



**Darson Trading Limited v Oketch (Civil Appeal E004 of 2023)  
[2024] KEHC 10812 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10812 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CIVIL APPEAL E004 OF 2023  
WM MUSYOKA, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**DARSON TRADING LIMITED ..... APPELLANT**

**AND**

**DANIEL ONYANGO OKETCH ..... RESPONDENT**

*(Appeal from orders made in the ruling by Hon. PA Olengo, Senior Principal Magistrate, SPM, in Busia CMCCC No. 352 of 2021, delivered on 17th February 2023)*

**JUDGMENT**

1. The appellant had been sued by the respondent, at the primary court, principally for injunctions, with respect to a motor vehicle that the respondent had bought from the appellant by hire purchase. The case by the respondent was that he had incurred huge costs of repairing the vehicle, and it had stayed off the road for a while, he wanted the appellant barred from re-possessing the vehicle, and compelled to settle the repair charges that he had incurred on the vehicle, to the tune of Kshs. 450,000.00, plus general and special damages.
2. A trial was conducted, where the matter proceeded ex parte, in the absence of the appellant. 1 witness testified for the respondent. Judgment was delivered on 30<sup>th</sup> August 2022. The respondent was awarded Kshs. 250,000.00 for general damages, with specials of Kshs. 1,850,000.00.
3. The appeal herein did not arise from the judgment, but from a post-judgment order. Upon judgment being delivered, on 30<sup>th</sup> August 2022, a Motion, dated 1<sup>st</sup> December 2022, was filed at the registry of the trial court. That Motion came up in court on 15<sup>th</sup> December 2022, and was dismissed, as the appellant was not present in court, to prosecute it. The appellant filed another application, dated 20<sup>th</sup> December 2022, seeking the setting aside of the orders of 15<sup>th</sup> December 2022, and the reinstatement of the application, dated 1<sup>st</sup> December 2022. It was averred that neither the appellant nor its Advocate had been informed that the matter was due for court appearance on 15<sup>th</sup> December 2022, and the fact



of the dismissal of the application was established on 19<sup>th</sup> December 2022, when their representative perused the court file on 19<sup>th</sup> December 2022. It was submitted that there was an honest mistake on the part of the Advocates for the appellant. The respondent opposed that application, on grounds that the parties had reached a consent, and part-payment had been made, based on that consent. The application, dated 1<sup>st</sup> December 2022, was dismissed for a second time on 30<sup>th</sup> January 2023, although it would appear that that dismissal targeted the application, dated 20<sup>th</sup> December 2022.

4. Another Motion was filed, dated 12<sup>th</sup> January 2023. It sought stay of the orders made on 30<sup>th</sup> August 2022, and leave to defend the suit at the trial court. It also prayed for disclosure of the location of the subject motor vehicle. The case presented was that the appellant was never served with the summons to enter appearance, and that it only got to learn of the case when the process of execution commenced. To that application was attached a draft defence, where the appellant denied everything pleaded in the plaint, and counter-claimed for a sum of Kshs. 2,450,000.00, and for orders that the subject vehicle be availed to the court, and its location be disclosed. That application was argued on 1<sup>st</sup> February 2023, and ruling was reserved for 17<sup>th</sup> February 2023. The trial court noted that the appellant had been served with the pleadings, going by the affidavits of service on record, and that the appellant had not sought to cross-examine the process-server, before concluding that the judgment entered was regular. However, in view of the draft defence and counter-claim, the trial court allowed the application, dated 12<sup>th</sup> January 2023, on condition that the appellant deposit the whole decretal sum in court, save the amount already paid to the respondent, within 7 days, to file its defence and counter-claim within 7 days, and to pay throwaway costs of Kshs. 50,000.00 to the respondent.
5. The appellant was aggrieved by the orders made on 12<sup>th</sup> February 2023, hence the appeal herein. It has listed 15 grounds of appeal, in its memorandum of appeal, dated 22<sup>nd</sup> February 2023, which revolve around the conditions imposed on the setting aside, as stringent and without justification; the throwaway costs of Kshs. 50,000.00 being unjustified; the trial court considering extraneous matters that were not canvassed at the hearing of the application; ignoring the issues raised in the draft defence; failing to establish the whereabouts of the subject motor vehicle; ignoring the evidence tendered through documents; being influenced by unknown issues; condemning the appellant unheard by imposing punitive and oppressive throwaway costs; not exercising discretion judiciously; ordering deposit of the money in court, without considering that the vehicle was in the possession of the respondent; and ordering deposit of the decretal amount and payment of throwaway costs to be deposited in court within 7 days.
6. Directions, on the disposal of the appeal, were given in the ruling that I delivered on 8<sup>th</sup> May 2024, to the effect that the appeal would be canvassed by way of written submissions. Both sides have complied, by placing on record their respective written submissions.
7. The appellant submits that it was unable to comply with the stringent conditions imposed, for the setting aside of the judgment, as the 7 days, given by the trial court, was a very short period for it to open an account with the court. It also argues that the court had not availed to it the account where the said amount was to be deposited. It is also submitted that there was a substantial counter-claim. *Mureithi Charles & another vs. Jacob Atina Nyagesuka* [2022] eKLR (Odunga, J) is cited on the point that setting aside a judgement is at the discretion of the court, and exercise of discretion is designed to avoid injustice or hardship. *Pindora Construction Ltd vs. Ironmongers Saytray ware Civil Appeal No. 16 of 1976* is cited, for the point that a party should not be precluded from defending, instead such party ought to be penalised, to some extent, in view of his somewhat dilatory actions. *Murai vs. Wainaina (No. 4)* [1982] KLR 38 (Madan, Wambuzi JJA & Miller Ag JA) is cited, for the proposition that a mistake is a mistake, and the door of justice is not to be closed because of a mistake. A copy of the



- judgment in *CMC Holdings Limited vs. James Mumo Nzioki* [2004] eKLR (Tunoi, O’Kubasu JJA & Onyango Otieno Ag JA) is attached, although it is not cited in the body of the written submissions.
8. The principal argument, made in the submissions by the respondent, is that the appeal herein raises issues that are *res judicata*, having been determined by this court and the trial court at various times. It is pointed out that the prayers sought in the appeal were what the trial court granted in its impugned ruling of 17<sup>th</sup> February 2023, and this appellate court is being invited to grant orders in the same terms as those granted by the trial court. *Kanorero River Farm Ltd & another vs. National Bank of Kenya Ltd* [2002] eKLR (F. Ochieng, J) and *The Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 others* [2017] eKLR (Makhandia, Ouko, Kiage, M’Inoti & Murgor, JJA) are relied upon. It is further submitted that the trial court acted judicially when it imposed stringent conditions on the setting aside order, and the conditions for the setting aside of discretionary orders had not been met. *Mark William Trevor Prince & Caroline Elsa Anne vs. John Greaves Hilder* [1984] eKLR (Hancox JA, Chesoni & Nyarangi, Ag JJA) is cited. It is argued that the stringent conditions were justified, given that the trial court was setting aside a regular judgment. It is emphasised that a distinction ought to be drawn between a regular and an irregular judgment. *James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another* [2016] eKLR (Makhandia, Ouko & M’Inoti, JJA) is cited in support.
  9. The appeal turns on only 1 issue, whether the trial court exercised its discretion wrongly when it imposed the stringent conditions for the setting aside of the regular judgment of 30<sup>th</sup> August 2022.
  10. The starting point should be the nature of the power conferred upon a court with respect to setting aside a judgment. The principles are notorious. They were settled in such cases as *Shah vs. Mbogo* [1967] EA 116 (Harris, J), *Patel vs. EA Cargo Handling Services Ltd* [1974] EA 75 (Sir William Duffus P, Law Ag VP & Musoke JA), *Pithoni Waweru Maina vs. Thuka Mugiria* [1983] eKLR (Potter, Kneller JJA & Chesoni Ag JA), *Macauley vs. de Boer & another* [2002] 2 KLR (Onyancha, J) and *Njoroge vs. Prestige Air Services Ltd* [1991] KLR 447 (Wambilyanga, J). The principle is that there is a wide and inherent discretion to set aside an *ex parte* or interlocutory judgment, to avoid injustice or hardship resulting from accident or inadvertence or excusable error or mistake, on the part of the defendant, who has purportedly been served. However, the discretion is not to be used to assist a person who deliberately seeks to obstruct or delay the course of justice. For the purpose of exercising the discretion, the court considers the nature of the action, the defence proposed to be proffered, the reasons for the default in filing defence, the time taken before setting aside is sought, and whether costs would compensate the plaintiff for his trouble. Denying a defendant a chance to be heard is considered to be a matter of last resort.
  11. The matter before the trial court had proceeded *ex parte*, upon the appellant failing to appear and to file defence. The trial court, in the judgment of 30<sup>th</sup> August 2022, was satisfied that the appellant had been served, but defaulted in either appearing or filing defence. When the appellant sought setting aside of the judgment of 30<sup>th</sup> August 2022, in its application, dated 12<sup>th</sup> January 2023, the trial court, differently constituted, once again was satisfied that there had been proper service of the court process, which made the judgment regular. Usually, a trial court would be coy about setting aside a regular judgment, where there is proof that the defendant had been properly served, but defaulted in not appearing or filing a defence, except where it is demonstrated that there was inadvertence or excusable mistake on its part in the default. It was stated, in *James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another* [2016] eKLR (Makhandia, Ouko & M’Inoti, JJA), that the court has “unfettered discretion” in determining whether or not to set aside a regular default judgment.
  12. Did the trial court err, in finding and holding that the judgment was regular? The answer to that question should lie with whether there was proper service of the requisite court process. There is an affidavit of service, with respect to service of the plaint and the documents that had been filed with it,



- and a copy of an order that had been made on 18<sup>th</sup> August 2021, and issued on 19<sup>th</sup> August 2021. The affidavit of service was sworn on 30<sup>th</sup> August 2021, and it was alleged that service was effected on 23<sup>rd</sup> August 2021, at Mombasa, at the offices of the appellant. The exact location of those offices was not documented. Service was allegedly effected on a secretary, whose name is not indicated, who accepted the papers, but did not acknowledge receipt of the service, by signing on the copies that were to be returned to court.
13. The other affidavit of service was sworn on 14<sup>th</sup> September 2021, with respect to service of an order, made on 31<sup>st</sup> August 2021, and issued on 1<sup>st</sup> September 2021. The service was allegedly effected on 4<sup>th</sup> September 2021, at the offices of the appellant, at Mombasa, along Haile Selassie Avenue, within a building described as Blue Room Hotel. Service was effected upon a secretary, whose name is not disclosed, who accepted the order, but did not acknowledge receipt, by signing on the copy that was to be returned to court.
  14. The other service allegedly happened on 4<sup>th</sup> April 2022, of a hearing notice, dated 29<sup>th</sup> March 2022, in respect of a hearing scheduled for 26<sup>th</sup> May 2022. The alleged service is detailed in an affidavit of service, sworn on 25<sup>th</sup> May 2022. It was effected at the offices of the appellant, at some place along Moi Avenue, opposite the Mombasa Sports Club. The service was to a secretary, who accepted the papers, but did not sign on the copy that the process server was to return to court. The name of the secretary was not disclosed.
  15. In the ruling of 17<sup>th</sup> February 2023, the trial court considered those affidavits of service, was satisfied that they reflected proper service, and, based on that, concluded that the judgment, that followed the default to appear and defend, was regular. Was the trial court entitled to come to that conclusion? I believe it was. Proof of the initial service, of the plaint, and the other documents filed on 18<sup>th</sup> August 2021, and the order made on even date, was a little shaky, for the place at which the service was purportedly effected was not properly described. It merely alleged that the offices of the appellant were at Mombasa, without indicating where exactly in Mombasa that was, to eliminate any doubt. Proof of the other 2 services was better, for the places of service were clearly indicated.
  16. In its application to have the judgment set aside, the appellant asserted that it was not served with the court process, and was unaware of the proceedings, until the point of execution. The trial court noted that the appellant did not seek to have the person or persons, who served the court process, to be availed for cross-examination on the alleged service. Would calling the court process server have been necessary? Yes, it would. It is, by far, the most effective way of establishing whether or not there was proper service, and disproving or affirming the contents of affidavits of service. It was the appellant alleging lack of service, and it should have been the proper party to demand that the relevant court process server or servers be called upon to account. It never did so. It never denied that its offices were located at the 2 places indicated in the 2 latter affidavits. There was justification, therefore, for the court to conclude that the service effected, at various instances, prior to the passage of the decree was proper, which made the judgment in question regular.
  17. It is instructive that the appeal herein does not challenge the findings and holdings of the trial court on the fact of the service. The appellant does not complain that the trial court was wrong in concluding that it had been properly served with the relevant court process, that it was aware of the proceedings, one way or the other, and that the judgment was regular. Its concern is with what it considers to be the onerous conditions imposed for the setting aside of the judgment. In a sense, there appears to be concession, that the service was proper, and the judgment was regular, but the conditions imposed for the setting aside of the judgment was oppressive.



18. Were the conditions onerous? The conditions were that the decretal amount be deposited in court, less whatever had been paid to the respondent, and that throwaway costs be paid. As stated above, a court handling an application for setting aside a judgment has a very wide discretion. The setting aside is to be on terms that are just. A regular judgment is one where no wrongdoing can be attributed on the plaintiff, in terms of the service, and where there would be proof of inadvertence or excusable error on the part of the defendant. The appellant did not, at the trial, demonstrate that the respondent had in some way caused the judgment to be obtained irregularly. Indeed, the court concluded that the judgment was regular. Secondly, on appeal, no material has been placed before me, which points to any irregularity, committed by the respondent, with respect to the process leading up to that judgment. The appellant did not, at the trial, demonstrate that the default on its part, in failing to enter appearance and file defence, was on account of some excusable mistake or inadvertence. Its alleged lack of service, but made no effort to prove the same.
19. As the judgment was established to be regular, it should not cause any surprise, that onerous conditions were imposed. The trial court found that the appellant had not demonstrated that it had a good reason for not having filed a defence. From that conclusion, the trial court could have as well dismissed the application, dated 12<sup>th</sup> January 2023, for it was challenging a regular judgment, where no good reasons existed for disturbing it. The appellant was entitled to his judgment, for he had done no wrong. However, the trial court bend over backwards, in proper exercise of its very wide discretion, to accommodate the appellant, and do to it some justice, not based on wrongdoing on the part of the respondent, nor on excusable error or inadvertence on its part, but rather on the basis that its draft defence appeared to raise triable issues, and its draft counter-claim sounded reasonable. In a scenario where judgment is regular, and the plaintiff has done no wrong, and the defendant has no real good reason to have the judgment set aside, except that it appears to have a good defence, onerous conditions would be attractive to impose, to compensate the plaintiff for the inconvenience it suffers by having its regular judgment set aside, punish the defendant for its dilatory conduct, and to provide security for a possible successful outcome given the untrustworthiness or unreliability of the defendant.
20. The appellant has raised arguments, in his memorandum of appeal, about the whereabouts of the motor vehicle and tampering with the vehicle's tracking system. That was not an issue before the trial court, when it dealt with the application, dated 12<sup>th</sup> January 2023, as that application was about the setting aside of the impugned judgment, and a stay order to obviate execution of the judgment. It is not an issue, therefore, that the trial court should have considered, in the ruling of 17<sup>th</sup> February 2023, and it is not available for consideration on appeal.
21. It is not lost to me, that when the execution process commenced, the appellant rushed to court, on an application dated 1<sup>st</sup> December 2022, to have the judgment set aside or varied. That application was placed before the court, under certificate of urgency, on 8<sup>th</sup> December 2022. The trial court certified the application urgent, directed that it be served, and fixed it for inter partes hearing on 15<sup>th</sup> December 2022. That hearing on 15<sup>th</sup> December 2022 did not happen, for the appellant did not attend court, when it came up, and it was dismissed. The appellant then rushed to court, by an application, dated 20<sup>th</sup> December 2022, to seek reinstatement of the application, dated 1<sup>st</sup> December 2022, on grounds that it had not been alerted or notified of the hearing date of 15<sup>th</sup> December 2022. The said application was filed by the appellant, under certificate of urgency, and it was up to the appellant to follow up on the orders made, or directions given, upon the matter being placed before the duty court. That court had no obligation, upon making the orders or giving the directions, to inform the appellant of those orders or directions, and it was up to the appellant to follow up, with the registry of the court, and thereafter take the steps commanded in the orders or directions. The appellant had no one to blame, but itself, for dilatoriness.



22. The same kind of dilatoriness was in display here at the High Court, in this cause, with respect to an application, dated 9<sup>th</sup> October 2023. That application sought stay of orders that had been made by the trial court on 9<sup>th</sup> August 2023. It was placed before me, on 12<sup>th</sup> October 2023, under certificate of urgency, and I directed that it be served, to be heard inter partes on 19<sup>th</sup> October 2023. Come 19<sup>th</sup> October 2023, the appellant did not attend court, and I dismissed its application, dated 9<sup>th</sup> October 2023. Just like in the case before the trial court, the appellant rushed to court, by a Motion, dated 24<sup>th</sup> October 2023, under certificate of urgency, asking that the application, dated 9<sup>th</sup> October 2023, be reinstated. It complained that it had not been notified of the hearing scheduled for 19<sup>th</sup> October 2023. Yet, the application, dated 9<sup>th</sup> October 2023, was filed by it, under certificate of urgency, and no one, including the court, was obliged to alert or notify it of the directions given by the court on that application, for the sole duty lay with it, to follow up with the court registry, to establish the directions that might have been given by the court, so that it could comply with them.
23. The respondent argues that the appeal is res judicata the orders made by the trial court on 17<sup>th</sup> February 2023. I tend to agree. Prayer (b), in the memorandum of appeal, is to the effect that “The Application dated 3<sup>rd</sup> January 2023 be allowed to grant the Appellant leave to file his Defence and counterclaim to be determined on merit.” In the first place, there was no application, before the trial court, dated 3<sup>rd</sup> January 2023, for the impugned decision of the trial court arose from an application dated 12<sup>th</sup> January 2023. The trial court granted the prayers sought in that application, dated 12<sup>th</sup> January 2023, by setting aside the judgment and giving leave to the appellant to defend the suit, by filing defence within 7 days. So, the appellate court is being invited to grant the same order, of setting aside, and leave to defend, as that granted by the trial court on 17<sup>th</sup> February 2023, in the decision which is the subject of this appeal.
24. Paragraph (c), in the memorandum of appeal, seeks that the order of the trial court “be set aside and or be stayed pending the hearing and determination of the said application and allow the Appellant to be heard on its defence and counter claim on merit.” I cannot pretend to understand what the appellant is praying for. What I make of it is that the appellant is asking that the order that the trial court made on 17<sup>th</sup> February 2023, setting aside the judgment and giving leave to file a defence, should be set aside or stayed, and that the appellant should be heard on its defence and counterclaim. It makes no sense completely. If I set aside the orders that the trial court made, then there would be no basis for the appellant to be heard, for the order allowing it to file defence would be lost. Secondly, the appellant has not asked for the hearing of the said application afresh. In any case, why would that application be heard afresh, in the first place, when the same was fully argued before the trial court, and a considered ruling was delivered, yet there is no allegation, nor proof, of a breach of the rules of natural justice or fair trial principles, with respect to the manner in which it was handled by the trial court.
25. The upshot is that the appeal herein has no merit at all. It is wholly misconceived, and I hereby dismiss it, with costs. Orders accordingly.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates



Mr. Osoro, instructed by Osoro Juma & Company, Advocates for the appellant.

Mr. Okutta, instructed by Ouma-Okutta & Associates, Advocates for the respondent.

