



**Muli v Tracom Services Limited (Civil Appeal E758 of 2022)  
[2024] KEHC 11958 (KLR) (Crim) (8 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11958 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CIVIL APPEAL E758 OF 2022  
JM NANG'EA, J  
OCTOBER 8, 2024**

**BETWEEN**

**PATRICK MAMBUI MULI ..... APPELLANT**

**AND**

**TRACOM SERVICES LIMITED ..... RESPONDENT**

*(Being an appeal from the ruling Chief Magistrate's Court at Nairobi Milimani Commercial Courts (E. M KAGONI – PM) delivered on 20/9/2022 in CMCC No. 4850 OF 2016)*

**RULING**

**Background to the appeal.**

1. This appeal follows the above decision of the said trial court in which the appellant's Notice of Motion dated 15/6/2022 seeking inter alia an order setting aside the trial court's judgement and decree together with all other consequential orders was dismissed with costs. By affidavit in support of the Motion the appellant had argued that he was not served with Summons to enter appearance in the suit leading to irregular entry of default judgement against him for purported failure to enter appearance and/or file defence within the period prescribed by the law. The appellant further deposed that he only became aware of the suit on 26/5/2022 when he was served by WhatsApp mobile phone application with Notice to Show Cause why execution should not issue. He contends that he had sold motor vehicle registration number KAT 586 V, which is alleged to have caused the accident that gave rise to cause of action upon which the suit was instituted, to one Evans Ng'ang'a Gicharu ("the 3<sup>rd</sup> party"). The 3<sup>rd</sup> party purportedly swore an affidavit on 15/6/2022 which is annexed to the appellant's affidavit confirming the appellant's averments and also admitting that he was the one in control of the vehicle at the time of occurrence of the accident in question. From the depositions of the appellant and the 3<sup>rd</sup> party, the latter reported the accident to his insurer which was in the process of compensating him.



The appellant, therefore, avers that he was not the beneficial owner of the vehicle at the material time and was thus wrongly sued.

2. In his ruling the learned trial magistrate rejected the appellant's contention that he was not served with suit documents observing that the latter never sought to challenge the process server said to have delivered the suit documents to him by cross-examination. The court accordingly reached the conclusion that the impugned default judgement was regularly entered.
3. The above finding notwithstanding, the learned trial magistrate found that the appellant's draft defence at least raised one triable issue to wit; whether the appellant had indeed sold the vehicle in question before the accident subject of the suit occurred. Nevertheless, the lower court noted as follows before dismissing the appellant's application: "The present suit was instituted in 25.07.2016, vide a Plaint dated 15.07.2016. The applicant was duly served on 26.09.2016 and interlocutory judgement was entered on January 2017. The present application is dated 15.06.2022. In my view the application is now brought over five years and some months. Taking note that the Applicant was duly served. Taking note that there is no valid reasons as to why the Applicant never entered appearance and filed his Defence on time. Taking further note that the right to be heard is not a carte blanche and there exists circumstances where the same can be denied and lastly, taking note of Section 1 A of the [Civil Procedure Act](#), and which Act grants the court the power to give effect to the overriding objective of the court which is, to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Setting aside of the ex-parte judgement entered herein, for a Defendant who was served, who has no valid reasons for failing to enter appearance and file his Defence on time, would go against the principle and would greatly prejudice the plaintiff herein. In view, of this the court exercises its unfettered discretion to dismiss the application." (sic).

#### **Guiding Principles.**

4. It is trite law that the appellate court can only interfere with the findings and/or award of the trial court if the court misdirects itself on matters of fact and/or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of [Ocean Freight Shipping Co. Ltd V. Oakdale Commodities Ltd](#) (1997) eKLR Civil Appeal No. 198 of 1995). The appellate court also has the duty of analysing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle V. Associated Motor Boat Co.* ( 1968) EA 123 among other decided cases. The Court of Appeal for East Africa in *Peters V. Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

#### **Grounds of appeal.**

5. The appellant's grounds of appeal as per Memorandum of Appeal dated 26/9/2022 may be condensed as hereunder:



- (a) That the learned trial magistrate erred in law and fact by finding that the appellant was duly served with the suit documents before the impugned judgement was entered against him.
- (b) That the learned trial magistrate erred in law and fact in holding that the appellant's failure to seek cross-examination of the process server amounted to admission that he was served with the suit documents.
- (c) That the learned trial magistrate erred in law and fact in finding that the appellant's draft defence annexed to his application under consideration by the court raises triable issues but still go ahead to dismiss the application.
- (d) That the learned trial magistrate erred in law and fact in failing to consider the appellant's affidavit evidence placed before him.

And

- (e) That the learned trial magistrate erred in law and fact by failing to judiciously exercise his discretion and set aside the contested judgement.
6. The appellant prays for these reliefs: that the appeal be allowed; that he be granted unconditional leave to defend the suit and the costs of this appeal.

#### **Analysis and determination.**

7. Learned Counsel for the parties filed written submissions which I have perused against the record of this appeal. Counsel for the appellant submit that there is no evidence proving service of Summons to enter appearance upon the appellant arguing that contrary to the provisions of Order 5 rule 15 (1) of the *Civil Procedure Rules 2010* requiring a court process server to explain how the person purportedly served with court documents was identified, no such explanation is given in the return of service filed. The respondent's reply is that the appellant should have sought to cross-examine the process server for answers in that regard. Reliance is placed on case law in Kisumu CACA NO. 15 of 2010 (*Amayi Okumu Kasiaka & 2 Others V. Moses Okware Opari*) where the Court of Appeal in a similar case stated that the process server ought to be cross-examined to clear any doubts as to service of court process.
8. The appellant having failed to cross-examine the court process server regarding his alleged service of Summons to enter appearance in the suit upon him, the trial court rightly accepted the process server's evidence. The default judgement was therefore regularly entered and the appellant would not be entitled to leave to defend the suit *ex debito justitiae* unless he surmounts the requirement of demonstrating that his exhibited draft defence otherwise raises triable issues. Grounds (a) of the appeal fails but (b) succeeds.
9. Turning to ground (c), after considering the appellant's draft defence the trial court arrived at the conclusion that it raises at least one triable issue, the question of whether or not the vehicle said to have caused the loss complained of in the suit was owned by the appellant at the time material to the suit. In reaching this finding the trial court must have considered the appellant's affidavit evidence. Indeed, this is a triable issue since if the court finds upon hearing the suit on merits that the appellant was not the beneficial owner of the vehicle that allegedly occasioned the damage complained of, he may not be found liable in the suit. I agree with the appellant that this finding was sufficient to entitle him to leave to defend the suit regardless of the length of delay in bringing the application to set aside the *ex parte* judgement as for the inconvenience caused costs are an adequate remedy to the respondent. It is also trite law that one triable issue suffices to entitle the defendant to leave to defend a suit. Moreover, pursuant to Article 25 (c) of the *constitution*, the right to fair hearing guaranteed by Article 50 of the



constitution is very sacrosanct and is one of only four rights under the Bill of Rights that cannot be derogated from under any circumstances.

10. Ground (c) of the appeal in the premises succeeds. Ground (d), however, fails given the court's observation hereinabove that the trial court must have considered the appellant's evidence before making the finding that his draft defence raises triable issues.

**Determination.**

11. The upshot is that the trial court did not exercise its discretion judiciously by finding that the appellant's draft defence raises triable issues but then inconsistently declining to set aside the ex-parte judgement. I concur with the appellant on the authorities cited that the purpose of the overriding objectives in sections 1A and B of the Civil Procedure Act is inter alia to give greater latitude to overcome any past technicalities that may hinder attainment of the objectives.
12. Ground (e) of the appeal succeeds in the circumstances. Consequently, the appeal is allowed with the result that the trial court's ruling dated 20/9/2022 dismissing the appellant's application dated 15/6/2022 is set aside and substituted with an order granting him leave to defend the suit on condition that he pays to the respondent thrown away costs assessed at Ksh. 20,000 within 7 days of the date hereof failure to which the exparte judgment will stand.
13. Ruling accordingly.

**RULING DELIVERED VIRTUALLY THIS 8<sup>TH</sup> DAY OF OCTOBER 2024 IN THE PRESENCE OF;**

The appellant's advocate, Mr. Ngure

The respondent's advocate, Mr. Maina

The Court Assistant, Amina

**J.M NANG'EA, JUDGE.**

