



**Mbithi v Wambua (Civil Appeal E923 of 2022)  
[2024] KEHC 2640 (KLR) (Civ) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2640 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E923 OF 2022**

**DAS MAJANJA, J**

**MARCH 12, 2024**

**BETWEEN**

**FIDELIS NTHEKETHA MBITHI ..... APPELLANT**

**AND**

**PATRICK WAMBUA ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. J.W. Munene Adjudicator/RM dated 13<sup>th</sup> October 2022 at Nairobi Small Claims Court, Milimani in SCCC No. E2257 of 2022)*

**JUDGMENT**

1. The Appellant is dissatisfied with the ruling of the Subordinate Court dated 13.10.2022 which declined to allow his application to, inter alia, set aside judgment of the court dated 26.04.2022.
2. The application which is the subject of the appeal was necessitated by a series of events which I shall outline in chronological order. The Respondent filed a Statement of Claim dated 08.04.2022 claiming payment of Kshs. 1,050,000.00 allegedly owed to him as a result of a loan given to the Appellant. The Statement of Claim and other documents were served on the Appellant as shown by the affidavit of service sworn on 14.04.2022 by Ngunjiri Gichari. He stated that the pleadings together with a mention date of 19.04.2022 were served on the Appellant herein via WhatsApp on phone number 0727xxx204. A screen shot of the WhatsApp communication was attached as proof.
3. The record of proceedings of the Subordinate court show that the matter was mentioned on 19.04.2022 but there was no appearance by either party. The court directed that notice do issue to the parties by the registry for a mention on 26.04.2022. A certificate of service sworn by Ngunjiri Gichari on 25.04.2022 states that he served a mention notice to the Appellant on 20.04.2022 informing him of the mention slated for 26.04.2022. He attached a screen shot of the said WhatsApp communication.



4. When the matter was mentioned on 26.04.2022, neither the Appellant nor his advocate appeared in court. The Appellant had also not filed a response to the claim. The Respondent prayed for judgment and the court entered judgment in default of response against the appellant for Kshs. 1,000,000.00 together with costs and interest at court rates from the date of filing suit.
5. The advocate for the Respondent proceeded to serve the notice of entry of judgment on the appellant via WhatsApp on 27.04.2022 and returned to the court an affidavit of service sworn on 27.5.2022. A screenshot of the WhatsApp communication was attached as well. The Respondent proceeded to extract decree and instructed Nextgen Auctioneers to execute against the judgment debtor but the warrants of attachment issued by the court were returned unexecuted citing lack of sufficient attachable assets. The Respondent thereafter applied execution by way of arrest and committal. The court issued a Notice to Show Cause dated 04.08.2022 which was served on 17.08.2022. Service of the notice was duly effected as shown in the affidavit of service dated 19.08.2022 sworn by Ngunjiri Gichari. The Notice to Show Cause came up for hearing on 23.08.2022 and in the absence of the Appellant, the court issued warrants of arrest and committal to civil jail. On the same day, the Appellant filed the application to set aside judgment.
6. The trial court dismissed the application to set aside judgment thus occasioning this appeal. In his memorandum of appeal, the Appellant raised two issues; whether the trial court erred in reaching a finding that proper service of pleadings was effected on the Appellant and whether the trial court misapplied the law and arrived at an erroneous decision thus prejudicing the Appellant's right to a fair hearing.
7. The appeal revolves around the exercise of the court's discretion to set aside an *ex-parte* judgment under Order 10 Rule 11 of the *Civil Procedure Rules*. In *Richard Nchapai Leiyangu v IEBC & 2 others* NYR CA Civil Appeal No. 18 of 2013 [2013] eKLR, the Court of Appeal expressed the applicable principle as follows:

We agree with the noble principles which go further to establish that the courts' discretion to set aside *ex parte* judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.
8. In the circumstances the court is guided by the principle that the appellate court will not interfere with the decision of the trial court unless it is satisfied that the judge in exercising his 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 that as a result there has been an injustice (see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co. Ltd and Others v East African Underwriters (Kenya) Ltd* [1985] eKLR).
9. From the evidence on record, the trial court was satisfied that the Statement of Claim and Summons to Enter Appearance were properly served on the Appellant. The Appellant at paragraph 2 of his supporting affidavit sworn on 23.08.2022 deponed that he was served with the Notice to Show Cause why he should not be committed to civil jail. The chronology of events as outlined in the preceding paragraphs show that the mode of service used by the Respondent was the same one from the Summons to the Notice to Show Cause. The Appellant did not explain how he was able to receive service of the Notice to Show Cause but fail to receive the other pleadings and notices yet they were served through the same medium. This court is satisfied that service was duly effected on the Appellant and the judgment in default of appearance entered by the trial court is regular.



10. 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 (see *Tree Shade Motors Limited v D T Dobie and Company (K) Ltd and Another* [1998] eKLR). In making an application to set aside judgment, an applicant ought to attach the draft defence/statement of response or even set out in the body of the deposition the nature of its defence. Such a defence need not be iron clad but need only raise a triable issue (see *Blue Shield Insurance Company Limited v Joseph Mboya Ogutu* [2009] eKLR).
11. The Respondent's case was that he advanced the Appellant Kshs. 1,050,000.00 under an agreement dated 02.12.2020 which the Appellant failed to repay. In his deposition, he denied the agreement but admitted that the Respondent had loaned him money under verbal agreements on different occasions which he repaid. That he only owes Kshs. 40,000.00 and had reached out to the Respondent to reconcile accounts but the Respondent ignored him. In this case, the court ought to determine how much the Appellant owes the Respondent. I would therefore hold that the Appellant has a triable defence.
12. In view of the finding that the Appellant was duly served and that he ignored court process, I allow the appeal and make the following orders:
  - a. The Ruling and Order of the Small Court dated 13.10.2023 is set aside and substituted with an order allowing the application dated 26.04.2022 on condition that the Appellant shall deposit Kshs. 500,000.00 within 14 days from the date hereof.
  - b. The Appellant shall pay cost of the appeal and the proceedings before the Small Claims Court assessed at Kshs. 20,000.00 within 14 days from the date hereof.
  - c. The matter shall be heard and determined within 60 days from the date it is first mentioned before the Small Claims Court.
  - d. In default of compliance with orders (a) and (b), the judgment shall be reinstated and the Respondent shall be at liberty to execute the judgment.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MARCH 2024.**

**D. S. MAJANJA**

**JUDGE**

Mr Wachira instructed by Ndindi and Nadida Advocates for the Appellant.

Instructed by E. Kinyanjui and Company Advocates for the Respondent.

