedings against the Appellant seeking:
  - i. Judgment in the sum of Kshs 889,231.28 plus interest at court rates until payment in full;
  - ii. Costs of the claim;
  - iii. Other appropriate relief
2. For a better understanding of the matter, the chronology of events is highlighted below.
3. The claim was filed in the Small Claims Court on 3 May 2023.
4. According to the Respondent, the Appellant was served on 8 May 2023.
5. The matter was mentioned before the Court on 22 May 2023, when counsel for the Respondent informed the court that the Appellant's time was still running. The matter was given a further mention date on 9 June 2023.
6. According to the Appellant, the Appellant entered appearance on 2 June 2023.



7. On 9 June 2023, the Court entered judgement in default of appearance against the Appellant for the sum claimed plus interest.
8. On 12 June 2023, the Appellant filed Notice of Motion seeking to set aside the default judgement. It is this Application and subsequent determination that are the subject of this appeal.

### **Application dated 12 June 2023**

9. The Notice of Motion filed by the Respondent sought the following orders:
  - i. Spent
  - ii. The Honourable Court be pleased to set aside the judgement entered on 9 June 2023 against the Defendant/Applicant be allowed to defend this matter;
  - iii. The cost of this application be in the cause
10. The Application was supported by an Affidavit and premised on the following grounds which I reproduce verbatim:
  - i. That the Applicant/Defendant filed her Memorandum of Appearance on 2 June 2023;
  - ii. That 15 days after service expires on 17 June 2023;
  - iii. That the Applicant has 15 days to put in her defence and response;
  - iv. That the Applicant has learnt that interlocutory judgement has been entered while there was still time for the Defendant to file her response within 15 days after filing of the memorandum of defence;
  - v. That the Applicant has been condemned unheard on merits;
  - vi. That the Applicant will be greatly prejudiced in paying arbitrarily a sum of Kshs 889,231.28 which is not justifiable and hearing her side of the story how the sum can to be;
  - vii. That it is in the interest of justice that the applicant be given an opportunity himself on the false claim against him;
  - viii. That the Applicant has triable issues as has been demonstrated in the draft defence;
  - ix. That it is in the interest of justice that the applicant be given an opportunity to defence herself on the false claim against him.
11. Attached to the Supporting Affidavit was a draft Statement of Defence. Also attached was an extract from the Court Tracking System (CTS) portal indicating documents uploaded by the Appellant but not paid for. The dates of the uploads are not visible.
12. In their Replying Affidavit, the Respondent averred that the Appellant was duly served with the Statement of Claim as well as the Notice of First Mention. The Respondent averred that the Appellant was mistaken in calculating the 15 days stipulated for filing a response from the date when she filed the Memorandum of Appearance instead of from when she was served with the Notice of First mention.
13. The Appellant filed a Supplementary Affidavit stating that no hearing notice had been served upon her before the interlocutory judgement was entered.
14. Parties canvassed the Application by way of written submissions.



15. In its Ruling, the trial court observed that the purpose or object of the Appellant's application was to get the defence on record. The court relied on the case of Wachira Karani -vs- Bildad Wachira [2016] in enumerating the issues that a court must satisfy itself before setting aside default judgement. In dismissing the Application, the trial court held that the Appellant was served and entered appearance but failed to file a response within the stipulated timelines, hence the judgement was regular.
16. Aggrieved by the Ruling, the Appellant lodged an appeal on the following grounds:
  - i. That the learned trial Magistrate erred in law and fact in failing to appreciate that the Appellant had filed a Memorandum of Appearance and a draft Defence thus signifying her intentions of defending the suit;
  - ii. That the learned Magistrate misapprehended the law and fact by failing to note that there were triable issues that had been raised in the draft defence;
  - iii. That the learned Magistrate erred in law and fact failing to accord the Appellant a fair hearing and access to justice as envisaged under Articles 48, 50(1) and 159 of *the Constitution*;
  - iv. That the learned trial Magistrate erred in law by not properly exercising her judicial discretion by denying the Appellant justice and driving her from the seat of justice at the pre-trial stage when the Respondent had not even testified in the suit;
  - v. That the learned trial Magistrate erred in law by not properly exercising her judicial discretion by failing to note the application for setting aside the ex parte judgement was timely filed on 12 June 2023, three days after the said orders by the trial court.
17. The appeal was canvassed by way of written submissions.

### **Analysis and Determination**

18. This being an appeal from the Small Claims Court, the jurisdiction of the Court is circumscribed in section 38 of the *Small Claims Court Act*. Section 38 of the *Small Claims Court Act* provides as follows:
  1. A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;
  2. An appeal from any decision or order referred to in sub section (1) shall be final
19. The above provision means that this Court can only intervene if the evidence on record does not reasonably support the conclusions made by the trial court.
20. Section 43 of the Act empowers the court to set aside its orders by providing as follows:

The Court may on the application of any party to the proceedings set aside any of its orders and make such further orders as it thinks just.
21. The jurisdiction to set aside default judgement is wide and unfettered and the appellate court will not interfere with the decision of the trial court unless it is satisfied that the court misdirected itself in some matter and consequently, arrived at a wrong decision, or unless it is manifest from the case as a whole that the court had been wrong in the exercise of its discretion. These principles were enunciated in the cases of Mbogo v Shah [1968] EA 93 and United India Insurance Co. Ltd and Others v East African Underwriters (Kenya) Ltd NRB CA Civil Appeal No. 36 of 1983 [1985] eKLR.
22. In her lengthy submissions, the Appellant cited many provisions of the law including Articles 48, 50(1) and 159 (2) of *the Constitution*, sections 17, 27 and 43 of the *Small Claims Court Act*. The Appellant



also relied on several cases including the case of James Kanyiita Nderitu & Anor -vs- Marios Philatos Ghikas & Another [2016] eKLR. It was her submission that the doors of justice ought not to be closed to her.

23. The Respondent submitted that the *Small Claims Court Act* is a self-contained statute that regulates proceedings before that Court. The *Civil Procedure Act* is, therefore, not applicable to proceedings before the court. On that basis, there is no requirement to file a Memorandum of Appearance and thereafter a defence in matters before the Small Claims Court. This practice is grounded in the provisions of the *Civil Procedure Act*, which is not applicable to the Small Claims Court.
24. The Respondent further submitted that the Appellant was accorded a chance to respond to the claim in the lower court but failed to do so within the statutory timelines set out in the Small Claims Act. The Appellant cannot claim that she was denied a fair hearing when she in the first instance failed to file her response to the Respondent's claim.
25. Default judgment was entered on 9 June 2023 once the trial court was satisfied that the Appellant had been properly served. A glance at the Record of Appeal reveals an email dated 5 June 2023 from Waweru Maina, counsel for the Respondent, to the Appellant's counsel forwarding Statement of Claim, List of Witnesses, Witness Statement and List of Documents. The email also notified counsel for the Appellant of the mention on 9 June 2023.
26. Additionally, there is a Certificate of Service dated 18 May 2023 filed by the Respondent. The same indicates that the Appellant was served with the Statement of Claim and Notice of First Mention via whatsapp. A screenshot of the communication between Counsel for the Respondent and the Appellant is also attached.
27. From the foregoing, it is clear that the default judgement was regular.
28. Even where the judgment is regular, the court may yet proceed to set aside the judgment if justice of the case demands, particularly where the defendant demonstrates that it has a good defence and any prejudice caused by setting aside may be assuaged by an award of costs. This was held in the case of *Tree Shade Motors Limited v D T Dobie and Company (K) Ltd and Another* [1998] eKLR).
29. While the Appellant's failure to file a response to the Claim within the stipulated time can be attributed to their lack of appreciation of the law and procedures relating to the Small Claims Court, the Adjudicator did not consider whether the Appellant had a good defence or whether indeed any prejudice suffered by the Respondent could not be compensated by an order for costs. By filing a Memorandum of Appearance, the Appellant demonstrated an intention to defend the claim.
30. As to whether the Appellant's draft response raises triable issues, there seems to be an issue relating to the identity of the Appellant. It is my considered view that this is a case where costs and a conditional order would sufficiently protect the Respondent.
31. In the premise, the appeal is allowed and I make the following orders:  
The interlocutory judgement entered against the Appellant on 9 June 2023 is set aside on the following terms:
  - i. The Appellant shall deposit the decretal amount in a joint interest earning account in the names of the Advocates of the Appellant and Respondent within 21 days from the date hereof;
  - ii. The response to the Claim filed in the Small Claims Court shall be deemed as duly filed and served.
  - iii. The matter is referred back to the Small Claims Court for disposal;



iv. The Respondent shall have costs of this appeal assessed at Kshs 40,000/=

**DATED AND DELIVERED AT NAIROBI THIS 23 DAY OF JANUARY 2025.**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

..... for the Appellant

..... for the Respondent

.....Court Assistant

