



REPUBLIC OF KENYA



Chania Gardens Limited & another v Kingdom Bank Limited & another (Commercial Case E072 of 2022) [2024] KEHC 6425 (KLR) (Commercial and Tax) (15 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E072 OF 2022**

MN MWANGI, J

MAY 15, 2024

BETWEEN

CHANIA GARDENS LIMITED 1ST PLAINTIFF

GWEKA LIMITED 2ND PLAINTIFF

AND

KINGDOM BANK LIMITED 1ST DEFENDANT

AL-HILAM AUCTIONEERS 2ND DEFENDANT

RULING

1. Before me is Notice of Motion application dated 28th July, 2023 filed under to the provisions of Order 10 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A & 100 of the [Civil Procedure Act](#), Cap 21 of the Laws of Kenya, and all other enabling provisions of the law. The defendants seek the following orders -
 - i. Spent;
 - ii. Spent;
 - iii. That this Honourable Court be pleased to set aside the interlocutory judgment entered herein on 11th July, 2023 against the defendants and all consequential orders and proceedings thereto;
 - iv. That this Honourable Court be pleased to hold that the suit abated owing to the plaintiffs' omission to collect the summons issued by this Honourable Court within 30 days of issuance and therefore dismiss the suit;
 - v. That the costs of this application be provided for.



2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Jackson Kimathi, the 1st defendant's Head of Legal. In opposition thereto, the plaintiffs filed a replying affidavit sworn by Gabriel K. Gathumbi, an Advocate of the High Court of Kenya and learned Counsel for the plaintiffs, on 14th August, 2023. The plaintiffs also filed Grounds of Opposition dated 14th August, 2023 raising the following grounds of objection –
- i. The application is brought under the wrong provisions of law;
 - ii. This Honourable Court lacks jurisdiction to entertain the application as pleaded by the defendants;
 - iii. This Honourable Court is functus officio with respect to the issues raised by the defendants in the instant application;
 - iv. The issues regarding the plaintiffs' Request for Judgment have already been heard and determined by this Honourable Court rendering the defendant's Application res judicata;
 - v. The plaintiffs Request for Judgment was based on the defendants' failure to file a defence after the filing of a Memorandum of Appearance;
 - vi. The Civil Procedure Rules require the filing of a defence within 14 days of filing a Memorandum of Appearance which the defendants failed to do;
 - vii. This Honourable Court considered the merits of the Request for Judgment and granted interlocutory judgment in favour of the plaintiffs;
 - viii. This Honourable Court appreciated that the plaintiffs claim was for declaratory orders and accordingly ordered the matter to proceed for Formal Proof hearing;
 - ix. The issues regarding the issuance and service of summons are rendered irrelevant, immaterial and were overtaken by events upon the filing and service of a Memorandum of Appearance by the defendants;
 - x. The defendants having filed a Memorandum of Appearance, the issue of the suit abating cannot arise;
 - xi. The defendants were at all material times aware of the suit and filed several pleadings in response to the plaintiffs' claims including a Memorandum of Appearance, Replying Affidavit, Written Submissions, Notice of Appeal, Record of Appeal but either willfully or negligently omitted to file a defence;
 - xii. No prejudice can be deemed to have been occasioned to the defendants resulting in their clear failure to file a defence in the suit;
 - xiii. The defendants' application fails to invoke or meet the criteria for setting aside interlocutory judgments as set out in the Civil Procedure Rules and the law; and
 - xiv. The defendants' application is bad in law and is also without merit.
3. The application herein was canvassed by way of written submissions. The plaintiffs' submissions were filed on 18th December, 2023 by the law firm of Gathumbi & Company Advocates, whereas the defendants' submissions were filed by the law firm of KRK Advocates LLP on 24th November, 2023.
4. Mr. Kuria, learned Counsel for the defendants cited the provisions of Order 10 Rules 6 & 10 of the Civil Procedure Rules, 2010 and relied on the case of David Kiptanui Yego & 134 others v Benjamin



- Rono & 3 others [2021] eKLR, in submitting that an interlocutory judgment can only be in a claim for pecuniary damages or for detention of goods in the event a defendant fails to appear or to file a defence. He stated that since the plaintiffs' claims is declaratory in nature, the interlocutory judgment entered against the defendants is irregular. Counsel referred to the case of Abraham K Kiptanui v Delphis Bank Ltd & another HCCC No. 1864 of 1999 and urged this Court to set aside the interlocutory judgment as a matter of right.
5. Mr. Kuria referred to the provisions of Order 5 Rule 1(1) to (4) of the Civil Procedure Rules, 2010 and the case of Frigoken Limited v Value Pak Food Limited [2011] eKLR and stated that it is not disputed that the plaintiffs did not serve them with summons to enter appearance in this matter. In addition, that the summons appearing in the Case Tracking System (CTS) that were filed together with the plaint are unsigned, unsealed, and undated. He contended that for the said reason, there was no service of summons to enter appearance, proper or otherwise upon the defendants, to enable them defend themselves in this suit, and the interlocutory judgment entered is an irregular judgment that ought to be set aside by the Court *ex debito justitiae*. In submitting that the suit herein abated owing to the plaintiff's failure to collect and serve summons to enter appearance upon the defendants within 30 days from the date when the suit was filed, Mr. Kuria relied on the case of Abdulbasit Mohamed Ahmed Dahman & another v Fidelity Commercial Bank Limited [2016] eKLR.
 6. Counsel for the defendants relied on the decisions in Patel v E.A. Cargo Handling Services Ltd. [1974] EA. 75 cited with approval in Enrique Heguet Huerta v Kenneth Kilole William [2017] eKLR and Tree Shade Motors Ltd v DT Dobie & another [1995-1998] EA 324 and submitted that the defendants' statement of defence raises a reasonable defence against the plaintiffs' claim, and that it is not only arguable but it also raises triable issues that warrant consideration at the full hearing. He stated that the defendants' failure to file a statement of defence was neither willful nor intentional but was occasioned by the plaintiffs' failure to serve summons to enter appearance on the defendants.
 7. Mr. Gathumbi, learned Counsel for the plaintiffs referred to the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010 and submitted that in as much as the defendants are seeking for an order to set aside the interlocutory judgment herein, they have not sought leave to file and serve a defence out of time. He argued that this Court cannot issue orders in a vacuum, thus in the absence of an application for leave to file a defence out of time, this Court is unable to consider or grant any such orders. On the issue of summons to enter appearance, Counsel contended that the Deputy Registrar in her ruling found that the plaintiffs had filed summons under the CTS. In addition, that the defendants did not deny that they have since filed and served a memorandum of appearance in this matter.
 8. Counsel stated that a memorandum of appearance is a pleading filed by a defendant solely in reaction or response to the filing and service of summons to enter appearance to communicate a defendant's intention to appear and defend the suit. He submitted that by filing a memorandum of appearance, the defendants admitted awareness of the suit, acquiesced in the process and are therefore estopped from now raising or revisiting the issue of validity or service of summons. Mr. Gathumbi relied on the Court of Appeal case of *Yooshin Engineering Corporation v AIA Architects Limited (Civil Appeal E074 of 2022)* [2023] KECA 872 (KLR) and the case of Tanga Investments (K) Limited v N F Metals Corporation [2021] eKLR and submitted that in any event, the irregularity in the summons herein or in the service of the same was waived by the defendants upon the filing of an unconditional memorandum of appearance by them.
 9. Mr. Gathumbi referred to the provisions of Order 10 Rules 4, 5 & 10 of the Civil Procedure Rules, 2010 and stated that entry of final judgment is possible where a defendant fails to file a defence to a liquidated claim, but the Court also has the discretion to enter interlocutory judgment in respect of an unliquidated claim and thereafter set down the matter for formal proof hearing. He further stated



that whether or not interlocutory judgment is entered, this matter still had to be set down for hearing where the plaintiffs would be required to tender evidence and prove their case against the defendants. He stated that the defendants on the other hand would not be able to present evidence challenging the plaintiffs' claim in the absence of a defence and its accompanying pleadings and/or documents. He argued that the plaintiffs stand to suffer prejudice in the event the instant application is allowed since if they were to succeed in their claim, it would imply that the defendants would have illegally held on to the 2nd plaintiff's property since October 2021 over a non-existent and fictitious debt.

10. Counsel for the plaintiffs submitted that since the defendants have not sought for an order for leave to file a defence out of time, they presume, wrongfully so, that if interlocutory judgment is set aside, then the right to file a defence out of time is automatic. He cited the case of *Julis Mukami Kanyoko & 2 others vs Samuel Mukua Kamere & another* [2014] eKLR and stated that the Court's power and discretion to set aside an interlocutory judgment is separate and distinct from its discretion to grant leave to file a defence out of time. He pointed out that the defendants filed a memorandum of appearance and voluminous pleadings in response to the plaintiffs' application for injunction, but deliberately and intentionally opted not to file a defence, yet the defendants have not averred that failure to file a defence in this matter was as a result an accident, inadvertence, excusable mistake or error or any other valid reason. He expressed the view that the defendants are undeserving of the discretion of this Honourable Court.
11. Mr. Gathumbi cited Order 5 of the Civil Procedure Rules, 2010 and stated that it is not in dispute that they filed summons to enter appearance, but they said summons have not been signed and sealed by the Court to date, which task is an administrative function of the Court and not the plaintiffs'. He contended that since summons to enter appearance have not been issued by the Court, the issue of this suit abating does not arise.

Analysis And Determination.

12. I have considered the instant application, the grounds on the face of the Motion and the affidavit filed in support thereof, the replying affidavit and grounds of opposition filed by the plaintiff and the written submissions by Counsel for the parties. The issues that arise for determination are;
 - i. Whether the interlocutory judgment entered against the defendants on 11th July, 2023 should be set aside; and
 - ii. Whether this suit has abated.
13. The defendants in their affidavit in support of the application herein deposed that the plaintiffs filed this suit accompanied by an application for injunction against the defendants. Subsequently, the plaintiffs obtained an interlocutory judgment against the defendants on 11th July 2023 for failure to file a defence. They stated that they have never been served with summons to enter appearance in this matter by the plaintiffs to date.
14. They averred that the summons appearing on the CTS that were filed together with the plaint in this suit are unsigned, unsealed, and undated, contrary to the provisions of Order 5 Rule 1(2) of the Civil Procedure Rules, 2010. They further averred that the plaintiffs filed a request for judgment on 13th March, 2023 for failure by the defendants to file a defence. That on 10th May, 2023, the Court indicated that it would peruse the affidavit of service sworn on 10th March, 2022 so as to ascertain the issue of service of summons, and thereafter issue directions on the way forward.
15. The defendants deposed that on 11th July, 2023, the Court held that the summons were duly generated from the e-filing portal and that they were proper, it noted that the defendants had failed to file a



defence within the set timelines or at all, and proceeded to enter interlocutory judgment against the defendants.

16. The defendants contended that the Court issued the said summons to enter appearance, but the plaintiffs failed to collect them within 30 days of their issuance, and for the said reason, the suit abated pursuant to the provisions of Order 5 Rule 1(6) of the Civil Procedure Rules, 2010. The defendants attributed the failure to file a defence in time to lack of service of summons to enter appearance.
17. The plaintiffs in their replying affidavit averred that the suit was filed on 7th March, 2022 by way of a plaint, verifying affidavit, and witness statements all dated 7th March, 2022. That alongside the said pleadings, the plaintiff also filed summons to enter appearance which are yet to be signed by a Judge or an Officer appointed by the Judge and thereafter be sealed with the seal of the Court as provided for under Order 5 Rule 1(2) of the Civil Procedure Rules, 2010. For this reason, neither the plaintiffs nor their Advocates on record can be blamed for the delay in the signing and sealing of the said summons as this is the administrative responsibility of the Court.
18. The plaintiffs averred that summons to enter appearance have neither been issued by the Court nor has there been any notification of any such issuance of them, thus the issue raised by the defendants alleging that this suit has abated is unfounded and simply does not arise.
19. It was stated by the plaintiffs that the defendants filed a memorandum of appearance dated 15th March, 2022, after they were served with the plaint dated 7th March, 2022 by the plaintiffs, and since the purpose of service of summons to enter appearance is to inform and/or make the defendants aware of the suit and proceedings filed against them, filing a memorandum of appearance by the defendants confirms that they were well aware of the suit and the proceedings filed against them.
20. It was stated by the plaintiffs that pursuant to the provisions of Order 7 Rule 1 of the Civil Procedure Rules, 2010, the defendants were required to file a statement of defence within a period of 14 days after entering appearance. However, in this case a period of approximately one year has passed since the defendants entered appearance but they have never filed a defence.
21. Consequently, vide a request for judgment dated 13th March, 2023 the plaintiffs requested for interlocutory judgment against the defendants in accordance with Order 10 Rule 10 of the Civil Procedure Rules, 2010. The Court considered the said request and on 11th July, 2023 entered interlocutory judgment for the plaintiffs against the defendants and directed that this matter proceeds to formal proof hearing.
22. The plaintiffs asserted that in as far as the defendants are seeking to challenge this Honourable Court's decision to enter interlocutory judgment in favour of the plaintiffs as against the defendants, this Court is functus officio, hence lacks the jurisdiction to reconsider its decision and/or sit on appeal of its own decisions. They contend that the only available options to the defendants with respect to this issue is to seek a review or file an appeal against the said decision.

Whether the interlocutory judgment entered against the defendants on 11th July 2023 should be set aside.

23. Interlocutory Judgments are provided for under Order 10 Rule 6 of the Civil Procedure Rules, 2010 which state as hereunder –

“Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such



defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.”

24. Order 10 Rule 4 of the Civil Procedure Rules, 2010 provides for consequences for not entering appearance and/or filing a defence in a suit where the claim is liquidated in nature, whereas Order 10 Rule 9 of the Civil Procedure Rules, 2010 provides that in any other claim which is not provided for by Order 10, the plaintiff is at liberty to set the matter down for hearing in cases where the defendant has not entered appearance and/or filed a defence. Pursuant to the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010, this Court has the discretion to set aside interlocutory judgments. The said provisions state as follows-

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

25. In view of the above provisions, I do not agree with the plaintiffs that since an interlocutory judgment was entered in favour of the plaintiffs as against the defendants, this Court is functus officio, hence it lacks the jurisdiction to reconsider and/or sit on appeal of its own decisions. In light of the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010 reproduced hereinabove, considering and/or determining an application seeking to set aside an interlocutory judgment such as the instant one does not amount to sitting on appeal of this Court’s own decision. In the oft cited case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75, the Court held as hereunder in regard to a Court’s discretion when considering an application for setting aside interlocutory judgment -

“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 it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the 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.”

26. From the above excerpt, the first and foremost duty of this Court is to determine whether the interlocutory judgment on record is a regular or irregular judgment. It is not disputed that the plaintiffs’ claim in this suit is neither a liquidated demand nor do the plaintiffs seek pecuniary damages, detention of goods or both. It is evident from the plaint that the plaintiffs are seeking declaratory orders as against the defendants. In the case of *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others* (supra) the Court when faced with a similar issue held as follows-

“However, I note that this suit is not one of liquidated damages neither is it one for pecuniary damages hence no interlocutory judgment could be lawfully entered.”

27. I concur with the above finding and hold that no interlocutory judgment could be lawfully entered in this case. The interlocutory judgment in place is therefore an irregular judgment. Further, since it is not disputed that to date the defendants have never filed a defence to the plaintiffs claim, the plaintiffs remedy lies under the provisions of Order 10 Rule 9 of the Civil Procedure Rules, 2010.

28. In the premise, this Court finds that the interlocutory judgment entered herein on 11th July, 2023 against the defendants ought to be set aside *ex debito justitiae*, which I hereby do.



Whether this suit has abated.

29. It is not disputed that summons to enter appearance have never been served on the defendants since the institution of the suit between the parties herein. It is however worth noting that once the defendants were served with the plaint in this suit together with all its accompanying documents and the plaintiff's application for injunction, they filed a memorandum of appearance dated 15th March, 2022 and participated in the prosecution of the plaintiffs' application for injunction until a ruling on the same was delivered by the Court on 10th March, 2023.
30. The defendants averred that since the plaintiffs have never served them with summons to enter appearance and they admitted to never collecting them from Court, the suit abated after the elapse of thirty (30) days from the date it was filed for failure by the plaintiffs to collect summons to enter appearance and serve them upon the defendants. It is manifest from the defendants' affidavit in support of the application herein, the plaintiffs' replying affidavit and the documents available on the CTS, that the summons to enter appearance filed by the plaintiffs have never been signed and/or sealed to date. In addition, there is no evidence that the plaintiffs were notified by the Court that the said summons were ready for collection but they failed to go and collect them for service upon the defendants.
31. Issuance of Summons to enter appearance is provided for under Order 5 Rule 1 of the Civil Procedure Rules, 2010 which states as hereunder –
- (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.
 2. Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.
 3. Every summons shall be accompanied by a copy of the plaint.
 4. The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:
Provided that the time for appearance shall not be less than ten days.
 2. Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.
 3. Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.”
32. Order 5 Rule 1(2) of the Civil Procedure Rules, 2010 provides that prior to service of summons to enter appearance upon a defendant(s), the said summons shall be signed by the Judge or an Officer appointed by the judge and shall be sealed with the seal of the Court without delay, and in any event not more than thirty (30) days from the date of filing suit. In this case, the summons filed by the plaintiffs have neither been signed nor sealed as provided for Order 5 Rule 1(2) of the Civil Procedure Rules, 2010, a fact which is not disputed, thus the plaintiff could not effect service of the said summons upon the defendants. That being the case, I agree with Counsel for the plaintiffs that they cannot be blamed for failing to have the summons to enter appearance signed and sealed by the Court as that is the responsibility of the Court and not a litigant.
33. It is noteworthy that in this case, despite the fact that the defendants were not served with summons to enter appearance, they not only entered appearance vide a memorandum of appearance dated 15th



March, 2022, but they also fully participated in prosecuting the plaintiff's application for injunction until a ruling on the same was delivered by the Court on 10th March, 2023. The Court of Appeal in the case of *Yooshin Engineering Corporation v AIA Architects Limited* (supra) in holding that the High Court Judge was right in finding that the appellant was properly deemed to have waived its right to raise the issue of service of summons to enter appearance since it appeared and participated without raising the issue, cited with authority the case of *Nanjibhai Prabhudas & Co. Ltd v Standard Bank Ltd.* [1968] EA 670 where it was held that –

“The defect of which the defendant complains in regard to the service of the summons constitutes, at most, an irregularity capable of being waived, and, secondly, that irregularity has been waived...It does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. The practical difference between an irregularity and a nullity is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgement on a writ which has never been served and one in which there has been a defect in the service but the writ had come to the knowledge of the defendant...Here there is no doubt that the summons, which on the face states that a copy of the plaint was annexed to it came to the knowledge of the defendant and that the latter's subsequent course of conduct was adopted and followed in the light of the information so conveyed to it. Therefore, there can be no doubt that any defect there may have been in the service constituted an irregularity only, capable of being waived.”

...Where the defendant enters an unconditional appearance to an action it has always been regarded as an act which waives any irregularity.” (Emphasis added).

34. In *Tanga Investments (K) Limited v N F Metals Corporation* (supra) the Court also held that –
- “The said Advocate was consequently served with the summons to enter appearance and the pleadings. Thereafter she filed a memorandum of appearance “under protest”, in view of the foregoing, I hold that the irregularity in service (if any), was waived by acquiescence when the defendant's Advocate wrote to the plaintiff's Advocate saying that they had received instructions to enter appearance.”
35. In the sum, this Court finds that by virtue of the defendants filing an unconditional memorandum of appearance and participating in the prosecution of the plaintiffs' application for injunction until a ruling on the said application was delivered by the Court on 10th March, 2023, without raising the issue of service of summons, they waived the irregularity in the service of the said summons.
36. This Court therefore finds that the issue of whether or not the suit has abated pursuant to the provisions of Order 5 Rule 1(6) of the Civil Procedure Rules, 2010 does not arise.
37. As was correctly pointed out by the defendants' Counsel, the plaintiffs have not in the instant application sought leave to file a defence out of time, hence this Court shall not determine whether or not they should be allowed to do so as that issue was not one of the prayers sought, but a matter that came up during submissions.



38. In the circumstances, this Court finds that the instant application is partly merited. I make the following orders –

- i. The interlocutory judgment entered by the Court as against the defendants on 11th July, 2023 and all consequential orders and proceedings thereto are hereby set aside; and
- ii. Costs shall be in the cause.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Munene h/b for Mr. Kuria for the defendants/applicants

Mr. Gachanja h/b for Mr. Gathumbi for the plaintiff/respondents

Ms B. Wokabi – Court Assistant.

