



REPUBLIC OF KENYA



**Njeru v Musili (Civil Appeal 48 of 2023)  
[2024] KEHC 10900 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10900 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL 48 OF 2023  
LM NJUGUNA, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**PETER MURIITHI NJERU ..... APPELLANT**

**AND**

**STEPHEN MALUKI MUSILI ..... RESPONDENT**

*(Appeal arising from the decision of Hon. S. Ngii, SPM in Magistrate's Court at Siakago Civil Suit No.E111 of 2022 delivered on 20th April 2023)*

**JUDGMENT**

1. The appellant has filed a memorandum of appeal dated 28<sup>th</sup> August 2023 challenging the decision of the trial court and seeking the following orders:
  - a. That the ruling made on 20<sup>th</sup> April 2023 be set aside;
  - b. That this case be heard afresh before a different magistrate;
  - c. That in the alternative, this honourable court do take up the submissions of the parties, and/or reassess the evidence and issue a ruling thereon and
  - d. That the costs of this appeal be paid to the appellant by the respondent.
2. The appeal is premised on the following grounds:
  - a. That the learned magistrate erred in law and fact in ignoring the straightforward fact and law that;
    - i. The appellant was not served in person; and
    - ii. There was no notice to show cause served upon the appellant.



- b. That the learned magistrate erred in finding that the appellant is liable to the respondent without looking into the merits of the case;
  - c. That the learned magistrate erred in law and fact in not finding triable issues in the defense put forth by the appellant while the appellant has paid over half of the contractual sum to the respondent;
  - d. That the learned magistrate erred in law in misapprehension of legal authorities used to inform the decision from him regarding the matter;
  - e. That the learned magistrate erred in law and fact in declining to consider the appellant's defense at all and for that the appellant is set to lose the paid-up contractual sum and the property;
  - f. That the learned magistrate erred in law and fact by premising the ruling on alien statements that were not said or written nor put forth by the appellant in his defense; and
  - g. That the learned magistrate erred in law and fact in issuing a ruling that has typographical errors at crucial junctures of the decision, thus compromising comprehension and understanding of their position as a court.
3. The respondent filed a plaint dated 16<sup>th</sup> December 2022 seeking judgment against the appellant for payment of Kshs.1,320,700/= plus costs and interest. It was the respondent's case that he entered into an agreement dated 25<sup>th</sup> April 2022 with the appellant for the sale and purchase of Khat worth Kshs.1,320,700/=. That the appellant undertook to pay the respondent the said amount but has since refused to pay despite several reminders to do so.
  4. The appellant failed to enter appearance and interlocutory judgment was entered against him in the suit. The respondent filed an application dated 21<sup>st</sup> February 2023 seeking to set aside the interlocutory judgment, an order for stay of execution and that he be granted leave to file his defense. He stated that he did not enter appearance because he misplaced his copies of pleadings served upon him by the appellant. The application was opposed through a replying affidavit in which the respondent stated that the appellant has not given sufficient reasons for failing to enter appearance or file a defense.
  5. The court directed that the application be served and heard on 09<sup>th</sup> March 2023 but on the said date, the respondent's advocate stated that he wished to proceed by way of written submissions. The court declined this position noting its previous directions. The parties chose to rely on the pleadings and the court delivered the impugned ruling.
  6. In his ruling, the trial magistrate relied on the cases of CMC Holdings Ltd v. Nzioki (2004) 1 KLR 173, Kalemera v Salama Estates Ltd [1971] EA 284 and Mugunga General Stores v. Pepco Distributors Ltd [1987] KLR 150. He stated that the copy of defense annexed to the application does not raise triable issues and that the respondent has not given good reasons for failing to enter appearance or file a defense in good time. The application was dismissed with costs to the respondent.
  7. This appeal was canvassed by way of written submissions.
  8. The appellant submitted that he was not served with the pleadings and that the respondent did not comply with Order 5 Rule 12 of the Civil Procedure Rules. That one attempt at service is not sufficient and the trial court erred in rejecting his reasons. That at the hearing of the application, the appellant's advocate inadvertently failed to inform the court that the pleadings were misplaced. That the appellant is bound to lose the money already paid to the respondent towards the claimed sum.



9. He relied on the case of *CMC Holdings Ltd v Nzioki* [2004] 1 KLR 173. That the appellant's defense raises triable issues since he has already paid the sum of Kshs.1,064,600/= in 35 installments between 16<sup>th</sup> July 2022 and 14<sup>th</sup> November 2022. That the main issue in the plaint is performance of the contract and so the court should have granted him a chance to ventilate his case. He relied on sections 1A and 1B of the *Civil Procedure Act* and urged the court to grant the orders sought. He also relied on the case of *Job Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio* [2015] eKLR.
10. On his part, the respondent submitted that proper service was effected upon the appellant in line with Order 5 Rule 12 of the Civil Procedure Rules through his wife and the trial court was satisfied with such service. That it was not necessary for a notice to show cause to be served upon the appellant since there were no execution proceedings going on. He relied on the case of *Board of Management St. Augustine Secondary School v Chambalili Trading Company Limited* [2021] eKLR and submitted that the appellant's failure to enter appearance despite being properly served, is a flaw that cannot be cured using the court's discretion under Article 159 of *the Constitution*. He stated that the statement of defense annexed to the application is not a pleading to be considered by the court since no court fees has been paid on it. He urged the court to uphold the ruling of the trial court.
11. The issue for determination is whether the appeal has merit.
12. An affidavit of service dated 28<sup>th</sup> December 2022 was deposed by James Kamau Thuo, a licensed court process server. In it, he deposed that he served the summons to enter appearance and plaint together with the accompanying documents upon the wife of the appellant at their home. That the appellant had travelled to Eldoret for work and she accepted service on his behalf but she refused to sign the acknowledgment documents.
13. Order 5 Rule 12 of the Civil Procedure Rules provides:

“Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.”
14. The appellant argues in this appeal that the respondent did not make numerous attempts to serve the document to him before resorting to the mode used. According to the supporting affidavit to the appellant's application before the trial court, he stated that he received the documents but they were misplaced, that is why he was not able to enter appearance and defend himself. Either way one looks at it, it is evident that the appellant was duly served with the respondent's pleadings and summons to enter appearance. What happened after that was left to the trial court to determine, which it did, dismissing the application. In my view, the affidavit of service is proof of sufficient service.
15. Another issue in contention is that the trial court did not allow the parties to canvass the application by way of written submissions. It is on this basis that in this appeal, the appellant prayed that the suit be heard afresh before a different magistrate or, in the alternative, the court considers the submissions of parties and/or reassesses the evidence. The application in question was seeking setting aside of the judgment entered against the appellant, stay of execution and leave to file a defense. These orders are usually granted at the discretion of the court, which discretion the court declined to exercise in favour of the appellant.
16. The right of the respondent to enjoy the fruits of his judgment is to be viewed vis-à-vis the appellant's right to defend the suit. It was the appellant's averment that he has already settled a substantial part of the contractual amount. However, the appellant did not get a chance to bring this information before



the trial court owing to his own indolence. While there is no doubt that he was properly served with the pleadings, even if the same were misplaced or lost, he had several options of how to access other copies including perusing the court file. He did not demonstrate that he did so but he wants the court to hear him out on his defense. The issue of whether a substantial part of the contractual amount has been settled already is one to be determined by the trial court and not through this appeal.

17. As mentioned earlier, each party has a right well within the law and it is upon the court to balance these rights. From a perusal of the draft statement of defense, the appellant raises an arguable case which deserves to see the light of day before the trial court. It is in the interest of justice and in light of Article 159 of *the Constitution* that the appellant be allowed to ventilate his case.
18. Therefore, I find that the appeal has merit and the same is hereby allowed with orders as follows:
  - a. The ruling made on 20<sup>th</sup> April 2023 be and is hereby set aside;
  - b. The notice of motion dated 21/02/2023 is hereby allowed in the following terms;
    - i. The judgment entered against the appellant on 01/02/2023 is hereby set aside.
    - ii. The appellant is granted leave to file his defence and the same to be filed within seven (7) days from the date of this ruling.
    - iii. The respondent is awarded half of the costs of the appeal.
19. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF SEPTEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

