



REPUBLIC OF KENYA



**Oile v Juma (Civil Appeal E786 of 2022)  
[2024] KEHC 11209 (KLR) (Civ) (12 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11209 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E786 OF 2022**

**CJ KENDAGOR, J**

**SEPTEMBER 12, 2024**

**BETWEEN**

**EUNICE BELLA OILE ..... APPELLANT**

**AND**

**LAMECH SHIYUKAH JUMA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. J.W. Munene, Resident Magistrate delivered on 17th August, 2022 in Nairobi SCC Commercial Case No. E3035 of 2022)*

**JUDGMENT**

1. The Respondent advanced the Appellant some money in May, 2021 through an oral agreement. The Respondent claimed the loan was for Kshs 667,000/=. The Appellant issued two cheques in favour of the Respondent, one for Kshs 460,000/= and another for Kshs 207,000/=. but they were dishonoured at the Bank. The Appellant later sent the Respondent Kshs 90,000/= to the Respondent's MPESA line. The Respondent claimed the Appellant refused to clear the balance of Kshs 577,000/=. He sued the Appellant at the Small Claims Court vide SCC COMM E3025 of 2022 and sought judgment in the sum of Kshs 577,000/= and costs of the claim.
2. The Appellant was served with the Statement of Claim on 19<sup>th</sup> May, 2022 but did not file a Response. The court gave a mention date of 30<sup>th</sup> May, 2022. She was served with the notice for the mention on 19<sup>th</sup> May, 2022, but she did not show up for the mention. On 30<sup>th</sup> May, 2022, the court gave a further mention date slated for 13<sup>th</sup> June, 2022. She was served with a notice but failed to attend the mention. The court gave a further mention date of 20<sup>th</sup> June, 2022. The Appellant was served with the mention notice on 13<sup>th</sup> June, 2022, but she did not show up again.



3. On 20<sup>th</sup> June 2022, the court entered judgment in default of response against the Appellant in the sum of Kshs 577, 000/= plus costs and interests. The following day, on 21<sup>st</sup> June, 2022, the Appellant rushed to the same court via a Notice of Motion seeking a stay of execution of the default judgment and requested the court to set it aside. She also sought time to file a Response to Statement of Claim.
4. On 4<sup>th</sup> July, 2022, the parties entered a consent allowing the Appellant's application and the default judgment was set aside. The court ordered the Appellant to file and serve the response to the claim, supporting documents, and witness statement before close of business that day. The hearing of the matter was slated for 21<sup>st</sup> July, 2022.
5. On 21<sup>st</sup> July, 2022, the Respondent was ready to proceed with the hearing, but the hearing could not take off because the Appellant was not ready. The Appellant stated that she was yet to comply with court orders of 4<sup>th</sup> July, 2022, and sought an adjournment. The court allowed her request and slated the hearing on 17<sup>th</sup> August, 2022.
6. When the matter came for hearing on 17<sup>th</sup> August, 2022, the Appellant had not filed her response to the claim. She, however, admitted Kshs 296,000/= but disputed the rest of the claim. The court entered judgment on admission against the Appellant in the sum of Kshs 296,000/=. It also ordered the matter to proceed for hearing on the remainder of the claim in the sum of Kshs 281,000/=. The Appellant, however, told the court that she was not ready for the hearing on that day and requested more time to file her response to the claim.
7. The court declined the request and ordered the hearing of the matter to proceed later that day for the remainder of the claim. The hearing took place, and the Court entered judgment in favour of the Respondent for the remainder of the claim in the sum of Kshs 281,000/= as well as the costs of the whole claim of Kshs 577,000/= plus interest.
8. The Appellant was dissatisfied with the lower court's judgment and appealed to this court vide a Memorandum of Appeal dated 30<sup>th</sup> March, 2023. Her grounds of Appeal are as follows;
  - 1) The learned trial magistrate erred in law and in fact in totally disregarding the evidence on record that the Claim was defended and failing to properly and exhaustively evaluate the evidence on record and as a result, she arrived at an erroneous decision.
  - 2) That the Learned Trial Magistrate erred in law and in fact by failing to evaluate that Appellant was wrongly enjoined in the suit as the Respondent had clearly in the Statement of Claim that the defendant was A-one Plus Limited.
  - 3) That the learned Trial Magistrate erred in law and in fact by failing to grant a chance to the Appellant to testify and defend herself in the suit contrary to the rules of natural justice and right to fair hearing as provided in Article 50 of the *Constitution* of Kenya (2010).
  - 4) The Learned Trial Magistrate misdirected herself by arriving at conclusions which are unsupported by enough evidence and/or based on no evidence.
  - 5) The Learned Magistrate erred in law and in fact by exercising her discretion arbitrarily and in disregard of the applicable legal principles and as a result he erred by entering judgment in favour of the Respondent and consequently, the decision of the Learned Magistrate is plainly wrong.
  - 6) The Learned Magistrate erred in law and in fact in failing to find that the cheques on record were issued by and or belong to A-One Plus Limited as such the matter in issue does not involve the Appellant.



- 7) The Learned Trial Magistrate erred in law and in fact in arriving at a decision that was against the weight of evidence on record and weight of law and as a result, she arrived at an erroneous decision.
9. She asked this court to allow the appeal and set aside the trial court's judgment. She also asked this court to substitute the lower court's decision with its findings. The matter was canvassed by way of written submissions.

### **The Appellant's Submissions**

10. The Appellant submitted that the trial court denied her a chance for a fair trial. She argued that the trial court denied her the right to testify and defend herself because her absence from court was due to unavoidable medical circumstances. She bases her argument on two factual claims. First, she claims that she filed her Response to Statement of Claim dated 4th July 2022. Secondly, she argues that she was not ready to proceed with the hearing because she had just given birth and was admitted in hospital.
11. She also argued that she was wrongly enjoined in the suit. She contended that A-One Plus Limited was a necessary party to the suit and ought to have been joined to it. She submitted that A-One Plus Limited, mentioned in the Statement of Claim as the Respondent, is a juristic person with the legal capacity to sue and be sued, as in this case; hence, the trial court ought to have considered enjoining the company suo moto.
12. She relied on several authorities including *Salomon v Salomon & Co. Ltd* (1897) AC, *Victor Mabachi & another v Nurturn Bates Ltd*, Civil Appeal No 247 of 2005 [2013] eKLR, *Kingori v Chege & 3 others* [2002] 2 KLR 243, *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55, and *Tang Gas Distributors Ltd v Said & others* [2014] EA 448.

### **The Respondent's Submissions**

13. The Respondent submitted that, by her conduct, the Appellant was not interested in participating wholly and fully in the proceedings at the lower court. He argued that the Appellant failed to file a response opposing the Statement of Claim; thus, his evidence at the lower court was uncontroverted. He argued that the Appellant failed to file a response despite several chances given to her to file the same simply because she had no defense.
14. He submitted that he proved his claim against the Appellant on a balance of probabilities and that there was no reason to bring the Company, named A-One Plus Auto Limited, into the case. He submitted that the monies were advanced to the Appellant, not the company. He cited the decision in *Mwangi v Kibiu* (Civil Appeal 16 of 2023) KEHC 18643 (KLR) (28 April 2023) (Judgment).
15. I have analyzed the submissions and the pleadings, and the issue is whether the trial court denied the Appellant the opportunity to testify and defend herself. The Appellant argued that she was not given the opportunity to defend herself. She argues that the court failed to recognize that she had filed her Response to the Claim and that she was admitted in hospital on the day the matter was heard. On the other hand, the Respondent argued that the Appellant, by her conduct, was not interested in participating fully in the proceedings at the lower court.



16. Being a first appeal, the duty of this court is to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court held:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

17. One point of departure and disagreement between the parties is whether the Appellant ever filed her Response to the Statement of Claim. The Appellant argued that she filed her Response to Statement of Claim dated 4th July 2022. Indeed, I have found a copy of the response in the court file. However, the Respondent argued that it was sneaked in and should be expunged. He maintained that the Appellant never filed a response; if she did, the same was never served and did not reflect in the Court’s record. On this issue, the lower court held that;

“The Respondent did not file any response to claim in spite of having been given time to do so/or having been duly served with statement of claim.”

18. I have perused the court file to ascertain whether the Appellant truly and properly filed the Response. Even though I found a copy of the Response in the file, the Appellant’s statements before the lower court are contradictory on this issue and leave many doubts about the truthfulness of her assertions that she had filed the Response.

19. On 21st July, 2022, the Appellant’s Advocate states, “I have filed Response to Claim but have not filed witness statement and list of documents.” However, when the matter came up for hearing on 17th August 2022, the same Counsel for the Appellant contradicted what they had told the court earlier. The counsel said; “we have not filed our response to claim. I have not filed my response to claim because I received documents from my client late in the day. I need time to file my response.” I also note the Appellant does not state the exact date on which she filed the Response to the Claim in court.

20. The Respondent argued that he was never served with the Response to the Claim. On the other hand, the Appellant does not claim to have served her Response to the Claim to the Respondent. Nonetheless, given that she alleged to have filed the Response by 21st July, 2022, it is not clear why she had not served the same on the Respondent when the matter came up for hearing on 17th August, 2022. I have no reason to doubt that had it has been on record when the trial court was determining the case; the court would not have minuted that there was no response.

21. I am guided by the decision of the court in *Kumbatha Naomi Cidi v County Returning Officer, Kilifi and others* Malindi EP No 13 of 2013 (UR)., where the court stated that;

“Any pleadings filed and not served on the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it. Service of a pleading accords the opposite party the chance to be heard and to adequately prepare for his/her case.”

22. Therefore, the Appellant’s Response to the Claim, though appearing in the court file, has no legal force.

23. I have also reexamined the record at the lower court, and I am satisfied that the court gave the Appellant adequate time and opportunity to defend herself. The record of the proceedings at the lower court



shows that the Appellant was not interested in defending herself. Although she disputes that she was served on 19th May 2022 and 30th May 2022, I have ascertained that there was proper service for the two disputed days.

24. I have confirmed that the Appellant was served with the Claim on 19th May, 2022, but did not file a Response. The court gave a mention date of 30th May 2022. She was served with the notice for the mention on 19th May 2022, but she did not show up for the mention. On 30th May, 2022, the court gave a mention date slated for 13th June, 2022, she was served with a mention notice for the mention on 30th May 2022, but she did not show up for the mention. The court gave a further mention date of 20th June 2022. The Appellant was served with the mention notice on 13th June 2022, but she did not show up yet again. The services undertaken on 19th May, 30th May, and 13th June were supported by their respective affidavits of service filed in court, and the Appellant did not dispute their truthfulness.
25. I am guided by the High Court decision in the case of [David Koome Matugi v APA Insurance Limited](#) [2021] eKLR, where the Court stated;

“(27) Quite illuminating eminent work by Chitale and Annaji Rao; The Code of Civil Procedure Volume II page 1670 that:

There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.”

26. Based on the above analysis of the evidence before me, I find that the trial court gave the Appellant adequate time and chances to defend herself and participate in the case. I see no reason to disturb the findings of the lower court.
27. The Appeal is hereby dismissed with costs to the Respondent.

**DELIVERED ON 12<sup>TH</sup> SEPTEMBER, 2024.**

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**C. KENDAGOR**

**JUDGE**

Cc Dalphin

Ms. Akinyi Adv h/b for Odiambo Adv for the Appellant

Mr. Monyangi Adv for Respondent

