Njagi v Mugo (Civil Appeal E066 of 2023) [2025] KEHC 4214 (KLR) (2 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4214 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E066 OF 2023

RM MWONGO, J

APRIL 2, 2025

BETWEEN

GEORGE NDWIGA NJAGI ..... APPELLANT

AND

PETER NJAGI MUGO ..... RESPONDENT

(Appeal arising from the Ruling of Hon. J.A. Otieno in Embu CMCC No. 67 of 2019 delivered on 25th October 2023)

JUDGMENT

The Memorandum of Appeal

1. By a memorandum of appeal dated 09th November 2023, the appellant seeks the following orders:
    1. That this Appeal be allowed;
    2. That the Ruling of the Learned Magistrate delivered on 25th October 2023 and the consequent decree thereunder be set aside and the same be substituted with an order allowing the application;
    3. That this Honourable Court be pleased to issue any other relief upon such terms and conditions that it may deem fit in the circumstances; and
    4. That costs of this Appeal be provided for.
2. The appeal is premised on the grounds that:
    1. The Learned Magistrate erred in law and fact in failing to appreciate the proper effect and purport of the evidence before it and arriving at the decision unsupported by and /or manifestly against the weight of the evidence and the law;

2. The Learned Magistrate erred in law and fact in disregarding the totality of the Appellant's pleadings, affidavit, submissions, cited authorities, and as a result, arrived at a materially unsupported finding of fact and law;

3. The Learned Magistrate erred in law and fact in failing to find that the Appellant was never served with Summons and the pleadings contrary to law, personally or otherwise, and thus the appellant/ 1st defendant in the trial court could not have been aware of the existence of the suit against him to enable him to defend the matter;

4. The Learned Magistrate erred in law and fact by entering interlocutory judgment on the basis of a falsified affidavit of service, which was a manifestly wrong exercise of discretion which this court can interfere with;

5. The Learned Magistrate erred in law and in failing to find that the affidavit of service sworn by the process server on the alleged service of summons to enter appearance was falsified and hence fatally defective, on the weight of the evidence presented and thus incapable of being relied upon to enter any judgment in favor of the respondent;

6. The Learned Magistrate erred in law and fact in failing to find that there is sufficient cause brought forth by the Appellant/Applicant to warrant the court to exercise its discretion in favor of the Appellant/ Applicant and the wider interest of justice;

7. The Learned Magistrate erred in law and fact in failing to scrutinize/ evaluate the evidence tendered in support of the application by the appellant and misapprehended the facts and the application before her by failing to correctly relate them to the case law cited and thereby failed to arrive at a fair Ruling;

8. The Learned Magistrate erred in law and fact in not addressing its mind to the supporting affidavit of George Ndwiga sworn on the 16th of June 2023 which clearly expounded on the real issues touching on the application;

9. The Learned Magistrate erred in law and fact in finding that the appellant ought to have consoled the respondent with throw-away costs as they go through the trial;

10. The Learned Magistrate erred in law and fact by finding that the Notice of Motion application dated 16th June 2023 lacked merit;

11. The Learned Magistrate erred in law and fact in failing to find that the appellant's failure to enter appearance and defense in the circumstances within the time stipulated in the circumstances where he was never served was curable in law; and

12. The Learned Magistrate erred in law and in fact by failing to do justice.

Background

3. For context, it is noted that the trial court's impugned ruling of 25/10/2023 concerned an application by the Defendant (present applicant) dated 16/06/2023 Seeking inter alia, stay and setting aside of the proceedings, Judgment and decree issued on 23rd June, 2021 and all consequential orders, and that the applicant be granted leave to file his defence. This application will shortly hereafter be revisited.

4. By way of background, the respondent, through a plaint dated 26th April 2019, sought judgment against the appellant and another party Hellen Muthike for general damages for pain and suffering, special damages of Kshs.4,750/=, and costs of the suit with interest. It was the respondent's claim that

on 27th April 2016, he was walking along the road at Kibugu Stage when the appellant's motor vehicle registration number KCB 927R was driven carelessly and knocked him down occasioning serious injuries. The plaint detailed the injuries sustained by the respondent.

5. According to the court record, the appellant was duly served with the court processes but failed to enter appearance or file any response. Consequently, the respondent requested for interlocutory judgment and the same was granted. The matter went to formal proof where the respondent testified on the circumstances surrounding the accident, and produced documentary evidence in support of his case. The trial court assessed liability at 100% against the appellant, awarded general damages of Kshs.200,000/=, special damages of Kshs.3,000/=, and costs of the suit plus interest. A decree was issued dated 20th January, 2023.

The Application for Stay of Execution dated 25th April 2022

6. Following the judgment, the respondent moved to execute for the decretal amount by auctioning the appellant's motor vehicle. The appellant filed a notice of motion dated 25th April 2022 seeking stay of execution of auction of his motor vehicle registration number KCB 927R. The court, in its ruling, noted that by the time the application was being filed, the motor vehicle had already been sold through a public auction, thus the application was overtaken by events. It found that there was nothing to stay, therefore the application was found to lack merit and it was dismissed.

7. The respondent moved the court for the matter to be listed for a hearing for notice to show cause why execution should not issue. At that hearing, the appellant told the court that he had never been served with court processes in the matter and this hindered his chance to a fair hearing. The court indulged him and accorded him an opportunity to instruct an advocate.

The Application dated 16th June 2023 (the subject of this appeal)

8. During the pendency of a further hearing of the notice to show cause, the appellant filed a notice of motion dated 16th June 2023 seeking orders that the judgment entered against him be set aside, execution be stayed and he be granted leave to defend the suit, such that the matter be heard de novo.

9. The respondent opposed that application through a replying affidavit in which he deposed that the court had already determined the issue of stay of execution as raised in the application dated 25th April 2022, through its ruling delivered on 21st December 2022. He termed the application as a non-starter and that the due process was followed during execution for the decretal amount. He stated that after its judgment and ruling on stay, the court became functus officio and should remain that way. He urged the court to let him enjoy the fruits of his judgment by striking out the application.

10. In its determination thereof, the court delivered a ruling on 25th October 2023 dismissing the application. The court relied on the provisions of Order 10 Rule 11 of the Civil Procedure Rules which allows the court to set aside a judgment on its discretion and as it shall deem just. It stated that the appellant's averment that he was never served with the pleadings in the suit does not render the interlocutory judgment irregular.

11. The court also noted that the application therein was filed 3 years after the judgment was entered yet there is no explanation for the inordinate delay. The court stated that it would amount to a pyrrhic victory if the appellant is allowed to benefit from his indolence, which will deny the respondent his right to enjoy the fruits of the judgment. That application was dismissed, thus, this appeal.

Written submissions

12. Parties filed written submissions on the appeal as directed by the Court.

13. The appellant submitted that the application was dismissed by the trial court only on the basis of inordinate delay but the substance of his intended defense ought to have been considered. That Order 10 Rule 11 of the Civil Procedure Rules gives the court discretion which should be used to alleviate hardship or injustice that may result from inadvertence of excusable mistake by the court, as was stated in the case of Shah v Mbogo 1967 EA 116.

14. He also relied on the cases of Kenya Game Hunting Union v Glory Car Hire [2014] KEELRC 658 (KLR), Patel v EA Cargo Handling Services Ltd [1974] EA 75, Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR), Miarage Co Ltd v Mwichuiri Co Ltd [2016] KECA 202 (KLR), Belinda Murai & 9 others v Amos Wainaina [1978] KECA 23 (KLR) and Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] KECA 597 (KLR). He argued that the discretion to set aside a judgment ought to have been exercised judiciously by the court and the merits of the defense ought to have been considered. He urged the court to allow the appeal.

15. On his part, the respondent submitted that the appeal is not properly before this court since it was filed out of time and without the leave of court. He cited section 79G of the *Civil Procedure Act* and the case of Gerald M'limbine v Joseph Kangangi [2008] KEHC 1923 (KLR) where it was held that an application for leave to appeal should be accompanied by the intended appeal. He submitted that the grounds of appeal are tedious and the court should not spend too much time gleaning through them to find the factual and legal issues.

16. He relied on Order 42 Rule 1(2) of the Civil Procedure Rules which provides for the contents of a memorandum of appeal. It was also his argument that fear of execution is not a ground for stay and the court already expressed itself on this matter. Further reliance was placed on the case of Child Welfare Society of Kenya v Republic & 2 others Ex-parte Child in Family Focus Kenya [2017] KECA 175 (KLR). He urged the court to dismiss the appeal as incompetent.

Issue for Determination

17. The issue for determination is whether the appeal has merit.

Analysis and Determination

18. It is worth reiterating that the appellate court makes its decision based on the record of the trial court as was held in the case of Okeno v Republic [1972] EA 32 wherein the court held:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

19. The court herein is bound to re-examine the evidence and proceedings before the trial court in order to contextualize the issues. The respondent, through his submissions, has raised an issue of the competence of the appeal herein. In my view, this issue should be canvassed first as it establishes the

jurisdiction of this court to hear the appeal. The subject of this appeal is the ruling of Hon. J.A. Otieno, SRM which was delivered on 26th October 2023 in determination of the notice of motion dated 16th June 2023. The record of appeal is dated 10th November 2023 and it was filed on the same day.

20. Section 79G of the *Civil Procedure Act* provides that appeals should be filed within 30 days of the impugned judgment. In this case, the impugned ruling is the one delivered on 26th October 2023. According to Order 42 Rule 1(1) of the Civil Procedure Rules, an appeal is lodged through a memorandum of appeal, which was done properly. In this case, the appeal was filed within time and in the manner prescribed.

21. The appellant is seeking, inter alia, that the ruling delivered on 25th October 2023 and the consequent decree thereunder be set aside and the same be substituted with an order allowing the application. The appellant's application dated 16th June 2023 sought the following orders:

    1. That this application be heard ex-parte in the first instance and as a matter of urgency on the ground, inter alia, that interlocutory Judgment having been entered, the plaintiff has now taken out Notice to Show cause scheduled for hearing on 21st June 2023 against the 1st defendant/ applicant who did not participate in the proceedings and as such there is eminent danger of execution taking place.

    2. That pending the hearing of this application and or further orders of this Honourable court, there be a stay of execution of the proceedings, judgement and Decree issued on 23rd June 2021.

    3. That pending the hearing of this application and or further orders of this honourable court, the proceedings, judgment and Decree issued on 23rd June 2021 and all consequential orders be set aside and or varied.

    4. That the 1st defendant/ applicant be granted leave to file his defence and the matter be heard de novo.

    5. That this application be served on the Respondent and be heard inter-parties on such date at such time as this Honourable Court may direct.

    6. That the costs of this application be provided for.

22. The court dismissed that application and did not grant any of the orders sought. Before this application which culminated into the impugned ruling, the appellant had filed a previous application dated 25th April 2022 at a time when the respondent had put in motion his intention to execute for the decretal amount awarded through the suit. That previous application sought the following orders:

    1. That this application be certified as urgent and be heard ex-parte in the first instance.

    2. That pending hearing and determination of this application the Court be pleased to order stay of execution of the decree herein and M/S Giant Auctioneers be ordered to release the objector/applicants motor vehicle KCB 927R forthwith.

        3. That NTSA be barred from effecting any registering motor vehicle KCB 927R to the names of the highest bidder in any auction which may be carried in execution of the decree herein.

        4. That the Court be pleased to uphold the objection by the applicant to the effect that motor vehicle KCB 927R does not belongs to the objector/1st defendant and cannot therefore be subject of attachment in execution of the decree herein.

5. Costs of this application be in the cause.

23. In essence, this previous application was intended to challenge the sale by auction of the appellant's motor vehicle. The court, as constituted at the time, found that the application had been overtaken by events since the motor vehicle in question had already been sold. Therefore, the application was dismissed.

24. Through both applications, the appellant informed the court that he was never served with the plaint. It was on this basis that the trial court dismissed the application dated 16th June 2023, stating that there was evidence to show that the appellant was served with the relevant court processes.

25. From a perusal of the trial court record, the respondent extracted summons to enter appearance and the same appear to have been served upon the appellant. There is an affidavit sworn by one Tabitha Mbugua who introduced herself therein as a Licenced Court Process Server. The affidavit stated:

> " 1. That, I am a Process Server duly authorized by this Honourable court and competent to swear.
>
> 2. That, on the 16th August, 2019, I received copies of Plaint dated 26th April 2019 and Summons issued on 29th April 2019 from the firm Mugendi Karigi & Company Advocates to effect service upon the Defendants herein.
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> 3. That on the same day, I proceeded to Embu Police Station where I was able to obtain 1st defendant contacts from the investigating officer.
>
> 4. That again I proceeded to call the 1st defendant vide his telephone number 0710-540-041 whom identified himself as George Ndwiga. I further explained the purpose of calling and said he was aware of the said accident and directed me where we meet in order to serve him with the said summons.
>
> 5. That he directed we meet at Kathangeri stage which is near Kieni in Embu County. We met at around 3:00pm where I explained the purpose of service. He willingly accepted his copies and told me he had authority to from Hellen Wairimu Muthike who was the 2nd defendant to receive the summons her behalf and assures me that he will take to the insurance.
>
> 6. That I further request him to sign on my copies which he declined. Time of service was 3:30 pm a copy herewith I hereby return to this Honourable court.
>
> 7. That, what is deponed herein is true to the best of my knowledge, information and belief saves as otherwise stated."

26. With this affidavit of service, the trial court was satisfied that service had been duly effected upon the appellant. Being so satisfied, this also informed the court's decision to allow the respondent's request for interlocutory judgment. An affidavit of service is one of the lawful ways through which the court can confirm that service has been effected. The court depends on it for the details as to how service of documents was carried out and how the recipient was tracked and identified. In the case of Tonui & another v Kenya Union of Post Primary Education & another; Registrar of Trade Unions (Interested Party) [2025] KEELRC 773 (KLR) the court stated:

> " In the absence of an Affidavit of service on record, it is difficult for the court to satisfy itself that service was indeed effected as by law required."

27. The application dated 25th April 2022 sought stay of execution and it was dismissed. In the circumstances, the appropriate action for the appellant to have taken was to appeal against that decision or to seek review. However, he did neither of these things. Instead, in the pendency of proceedings for notice to show cause why execution should not be levied, the appellant filed a similar application before the same court, which court was differently constituted (the previous Magistrate having retired). It would appear that the appellant intention was corralling and duping the court into sitting on appeal in its own decision in the name of revisiting his disgruntlement about service of the plaint. Unfortunately, the trial court fell into that trap.

28. The prayers sought through the application dated 16th June 2023 are for stay orders among other things. Needless to say, the stay orders could not have been canvassed through that application for the second time before that court. The issue was res judicata, having been determined by the same court through a previous application. Regardless, the trial court entertained the application and went into the issue of whether or not the appellant was served with the court processes and why it cannot set aside its own judgment even on its discretion.

29. Even then, the issues raised in that application should have been issues raised on appeal and not before the trial court, which had since become functus officio. In fact, the application dated 16th June 2023 should not have been entertained by the trial court at all. The court in Odinga v Independent Electoral & Boundaries Commission & 3 others [2013] KESC 8 (KLR) in reliance on a text by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," [2005] 122 SALJ 832, stated thus on the doctrine of functus officio:

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

Conclusions and Disposition

30. In essence, and without overstating the point, the subject of this appeal ought to have been the ruling delivered on 21st December 2022 dismissing the stay application or the substantive judgment in the suit delivered on 23rd June 2021. The grounds of appeal herein would only make sense if the appellant clarified which of the findings of the court he wishes to appeal against. For instance, issues of service of court processes and conduct of the suit by the trial court.

31. Ultimately, therefore, I am of the opinion that there is no basis for granting the orders prayed for in this appeal.

32. Instead, however, the court would and hereby sets aside that part of the impugned ruling wherein the trial court purported to sit on appeal in its own decision, and the appeal partially succeeds only to the extent of the said setting aside of the impugned ruling.

33. In all other respects, the appeal fails and is dismissed with costs.

34. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 2ND DAY OF APRIL, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Gitahi for Respondent

2. Nyairo holding brief for Njagi for Appellant

3. Francis Munyao - Court Assistant