



Hyrdo Water Well (K) Limited v Sechere & 2 others (Suing in their representative capacity as the officers of Chae Kenya Society) (Civil Case E212 of 2019) [2024] KEHC 4597 (KLR) (Commercial and Tax) (15 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E212 OF 2019
JWW MONG'ARE, J
APRIL 15, 2024**

BETWEEN

HYRDO WATER WELL (K) LIMITED PLAINTIFF

AND

NELSON MUKARA SECHERE 1ST DEFENDANT

HENRY NANDWA NAMAY 2ND DEFENDANT

GILBERT MUTHENGI WAMBUA 3RD DEFENDANT

SUING IN THEIR REPRESENTATIVE CAPACITY AS THE OFFICERS OF CHAE KENYA SOCIETY

RULING

1. There are two applications before the Court for determination. pursuant to the Court's directions of 29th June 2023, the matters were canvassed together are being determined together in this ruling. The first application is the Notice of Motion dated 15th January 2023, filed by the 2nd and 3rd Defendants, under Order 10 Rule 11, Order 22 Rule 19(2), Order 51 Rule 1 & 15 of the Civil Procedure Rules, 2010, Section 1A, 1B and 1A of the *Civil Procedure Act*, seeking the following orders:-
 1. That this Honourable Court be pleased to set aside or vary the Judgment entered against 2nd & 3rd Defendants on the 10th August, 2021 together with all the consequential orders.
 2. That upon the grant of prayer (1) above, leave be granted to the 2nd & 3rd Defendants to file their Defence together with the list of documents, list of witnesses and witness statements within 14 days from the date of the order.



3. That the Court be pleased to summon a representative from the Law Firm of M/S Mohamed Muigai LLP Advocates for cross-examination to determine whether the 2nd & 3rd Defendants gave the Law Firm instructions to put in a Defence and act on their behalf in this matter.
4. That costs of this application be on the cause.
2. The said application is premised on the grounds set on its face and the annexed affidavit sworn by the 2nd Defendant Henry Nandwa Namayi on 15th January 2023, responses filed by both the 2nd and 3rd Defendants and dated 11th April 2023 and the written submissions dated 26th June 2023. The grounds set out thereunder are as follows:-
 1. That the 2nd & 3rd Defendants never participated in the Court proceedings for lack of summons and notices and they were never aware that there has been a judgment already delivered against them until December, 2022.
 2. That the 2nd & 3rd Defendants only became aware of this Court case on the 14th December, 2022 when they received a call from one Mr. Noel Musyimi who informed them that he has Court documents to be served upon them.
 3. That the Plaintiff/Respondent herein is now seeking for Orders to have the 2nd & 3rd Defendants /Applicants arrested and committed to Civil Jail for failure to settle a decretal amount.
 4. That the 2nd & 3rd Defendants/Applicants confirm that they never gave instructions to the law Firm of M/S Mohamed Muigai and LLP Advocates to represent them in this matter.
 5. THAT the 2nd & 3rd Defendants/Applicants never gave authority to the 1st Defendant to appear, plead or act for them in any of the court's proceedings, in the manner prescribed in Order 1 Rule 13 (1) of the Civil Procedure Rules.
 6. That *the Constitution* of Kenya, 2010 guarantees one to be subjected to fair trial and be subjected to fair administration of justice. Further, the Applicants rely on Section 4 of the *Access to Information Act* 2016.
 7. That the Plaintiff/Respondent have applied for the Applicants committal to civil jail and unless they are restrained, the Defendants/Applicants shall be condemned unheard and will suffer immensely for no fault of their own.
 8. That the Judgment entered in the Plaintiff/Respondent's favour involves a very substantial amount of Kshs.25,823,773/= and the 2nd and 3rd Defendant s/Applicants are people of meagre needs and do not have the kind of money being demanded from them, and most importantly a contract they never took part in.
 9. That it is in the wider interest of Justice that the orders sought herein are granted on priority otherwise the Defendants/Applicants are apprehensive that the Plaintiff/Respondent's would proceed to execute against them and consequently they shall be condemned unheard for no fault of their own.
 10. That it is against natural justice, and the Laws of the land to be punished for sins that one has not committed and know nothing about.
 11. THAT this application has been made without unreasonable delay,



in good faith and with full disclosure of the circumstances that led to the application before Court.

12. That the Applicants will suffer great injustice if this application is not allowed.
 13. That it is in the interests of justice that this application be allowed to enable the matter be determined on its merit.
3. The application is opposed by the Plaintiff through a replying affidavit sworn by the Plaintiff's director, Ajay Velji Shahon 17th March 2023 and written submissions dated 28th June 2023.
 4. The second application is the 1st Defendant's Notice of Motion dated 29th May 2023, brought under Article 159(2) (d) of *the Constitution* of Kenya 2010, Sections 3A and 80 of the *Civil Procedure Act*, 2010, Order 45 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, seeking the following orders:-
 1. That the Honourable Court be pleased to allow the firm of Kinyanjui Kirimi & Co Advocates to act for the Defendant herein.
 2. That the Honourable Court be pleased to set aside the judgment and subsequent decree issued in this case on 10th August 2021 and all consequential orders arising there from.
 3. That this Honourable Court be pleased to reopen this case and allow the Defendants to defend this case.
 5. The application is anchored on the grounds set in on its face, the supporting affidavit sworn by the 1st Defendant, Nelson Mukara Sechere, on 29th May 2023 and written submissions dated 23rd June 2023. The grounds are:-
 1. That this honourable court delivered a judgment in this matter on 10th August 2021 by J Mativo (as he then was).
 2. That the Defendants were not represented at hearing of this suit and were not aware of the said Judgment at all having received no notice at all.
 3. That the Defendants had previously appointed inter alia the firm of Mohammed Muigai Advocates whom they have now learned stopped acting for them.
 4. That the matter proceeded ex-parte without any participation of the Defendants or their advocates.
 5. That on 24th May 2023, one of the Defendant's (Nelson Sechere) received a message from the Judiciary advising him that there were warrants of arrest issued against him.
 6. That indeed upon instructing the current advocates we have confirmed from the e-filing portal that warrants of arrest were signed in this matter on 25th April, 2023 and the matter is slated for mention on 31st May 2023.
 7. That the Defendants had filed a meritorious defence which they were not allowed to ventilate with evidence at the hearing of the suit.
 8. That the Defendants are only officials of a community based organization that relies on charity funding to carry out activities for the benefit of the general public and the community at large.



9. That it is only just fair and equitable that the court reviews the judgment and allows the Defendants to testify and give their side of the story for a fair and effective determination of the suit.
 10. That the right to be heard is a cardinal and fundamental natural right that should not be fettered by technicalities.
 11. That unless the temporary orders sought are granted staying the implementation of the judgment herein and the imminent arrest, the Defendants will suffer irreparable loss and damage which cannot be compensated by way of damages thus rendering the present application nugatory.
 12. That it is in the interest of justice and fairness that the orders sought be granted and said application be heard on priority basis.
6. The application is opposed by the Plaintiff by way of a replying affidavit sworn by Nikhil Salva on 9th October 2023 and written submissions dated 9th October 2023 which I have carefully considered.

Analysis and Determination

7. I have considered the motions, the grounds, the rival affidavits, the parties' respective submissions and authorities in support of their depositions. To my mind the only issue that arise for determination is:-
 1. Whether the Court ought to set aside the judgment and subsequent decree issued in this case on 10th August 2021 and all consequential orders arising there from and reinstate the suit for hearing.
8. The guiding principles for determining an application for setting aside an ex parte judgment are whether the judgment was procedurally entered, the reason why the applicant failed to turn up at the hearing, whether the defence which was already on record raised prima facie triable issues or was reasonable, whether the applicant has demonstrated an excusable mistake, inadvertence, accident or error and the overriding objective. See *CMC Holdings Ltd v James Mumo Nzioki* (Civil Appeal No. 329 of 2001) [2004] eKLR.
9. The Court's power to set aside an ex parte judgment is discretionary and must be exercised judiciously and not capriciously. See *Pindoria Construction Ltd vs. Ironmongers Sanitaryware* Civil Appeal No. 16 of 1976 and *Mureithi Charles & another v Jacob Atina Nyagesuka* (Civil Appeal No. E10 of 2020) [2022] eKLR.
10. As garnered from the pleadings, this suit was instituted by the Plaintiff by way of a plaint dated 27th June 2019. On 15th August 2019, the firm of Mohammed Muigai LLP filed a Memorandum of Appearance dated 14th August 2019, on behalf of Chae Kenya Society, the Defendants herein. Thereafter, on 30th August 2019, the firm filed a statement of defence and a list of witnesses both dated 29th August 2019 on behalf of the Defendants.
11. The 1st Defendant claimed that when the Defendants were served with the suit papers in 2019, they appointed the firm of Mohammed Muigai Advocates LLP to represent them. He deposed that he all along thought the said firm of Advocates was representing the Defendants in the matter and that on 24th May 2023, he was shocked when he received a message from the Judiciary indicating that there were warrants of arrest issued against him.
12. On their part, the 2nd and 3rd Defendant s claimed that they were not served with the summons or the hearing notices and that they did not grant the 1st Defendant authority to act on their behalf. They



both claimed that they were not aware of this case until 14th December 2023 when they received messages from Mr. Noel Musyimi who wanted to serve them with the summons almost three (3) years after filing of the case. Contending that summons and notices ought to have been served on them personally, they relied on Section 50 of the *Societies Act*, which provides that:-

- “(1) Every order, notice, summons or other document issued under this Act or under any rule made thereunder shall be validly served on a society, if it is sent by registered post addressed to it at its registered postal address; or
2. on an individual, if it is served or is sent by registered post addressed to him at the registered postal address of the society with which he is concerned.”

13. From my reading of the above provision, it is not mandatory requirement that service of summons upon a society is effected upon the members individually. Therefore, service effected through the society’s offices is valid.

14. From the record, the service of summons and pleadings was effected through the society’s offices situated at Dapton Court, DoorA9, Riverside Drive by Samson M. Wambua, a licensed process server on 10th July 2019. At para. 3 of the Affidavit of Service sworn on 19th August 2019, it was deposed that:

- “3. That on 31st July 2019, I proceeded to the said Defendants registered offices where I found their secretary who introduced herself as Sharon Shidere. I also introduced myself and the purpose of my visit which she confirmed to be aware of and consulted their operations director one Violet Ombaka who after informing her of my presence and purpose, she requested to speak to me and during our conversation and after introducing myself and informing her the purpose of my visit, which she confirmed to be aware of, she authorised me to serve the secretary with the Court Process and as well as authorised me to serve the secretary with the Court Process and as well as authorized her to accept service on behalf of the Defendants. Thereafter, I served copies of Summons to Enter Appearance, Plaintiff, Verifying Affidavit, List of Witnesses, Witness Statement, List of Documents and a bundle of documents upon the said secretary who accepted service on their behalf as so authorised by stamping, signing and inserting her phone number 0700687634 on the original summons which I now return herewith duly served, stamped and signed. It was at 11.26am”

15. From the foregoing, I am satisfied that there was proper service of summons and pleadings upon the 1st to 3rd Defendants, through the society’s offices per Section 50 (1) of the *Societies Act* as read with Order 5 Rule 3 of the Civil Procedure Rules. See *Agrigreen Consulting Corp Limited v National Irrigation Board* (Civil Case E252 of 2019) [2020] eKLR.

16. The record shows that Mohammed Muigai LLP filed a chamber summons dated 2nd October 2020, seeking leave to cease acting for the Defendants. From the affidavit of service sworn by Lawrence Gichana on 14th October 2020, the application and the hearing notice were served upon the Defendants through their emails, being directors@chae.or.ke and jkiboi@chae.or.ke at 1.24PM. The Court noted that the Defendants were properly served and it allowed that application on 12th November 2020. On 16th February 2021, the 1st Defendant, Mr. Sechere appeared in person and the Court granted the



Defendants two weeks' time to get legal representation. This position is reflected in the judgment of 10th August 2021 and at para. 8, the Court observed as follows:-

“ 8. Vide an application dated 2nd October 2020, the firm of Mohamed Muigai LLP acting for the Defendants. On 16th February 2021, the 1st Defendant attended court for the hearing of the said application and asked for 2 weeks to engage another lawyer. The matter was scheduled for directions on 8th March 2021, but on the said date he did not attend court. The matter was listed before me on 13th April 2021, but despite the Defendants being served, they did not attend court. I scheduled the matter for hearing on 19th May 2021 and directed that they be served. On the said date, despite being served, there was no appearance for the Defendants, hence hearing proceeded ex parte.”

17. Having looked at the record and the affidavit of service sworn by Douglas Mwanja Wambua, I am satisfied that the notice for the hearing slated for 19th May 2021 was properly served through email on 14th April 2021 through procurement@chae.or.ke and on 13th May 2021 through directors@chae.or.ke, info@chae.or.ke and jkipoi@chai.or.ke.
 18. I also note from the record that the Chae Kenya Society sent an email on Wednesday, 11th May 2022, through chaekenya@gmail.com and copied director@chaekenya.or.ke. In that email, they indicated that they wished to settle only the amounts originating from the bond and the tender document purchase. Consequently, the claim that the email domains were no longer working cannot stand as they are not supported by any evidence. Similarly, the claim that the society's offices were closed during the Covid -19 pandemic are of no weight as the service of summons and of the hearing notices were done in 2019 and in 2021, and not during the time when the pandemic prevailed.
 19. As such, it is clear that the judgment delivered on 10th August 2021 was a regular judgment. See Order 12 Rule 2 (a) of the Civil Procedure Rules.
 20. On the whole therefore, I am satisfied that the 1st to 3rd Defendants were properly served and that the 1st Defendant even attended Court and was afforded two weeks' time to appoint another lawyer but neglected to do so and therefore the 1st to 3rd Defendants were afforded an opportunity to appoint another lawyer. I am not convinced that they were not properly served. Neither am I persuaded that they have met the threshold for setting aside of the ex parte judgment against them.
 21. In the end, I find that the 2nd and 3rd Defendants' application dated 15th May 2024 is without merit and it is hereby dismissed with costs.
 22. The 1st Defendant's application 29th May 2023 is partially successful.
 23. I order that:-
 1. Leave be and is hereby granted to the firm of Kinyanjui Kirimi & Co. Advocates to come on record for the 1st Defendant and the firm of Ashioya Mogire & Nkatha Advocates to come on record for the 2nd and 3rd Defendants pursuant to Order 9 Rules 9 and 10.
 2. Costs in respect of the 1st Defendant's application are awarded to the Plaintiff.
- It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF APRIL, 2024.



.....

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Muchiri for the Plaintiff.

No appearance for the 1st Defendants.

Mrs Tuwei holding brief for Kirimi for the 2nd and 3rd Defendants.

Amos - Court Assistant

