



China National Aero Technology Engineering Corporation v Kyalo (Civil Appeal E270 of 2022) [2024] KEHC 8639 (KLR) (16 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E270 OF 2022
AM MUTETI, J
JULY 16, 2024**

BETWEEN

CHINA NATIONAL AERO TECHNOLOGY ENGINEERING CORPORATION APPELLANT

AND

CHANO KYALO RESPONDENT

(Being an appeal against the Ruling of the learned hounourable S. Atambo C.M in Kiambu CMCC No. 241 of 2017 Chano Kyalo vs. China National Aero-Technology Engineering Corporation delivered on 16th March 2022 declining to set aside a default Judgment entered on 31st July 2017)

JUDGMENT

- 1 The appellant in this appeal seeks to have this court overturn the Ruling of the learned Honourable Magistrate declining to set aside a default judgment.
- 2 The application for the setting aside was strenuously opposed by the Respondent before the learned Honourable Magistrate.
- 3 I have examined the record of appeal filed on 13th April 2023 as well as the supplementary record of Appeal dated the 15th August 2023 filed by the firm of Lesinko Njoroge & Gathogo Advocates for the Appellant.
- 4 Notably, the supplementary record of appeal introduced the Respondent's Affidavit of service sworn by Richard Wachira on 24th July 2017.
- 5 The document is critical for scrutiny by this court before determining the instant appeal.
- 6 The appeal will turn on majorly two points in my view:-



- a. Whether the default judgment was regular or irregular; and
 - b. Whether the learned Honourable Magistrate in declining to set it aside exercised her discretion judiciously.
- 7 The duty of this court as a first appellate court is clear that it is to re-evaluate the evidence tendered before the learned Honourable magistrate and in doing so draw its own independent conclusions.
- See *Selle vs. Associated Motor Board Co. Ltd* 1968 EA 123.
- The facts of the matter are that the plaint in the matter was filed on 12th May 2017.
- 8 The plaint and summons to enter appearance were served on the defendant on 18th May 2017. The defendant failed to enter appearance and file a defence. The trial court then entered judgment in default on 27th July 2017. The plaintiff's claim was for damages for injuries sustained while he worked with the Appellant Company. He succeeded in his claim which was undefended and was awarded the sum of Ksh. 400,000/= in general damages and special damages of Ksh. 3,000/= plus costs and interests from the date of judgment.
- 9 The appellant now seeks to have the court find that the learned Honourable Magistrate was wrong in law in failing to set aside the default judgment to allow them defend the suit.
- 10 The appellants in their memorandum of appeal raise several grounds. The grounds are reproduced as hereunder: -
1. The learned Honourable Magistrate erred in law and fact in failure to allow the application dated 29th October 2018 on the ground that the *ex-parte* judgment was wrong on ground that the Respondent was not an employee of the Appellant and documents produced at the *ex-parte* proceeding in respect of employment were forged.
 2. The learned Honourable Magistrate erred in failing to consider that summons of Appearance though served, the service was out of a collusion scheme by staff would receive summons but conceal from the employer (appellant).
 3. That the learned Honourable magistrate failed to consider that upholding the *ex-parte* judgment delivered on 23rd July 2018 based on forged employment documents rendered the *ex-parte* proceedings and outcome of the *ex-parte* judgment a nullity.
 4. That the Hon. magistrate failed to consider the balance of convenience in setting aside the *ex-parte* judgment delivered on 23rd July 2018 and considering the likely prejudice which could be on the appellant paying decretal sum based on forged employment documents.
 5. The learned magistrate failed to consider salary payments and occupation Accident Records presented by the Appellant in support of the Notice of Motion application dated 29th October 2018 as proof of the fact that the Respondent was never employed by the Appellant.
 6. The learned Hon. magistrate failed to set aside the *ex-parte* judgment delivered on the 23rd July 2018 and consider throw away costs to compensate the Respondent in case of any prejudice.
- 11 The appellant by the memorandum largely is dissatisfied with the fact that the court did not consider that they had a defence to this suit which could have extinguished the Respondents claim. The appellant grudgingly admitted service was affected thus he was under duty to show convincingly why they never filed their pleadings in defence of the suit.



- 12 In considering this appeal, the court is alive to the fact that it is being invited to interfere with the exercise of judicial discretion of the learned Honourable magistrate thus the conditions set out in *Mbogo vs. Shah* (1968) must be met by the appellant. The appellant must demonstrate that the decision by the magistrate was plainly wrong or that the court misdirected itself on a matter of either law or fact. The appellant would have also been successful if at all he were to demonstrate that the learned Honourable magistrate had relied in extraneous considerations in arriving at her decision.
- 13 In the instant appeal the appellant appears to be faulting the learned Honourable magistrate on account of her failure to allow them to defend the suit.

It is important for this court to point out that the appellant in his memorandum of Appeal contends that even though summons were served upon their employees the service was executed in collusion with the employees

“who would receive but conceal from the employer (the appellant)”.

- 14 If indeed the summons were served and the appellants employee’s colluded to conceal the same from the Appellant, then how do you blame the magistrate for declining to set aside the judgment when there was clear evidence of service.
- 15 The appellant has come on appeal on a very shaky ground. The record shows at page 59 in the Affidavit of Franklin Mokaya Otieno at paragraph 5 that according to the Appellant Walter Masinde was not served according to the appellant but the Affidavit of Richard Wachira is very clear on service.
- 16 On the one hand the appellant presents a case to the effect that Walter Masinde was not served, while at the same time urging that even if he was served, he was not a principal officer of the Appellant Company. The Appellant must be bold enough to take a position. The supplementary record of Appeal filed by the Appellant shows that summons were served upon one Walter Masinde as per the Affidavit of Richard Wachira sworn on 24th July 2017. According to Wachira Richard, Walter Masinde indicated to him that the was a personnel manager of the Appellant Company. It would have been prudent for the Appellant to discount the contents of Mr. Richard Wachira’s affidavit through the Affidavit sworn by Frankline Mokaya Otieno.
- 17 The Affidavit by Mr. Mokaya is silent on who Mr. Walter Masinde was in the Appellant’s Company. The failure by the Appellant to discharge that burden left the learned Honourable magistrate only with the facts as presented by Mr. Richard Wachira. The appellant knows too well that he who alleges must prove. If on the one hand they wanted the learned Honourable magistrate to believe that Masinde was never served, they ought to have stated so. If on the other hand the Appellant wanted the court to believe that Walter Masinde was served but was not the proper officer to be served, that should have come out clearly in their application. It cannot be that there was no service effected upon the Appellant without displacing the averments of Richard Wachira.
- 18 In an application for setting aside the law is that the Appellant/Applicant should be able to demonstrate that service was irregular or that even if the service was regular there was good cause for failing to enter appearance and file defence. In *James Kanyita Nderitu and Another vs. Marios Philotas Chikas & Another* [2016] eKLR. The court of Appeal held: -

“From the outset, it cannot be gainisaid that a distinction has always existed between a default judgement that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served. With summons to enter appearance



but, for some reason or another, he had failed to enter appearance, or to file defence resulting in the default judgment”.

- 19 The appeal by the appellant does not stand a chance on the issue of service. The appellant having failed to disapprove the fact that Walter Masinde was its employee and a Personnel Manager for that matter, the affidavit of Richard Wachira remains unchallenged.
- 20 A personnel Manager cannot be said to be an officer who cannot understand the nature of documents being served and what would be required to be done with those documents. Mr. Walter Masinde has not been proved to be an officer who would not understand the nature of the documents. Appellant counsel in his submission places reliance on the case of *Multiscope Consulting Engineer vs. University of Nairobi & Another* [2014] eKLR.
- 21 In the cited decision it was held that order 5 Rule 3 (a) was framed to ensure that summons are served upon persons who understand the type of documents being served and what action would be required upon receipt of such documents. Mr. Walter Masinde has not been proved to be an officer who would not understand the nature of the documents.
- 22 Further, counsel for the appellant submitted that
- “ the appellant had various construction sites in Ruaka where the said Walter Masinde was present”.
- 23 This limb of submission is an admission of the fact that indeed Mr. Walter Masinde was actually found at one of the sites. The submissions then validate the position of Richard Wachira. It is this court’s view therefore that there is no doubt that service was effected as by law required and that the magistrate was right in arriving at that conclusion.
- 24 The second issue that I now turn to consider is whether the Appellant offered an explanation as why they did not file a defence that could influence the mind of the magistrate to vacate the default judgment.
- 25 Upon a careful analysis of the material placed before the learned magistrate, this court finds I find that the Appellant did not provide a reasonable explanation for their failure to file a defence or even enter appearance. The main argument by the Appellant is that service was not effected upon a director, or the corporation Secretary. The fact is that service was effected upon one Walter Masinde and the Appellant does not deny that Masinde was its employee.
- 26 It is the view of this court that an officer at the level of personnel manager of a corporation is a responsible officer who represents management. The directors of a company cannot be said to be the only officers of a company who can accept service to the exclusion of the rest of management. It is not enough for the Appellant to say the officer upon whom the summons were served was a low level employee. If the appellant desired the court to believe so they ought to have placed on record his job description setting out his duties. It was the duty of the appellant to prove that Mr. Walter Masinde was not a proper officer of the Appellant. The court is alive to the provisions of Section 119 of the *Evidence Act* regarding presumption of likely facts. In the nature of the business of a company, a personnel manager would report to top management on matters touching on the company. It is highly unlikely that a person at the rank of a personnel manager would fail to bring to the attention of top management the fact of the company being sued.
- 27 I therefore reject the argument by the appellant that Walter Masinde was a low level employee for they did not present any material before magistrate to support that claim.



28 I similarly do not find any cogent explanation offered by the Appellant for their failure to enter appearance and file a defence. I decline to allow the appeal so rely on the basis that service was not effected on a Director of the Company or the corporation secretary.

29 In my view to do so would be tantamount to administering justice through technicalities which goes against the spirit of Article 159 of the *Constitution* of Kenya.

30 It is important to point out that to restrict service to corporation directors and Corporations would be to invite unpleasant scenarios where directors of companies and the Corporation secretaries immediately they learn of an impending major suit they would simply relocate to remote locations to evade service in order to defeat justice.

Kenya has travelled that road before with elections Petitions and must guard against such practice.

31 The appellant would have stood a better chance of success in this appeal had they offered reasons to justify the failure to enter appearance and file a defence after accepting that Mr. Masinde, who was their employee, had been served. They did not do so.

32 In the end I find that there is no basis to interfere with the exercise of discretion by the learned Honourable Magistrate in declining to set aside the judgment. The appeal is therefore dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JULY 2024.

HON. A.M MUTETI

JUDGE

In the presence of:

Kinyua: Court Assistant

Ndaiga for the Appellant

Kiptanui for Waiganjo for Respondent

