



**Nobel Trading Company Limited v Nduati (Civil Appeal
E035 of 2022) [2024] KEHC 3082 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3082 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E035 OF 2022
GMA DULU, J
MARCH 12, 2024**

BETWEEN

NOBEL TRADING COMPANY LIMITED APPELLANT

AND

JOHN CHEGE NDUATI RESPONDENT

*(From the ruling in CMCC No. 6 of 2020 delivered on 29th August
2022 by Hon. A. M. Obura (Mrs.) (CM) at Voi Law Courts)*

JUDGMENT

1. On 29th August 2022, the Magistrate’s court delivered a ruling to an application dated 30th May 2022 filed by the appellant’s herein requesting setting aside of the court trial proceedings, judgment of 31st January 2022, and the subsequent decree issued on 23rd May 2022 and grant leave to the appellant to defend the suit.
2. In the said ruling the trial Magistrate concluded as follows:-

“In my view, the judgment entered herein was regular and valid. It has been partly satisfied. I also find that there are no pending triable issues to be litigated. The defendant is stopped from denying the fact of service and that they had an opportunity to be heard in their defence if the defence filed through Kiarie Kariuki & Company Advocates did not align with their own defence. I am inclined to agree with the respondents that this application is an afterthought and unmerited. A successful party should not be kept too far from the fruits of its judgment. Consequently, I hereby dismiss it with costs.”
3. Aggrieved by the above ruling of the trial Magistrate the appellant Nobel Trading Company Ltd has come to this court on appeal through counsel Ms Oundo Muriuki & Company on the following grounds:-



1. The learned trial Magistrate erred in law and fact in failing to interrogate whether the appellant instructed the law firm of Kiarie Kariuki & Company Advocates to act for them in the matter, which firm never contested that they were never instructed the appellant in the matter.
 2. The learned trial Magistrate erred in law and fact in dismissing the application on account of proper service of summons as the only consideration without taking into account other equally salient factors such as the reasons for the appellant's failure to participate in proceedings, the fact that no defence witness statements were filed and witnesses called and the respective prejudice likely to be suffered by each of the parties.
 3. The learned trial Magistrate erred in law and fact in declining to set aside the judgment as against the appellant *ex debito justitiae* in absence of evidence of the appellant instructing any advocate to act for them.
 4. The learned trial Magistrate erred in law and fact in failing to analyse whether the appellant's draft statement of defence raised cogent triable issues.
 5. The learned trial Magistrate erred in law and fact in failing to consider the appellants affidavit and supplementary written submissions.
 6. The learned trial Magistrate misapprehended the issues arising in the application thus rendering a ruling at odds with the facts and relevant applicable law.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Komms Advocates for the appellant, as well as the submissions filed by Waithera Ngigi & Company Advocates for the respondent.
 5. This appeal is really hinged on whether an advocate was instructed to act for the appellant, and if not what should a court of law order.
 6. The appellant's counsel maintains that the appellant Nobel Trading Company Ltd did not instruct a lawyer to act for them in Voi CMCC No. of 2022, while counsel for the respondent maintained that the appellant did instruct the law firm of Kiarie Kariuki & Company Advocates, who represented them in the case.
 7. It is not disputed that the appellant was at one time the registered owner of motor vehicle KCP 457H. The contention is however that they sold the motor vehicle to Ilham Farid Mohamed, through a sale agreement and when served with summons, the appellant sent the summons to the buyer, who sent same to their insurer Monarch Insurance Co. Ltd who appointed counsel to act in the matter.
 8. The respondent's counsel, strongly argued in the submissions that Kiarie Kariuki & Company Advocates stated specifically that they were appointed by the Monarch Insurance Company Ltd, and as such the advocates having been appointed by the insurers, represented the appellant.
 9. In my view, from the facts disclosed in the matter, it cannot be said that the advocates Kiarie Kariuki & Company were appointed on behalf of the appellant.
 10. The first reason is the contents of Clause 4 of the sale agreement between the appellant and Ilham Farid Mohamed which specifically provides as follows:-

“The buyer shall get insurance cover from the company. Should the motor vehicle be involved in an accident/stolen/burned etc it shall be the sole responsibility of the buyer, notwithstanding that the vehicle has not been formally transferred.”



11. In my view, from the contents of the above agreement for sale, both the property and risk in the motor vehicle passed to the buyer on the basis of the above clause. Thus the buyer was to take their own insurance cover, and could not rely on the insurance policy of the seller. Secondly, even if the buyer did not take out insurance cover, he or she would be solely and personally responsible and liable for loss caused by the motor vehicle.
12. Thus in my view, by the appellant sending the court summons to the buyer, they did not constitute her (buyer) an agent to claim from the insurance, but it was for the buyer to take over responsibility for the case, and its consequences.
13. The second reason why the advocates were not appointed by the insurer for the appellant is that, the communication to the insurance company was made by Ilham Farid Mohamed the insured, and because of that the insurer acted under the policy to appoint the lawyer and the appellant who was not privy to the insurance cover, was totally cut off from the case as the advocate was not obligated to contact the appellant. Thus passing burden on the appellant would be a violation of Article 25 and 50 of *the Constitution* relating to the requirements of a fair trial as such would mean condemning them unheard. If indeed, Kiarie Kariuki advocate was appointed for the appellant they would have contacted them to get full instructions on the nature of the defence to file, which clearly did not happen herein.
14. I have also perused the amended defence relied upon dated 7th July 2021, and it is quite clear to me that it was not based on a brief obtained from the appellant as it was a general denial which does not disclose any of the relevant facts, that there was a buyer seller relationship between the appellant and someone else, who was to take the risk and take out insurance cover for the vehicle, and that the buyer had infact taken out insurance cover for the vehicle. The defence filed was thus clearly not for the appellant.
15. I note also there is also no specific averment made so far, that the advocate appointed by the insurer Kiarie Kariuki & Company engaged in any communication with the appellant, or any of its directors, or employees, to show that they represented them.
16. In those circumstances and in order to avoid violation of the principles of the rights to fair trial under *the Constitution* of Kenya, I will have to allow the appeal.
17. I thus allow the appeal, set aside the ruling of the learned Magistrate dated 29th August 2022 and order as follows:-
 1. I hereby set aside the proceedings and judgment of 31st January 2022 in Voi CMCC Suit No. 6 of 2020 and the consequential decree issued on 23rd May 2022 and grant leave to the appellant to defend the suit.
 2. I direct that the Magistrate's case herein be set down for fresh case management and de novo hearing.
 3. I order that the matter be mentioned in the Magistrate's court on 26th March 2024 for directions and progress.
 4. Costs will follow the decision in the re-hearing of the case.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MARCH 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-



Alfred/Trizah – Court Assistants

Mr. Juma for appellant

