Otieno t/a Awesome Foods v Mweiga Estate Limited (Civil Appeal E046 of 2024) [2025] KEHC 12748 (KLR) (17 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12748 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E046 OF 2024

DKN MAGARE, J

SEPTEMBER 17, 2025

BETWEEN

LYDIA WARUGURU OTIENO T/A AWESOME FOODS ..... APPELLANT

AND

MWEIGA ESTATE LIMITED ..... RESPONDENT

(An appeal arising from the Ruling and Order of lower court delivered on 11.7.2024 by Hon. Ismael Stanley in Nyeri CMCC No. 410 of 2021)

JUDGMENT

1. This appeal arises from the Ruling and Order of lower court delivered on 11.7.2024 by Hon. Ismael Stanley in Nyeri CMCC No. 410 of 2021. The suit had been filed on 17.12.2021. Summons were issued on 21.12.2021. There is an affidavit of service dated 17.05.2022 for service upon M/s Gathaara Mahinda & Company Advocates. The Appellant entered appearance on 24.03.2022 through the firm of M/s Gathaara Mahinda & Company Advocates.
2. The Appellant filed this appeal and set forth the following grounds in the Memorandum of Appeal dated 7.8.2023.
    a. That the learned trial magistrate erred in law and fact by failing to set aside interlocutory judgment entered against the appellant.
    b. That the learned trial magistrate erred in law and fact when he held that the appellant had been properly served with the summons to enter appearance despite there being evidence contrary to the same thereby arriving at the wrong decision.
    c. That the learned trial magistrate erred in law and fact when he adopted the wrong principles in law thereby arriving at the wrong conclusion.

d. That the learned trial magistrate erred in law and fact by dismissing the appellant's application despite the weight of evidence and the authorities cited by the appellant.

3. In summary the appellant raised issues that court fell into error both in law and in fact by declining to set aside the interlocutory judgment that had been entered against the appellant. Further, the court wrongly found that the Appellant had been properly served with summons to enter appearance, despite evidence to the contrary. Lastly, the court erred in dismissing the Appellant's application dated 15.08.2023, doing so against the weight of the evidence that had been placed before it.

4. The impugned ruling arose from an application dated 15.8.2023 that sought to set aside the interlocutory judgment. The grounds of the application was materially that the appellants were not properly served with the summons to enter appearance.

5. It was also contended that the Appellants were condemned without a hearing having not been served with the summons to enter appearance as summons were served upon the advocate who had no instructions from the Appellant, but filed a memorandum of appearance.

6. The Respondent opposed the application through the Replying Affidavit of Joseph Muthami sworn on 4.9.2023. It was deposed inter alia that, The Respondent's advocate wrote to the advocates for the Appellant who upon inquiry indicated that they would accept summons on behalf of the Appellant. The advocates filed memorandum of appearance due to instructions from the Appellant.

Submissions

7. The Appellant filed submissions dated 15.4.2025 in which it was submitted that judgment was irregular and should be set aside as of right. They cited Order 10 Rule 11 of the Civil Procedure Rules. Reliance was also placed among others on *Ali Bin Khamis v Salim Khamis Korobe & 2 Others* (1956) EACA 195 to submit that an order made without service of summons was a nullity. It was the case of the Appellants that the summons in this case was served to advocates and not the Appellant.

8. On the part of the Respondent, submissions dated 16.5.2025 were filed in which it was submitted that the court was correct in dismissing the application. They stated that there was evidence that the summons to enter appearance was properly served following which the appellant failed to file defence within the stipulated time. The Respondent also submitted that no draft defence was filed to demonstrate the seriousness of the intended defence. They cited the case of *Ecobank Kenya Limited v Minolta Limited & 2 others* [2018] KEHC 10053 (KLR). In that case, the court stated as follows:

(18) A careful consideration of the grounds set out in the Notice of Motion and its Supporting Affidavit does show that, quite apart from the fact that no explanation has been given for the failure by the Defendants to enter appearance, no draft Defence was exhibited to give the Court an inkling as to the nature of their defence, in the light of the clear admissions of their indebtedness as per the email communication at pages 23-25 of the Plaintiff's List and Bundle of Documents. Thus, in *Abdalla Mohamed & Another vs. Mbaraka Shoka* [1990] eKLR, wherein the Appellants applied for the setting aside of default judgment on the grounds, inter alia, that though they were actually served with summons the proper formalities in respect thereof were not followed, the Court of Appeal held thus:

"...this contradiction is a pointer that the appellants were aware of the action filed against them by the respondent long before the interlocutory and final judgments were entered against them. This was notwithstanding that the aforesaid returns of service were drawn in a manner that was irregular. It was for the appellants to establish on a balance of probabilities that even with the irregular returns of service, they were never served with the summons. This they did

not do as they rested their application on these returns of service. That per se, as the learned judge rightly observed, would not have been sufficient ground upon which the interlocutory and final judgments could be set aside considering that the said judgments were not clearly shown to have been entered irregularly..."

9. The Respondent also submitted that a retainer could be express or implied and there was a retainer between the Appellant and the firm of advocates to which the Appellant granted instructions to represent her. Reliance was placed inter alia on *Zakhem Construction (K) Ltd v Mereka & Co Advocates* (2017) eKLR.

Analysis

10. The issue that falls for this Court's determination is whether the lower court erred in dismissing the Appellant's application dated 15.8.2023. The application sought to set aside the interlocutory judgment against the Appellant. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of *Mbogo and Another vs. Shah* [1968] EA 93, the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

11. The duty of the first appellate court was set out in the locus classicus case of *Selle and another vs Associated Motor Board Company and Others* [1968] EA 123, where the court of appeal [Clement De Lestang, VP, Duffus and Law JJA] held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

12. In this case, the application was dealt with by way of submissions and affidavits. Therefore the evidence is dealt with in the same way as the lower court. This was so stated in the case of *Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR where Kiage JA stated as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; *Selle vs Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were

otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

13. The court is also alive to the fact that the lower court exercised an act of discretion in declining the Appellants' application. The impugned judgment was *ex parte* judgment. I have to reevaluate the procedure followed towards establishing validity of service of the summons to enter appearance.

14. The principle of natural justice requires that no one should be condemned without being heard, decisions should not be made in their absence, and they must be allowed to participate in proceedings that affect their lives and property.

15. I agree with the holding of the Supreme Court of India which stated in *Sangram Singh vs. Election Tribunal, Koteh*, AIR 1955 SC 664, at 711 cited in the case of *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR that:

> " There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

16. *Ex parte* judgments are generally set aside to accord a defendant an opportunity to be heard, in keeping with the principles of natural justice. That was the essence of the Appellant's application, which sought to set aside the interlocutory judgment on the ground that it had been entered without proper service of summons. While the issue of service is a valid ground for setting aside such a judgment, the Appellant was under duty to prove that no service was effected. The Respondent was under duty to prove that they served.

17. This thus means that once the court finds service was proper, there is a regular judgment. Well-established principles of setting aside interlocutory judgments were laid out in the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 where Duffus P. posited as follows:

> " The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J, put it "a triable issue" that is an issue which raises a *prima facie* defence and which should go to trial for adjudication.

18. It is of course different, when it is an irregular judgment. There is a distinction between a default judgment that is regularly entered and one which is irregularly entered. The difference between the two was set out by the Court of Appeal in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) as hereunder:

> In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 judgment

> 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 the default judgment, and will take into account such factors as the reason for the 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, whether in the whole it is in the interest of justice to set aside the default judgement, among others.

19. Where the judgment is irregular, then the court must set it aside as a matter of right. The court does not even have to be moved by a party. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.

20. In the appeal herein, the judgment entered was regular. While the appellant challenged it on the basis of lack of proper service, they failed to demonstrate the existence of a meritorious defence. It is acknowledged that annexing a draft defence is not a strict requirement; what is essential is that the applicant presents, either through a draft defence or supporting affidavits, sufficient material to show that they have a plausible defence worth considering. However, in this instance, there was no such demonstration before the lower court. Even on appeal, it remains unclear what defence the Appellant intended to raise, thereby weakening the basis for setting aside the judgment.

21. In the absence of such evidence, the trial court cannot be faulted for finding that the application lacked merit and for declining to exercise its discretion in favour of the Appellant. In *Wachira Karani vs Bildad Wachira* (2016) eKLR as was quoted in the case of *David Gicheru v Gicheha Farms Limited & another* [2020] eKLR the Court held that:-

> "The fundamental duty of the court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."

22. Asalready observed, the power to set aside an *ex parte* judgment is an exercise of judicial discretion. While this discretion is wide and unfettered, it is not arbitrary. It must be exercised judiciously and in accordance with established legal principles, taking into account the circumstances of each case, the reasons for not filing defence within time and whether a triable defence has been demonstrated. This is fortified by the passage constituting in the case of *CMC Holdings Ltd vs. Nzioki* [2004] KLR 173, where Court of Appeal posited as follows:

> In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.

23. The Appellant's submission is that service was effected on a firm of advocates, not on the Appellant personally. However, since the firm had previously acted for the Appellant by issuing a demand notice to the Respondent, it was duly authorized to accept service. Consequently, the advocates entered appearance on behalf of the Appellant and filed a memorandum of appearance dated 22.3.2022.

24. In so far as the service of summons was considered, knowledge of the existence of the suit was complementary to service but would not constitute service by itself. The Appellant centered her defence on denial of any instructions to the advocate. The Respondent satisfied the procedure as anticipated on the service of the summons to enter appearance. There was overwhelming evidence that the advocates had instruction from the Appellant to accept the summons, and they even filed the memorandum of appearance on behalf of the Appellant. There is no basis to interfere with the discretion of the learned magistrate. In *Pindoria Construction Ltd vs. Ironmongers Sanytaryware* Civil Appeal No. 16 of 1976 it was held that:

> "It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the *Civil Procedure Rules*. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the *ex parte* judgement..."

25. Considering all factors of this case, the lower court correctly dismissed the application to set aside interlocutory judgment. There was no way to tell whether the Appellant had a triable defence as no draft defence was filed in court. In *Patel vs. E.A Cargo Handling Services Ltd* (1974) EA 75 at p.76 Duffus P. held that

> "a triable issue is an issue which raises a *prima facie* defence and which should go to trial for adjudication".

26. In the circumstances, the appeal lacks merit and is consequently dismissed. Who then bears the costs of the appeal? The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

27. The law is that costs are at the discretion of the court, but this discretion must be exercised judiciously, based on sound reasoning, and not arbitrarily. A court may only withhold costs on proper grounds. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* 2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously

meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

28. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> 18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.
>
> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

29. Costs follow the event. The event is the dismissal of the appeal. The same was unmerited from the word go. Costs should thus go to the respondent.

Determination

30. In the upshot, I make the following orders:

    a. The appeal lacks merit and is accordingly dismissed with costs of Ksh. 65,000/=.

    b. The file is closed.

    c. Right of appeal 14 days.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 17TH DAY OF SEPTEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mrs. Macharia for the Appellant

Mr. Ngugi for the Respondent

Court Assistant – Michael