



**Milly Glass Works Limited v Africa Spirits Limited (Civil Suit  
99 of 2019) [2024] KEHC 11542 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11542 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 99 OF 2019  
JK NG'ARNG'AR, J  
OCTOBER 2, 2024**

**BETWEEN**

**MILLY GLASS WORKS LIMITED ..... PLAINTIFF**

**AND**

**AFRICA SPIRITS LIMITED ..... DEFENDANT**

**RULING**

1. Defendant/Applicant filed a Notice of Motion application dated 4<sup>th</sup> April 2024 under Certificate of Urgency pursuant to Order 10 Rule 11, Order 22 Rule 22, Order 51 Rule 1, 4 and 13 (2) and Order 40 of the *Civil Procedure Rules*, Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Article 50 and 159 of the *Constitution*, Section 3 and 4 of the *Fair Administrative Action Act* and all other enabling provisions of the law.
2. The Defendant/Applicant seeks that this court sets aside the decree issued on 27<sup>th</sup> February 2020 and all consequential orders arising therefrom, that this court be pleased to allow the Defendant to defend this suit and costs of this application be provided for.
3. The application is premised on grounds on its face and the Supporting Affidavit sworn by Priscilla Kamau on 4<sup>th</sup> April 2024 that the Defendant has since learnt that the Plaintiff obtained an interlocutory judgment herein and a decree was issued on 27<sup>th</sup> February 2020 for the sum of Kshs. 84,139,264.78 and a further Kshs. 1,117,955.48 taxed as costs. That the Defendant was never notified of the proceedings as there was no service of summons upon it and/or any of its directors. That the Defendant has since obtained the filed pleadings and Affidavit of Service relied upon in endorsing the interlocutory judgment in favour of the Plaintiff. That the Process Server in the said affidavit sworn on 4<sup>th</sup> February 2020 deponed that when he visited the Defendant's premises on 24<sup>th</sup> December 2019, he was informed that the company had closed down. That no effort was made to serve the Defendant save for service via registered post which substituted service was effected without leave of the court.



4. The Defendant/Applicant further stated that they have not had access to its premises since January 2019 as a result of the legal battles with Kenya Revenue Authority (KRA), who with other investigative agencies chased away staff and took up sole control of the Defendant's premises from January 2019 to December 2022 when they handed back the premises in a ruined state. That the Defendant was never made aware of the instant proceedings until a Statutory Insolvency Notice was issued in HCC COMM NO. E071 of 2024 on 20<sup>th</sup> March 2024 and the same was served via the Defendant's Director's email address. That unless the decree and any execution proceedings are stayed, the Defendant's application seeking setting aside of the interlocutory judgment and to be allowed to defend the suit in exercising its right to fair hearing shall be rendered nugatory and a mere academic exercise. That the Defendant has a merited defence with triable issues and that it is in the interest of justice that application be allowed as prayed.
5. The Plaintiff/Respondent in their Replying Affidavit sworn on 6<sup>th</sup> May 2024 by Mohamed Yusuf Khandwalla, the Financial Controller of the Plaintiff/Respondent, stated that they commenced the suit herein by way of plaint dated 29<sup>th</sup> November 2019 on account of non-payment of goods supplied to the Defendant despite its knowledge of the same. That despite follow-ups by the Plaintiff, the Defendant never responded to the same nor made any attempts to settle the debt necessitating the filing of the suit herein, almost 5 years ago. That upon filing of the suit and issuance of summons, the same were served on the Defendant as particularized in the Affidavit of Service dated 4<sup>th</sup> February 2020 by Patrick M. Mutuma. That the mode of service was proper and known in law, and as such the default judgment was regular and could only be set aside if the Defendant has a defence that raises triable issues. That the Plaintiff has partially executed the decree issued pursuant to the default judgment sought to be set aside herein against the Defendant, and as such this application has been overtaken by events and is incapable of being granted.
6. The Plaintiff/Respondent further avers that partial execution confirms that KRA did not have control of the Defendant's operations and that is why the Respondent was able to attach funds in the said accounts, more so, the said execution proceedings were undertaken way before the alleged death of the director said to have been in charge of management of the company in 2022, and nothing is placed before this court to prove that the said director was the sole director of the company. That the Applicant's application is informed by misrepresentation and that the Applicant has approached this court with unclean hands and that the orders sought being equitable reliefs ought to be granted to the most deserving party.
7. The Plaintiff/Respondent deponed that the defence is a mere denial that does not raise any triable issues to warrant setting aside of the judgment. That the purchase price of the goods supplied was payable in Mombasa where the Plaintiff is resident. This court is therefore ceased of the requisite jurisdiction. That if this court is inclined to allow the application, the same ought to be on condition that the Applicant deposits the entire decretal sum in a joint interest earning account held in the names of advocates for both parties.
8. The Defendant/Applicant filed a Further Affidavit sworn on 16<sup>th</sup> May 2024 by Priscilla Kamau that the mode of service adopted by the Plaintiff amounted to substituted service and the Plaintiff has not shown that it followed the laid down procedures of seeking leave to serve by substituted service. That there has never been an admission on the part of the Defendant/Applicant in respect of the alleged amount and the email correspondence was restricted to the fact that they were working on resuming operations. That in light of the fact that the amount therein is disputed, there is need to have the issue proceed for trial and have the issue determined on merit. That the issue of jurisdiction cannot be summarily deliberated upon vide the instant application and will require to hear parties on merit.



9. The Defendant/Applicant further stated that partial settlement of the decretal amount by way of garnishee proceedings was not voluntary as the Defendant/Applicant were neither notified nor participated in applications leading to execution by way of garnishee proceedings. That partial payment of the decretal amount cannot be said to be an admission of debt when there was no authorization or consent to release of funds held in the accounts and that the said execution was unlawful. That where service of summon was not proper, the setting aside of *exparte* judgment is a right and not conditional on payment of the decretal amount. That the Plaintiff has admitted that they are already in possession of funds collected from the bank accounts and as such ought not to be heard demanding for further payments until the matter is heard on merit. That payment of the decretal amount is reserved in applications for stay of execution pending determination of an appeal and not in applications designed to set aside *exparte* judgments on account of irregular service of summons.
10. The application was canvassed by way of written submissions. The Defendant/Applicant filed submissions dated 4<sup>th</sup> June 2024 and argued that there was improper service on the corporation which was contrary to the provisions of Order 5 Rule 3 of the *Civil Procedure Rules*. The Defendant/Applicant invited the court to be guided by the decision in *Agigreen Consulting Corp Limited v National Irrigation Board* (2020) eKLR. On whether the Defendant has triable defence, it was argued that the Defendant has pleaded the issue of jurisdiction in its draft defence being that the court lacked jurisdiction as the Defendant is located in Kiambu and the goods were allegedly delivered in Kiambu. That Section 15 (c) of the *Civil Procedure Act* do not avail an option for litigants to forum shop. The Defendant/Applicant also submitted that it is trite law that where a defence raises triable issues, the court ought to set aside interlocutory judgment as was held in *International Air Transport Association & Another v Roskar Travel Limited & 3 Others* (Civil Cases E457 of 2020) (2022) KEHC 200 (KLR) (Commercial and Tax) (17 March 2022) (Ruling). The Defendant/Applicant therefore prayed that the instant application be allowed with costs to them.
11. The Plaintiff/Respondent filed submissions dated 22<sup>nd</sup> July 2024 and argued on whether there was proper service of summons to enter appearance and whether the default judgment herein was regular judgment, that substituted service is set out under Order 5 Rule 17 and is only applicable where service cannot be effected under Order 5 Rule 3. That service by the Plaintiff was as per Order 5 Rule 3 and reliance was placed on decision in *Kibatia & Company Advocates v Kings Group of Schools Limited & Another* (Miscellaneous Application 57 of 2020) (2023) KEHC 21590 (KLR) (19 July 2023) (Ruling), *B M Mung'ata & Co. Advocates v Mutune David Masai & Another* (2020) eKLR to support the position that indeed there was proper service. The Plaintiff/Respondent contended that the court is empowered under Order 10 Rule 11 of the *Civil Procedure Rules* to vary such judgment and any consequential decree or order. That though the power is discretionary, it must be exercised judicially as was the holding in *Richard Murigu Wamaiv Attorney General & Another* (2018) eKLR. That the rules of setting aside of default judgment has been set out in a litany of cases and the Court of Appeal in *James Kanyiiita Nderitu & Another v Marios Philotas Lilikas & Another* (2016) eKLR differentiated between default judgment obtained regularly and that which has been unregularly obtained.
12. The Plaintiff/Respondent further submitted on whether there having been partial execution of the decree that the application has been brought late in the day, is overtaken by events and the Applicant is estopped from seeking setting aside of the default judgment. On whether the Applicant has met the threshold for setting aside, the Plaintiff/Respondent argued that the draft defence filed by the Applicant is a sham. That on the issue of territorial jurisdiction, this court is clothed with jurisdiction to hear the matter and as such the same cannot suffice as a triable issue. That in the absence of a reasonable explanation for failure to file defence within the requisite period, the Applicant is undeserving of the orders sought in the application and the same ought to be dismissed with costs. The Plaintiff/



Respondent submitted that allowing the application would be tantamount to assisting in obstruction of justice and further delay the matter, but if the court is inclined to grant the orders sought, the same should be conditional on depositing the decretal sum in court or in a joint interest earning account in the names of both advocates. The Plaintiff/Respondent relied on the holding in *Manson Oyongo Nyamweya v Kithure Kindiki* (2017) eKLR and *Henry Orina Okao v Timothy Ogucha Omatu* (2014) eKLR.

13. I have considered the Notice of Motion application dated 4th April 2024, the Replying Affidavit sworn on 6th May 2024, Further Affidavit sworn on 16th May 2024, and submissions by the parties. The issues for determination are: -

- a. Whether this court should set aside the decree issued on 27<sup>th</sup> February 2020 and all consequential orders arising therefrom, and grant the Defendant leave to file their defence.
- b. Who should bear costs of this application.

14. Courts are empowered under Order 10 Rule 4 of the *Civil Procedure Rules* to enter interlocutory judgment where a plaint has been drawn claiming pecuniary damages as follows: -

1. Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
2. Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

15. The court may set aside or vary interlocutory judgment entered in default of appearance or defence. Order 10 Rule 11 of the *Civil Procedure Rules* provides: -

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

16. Courts have the discretion of setting aside *ex parte* judgments for the interest of justice to the parties. This court relied on the holding in *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede* (1982-1988) KAR to support the position as follows: -

“The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”

17. Inasmuch as the court has the power to set aside the interlocutory judgment and grant the Defendant leave to file a statement of defence, a good explanation ought to be advanced to set aside the judgment. The court in *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* (2018) eKLR held: -

- i) the defendant has a real prospect of successfully defending the claim; or
- ii) it appears to the court that there is some other good reason why;
- iii) the judgment should be set aside or varied; or
- iv) the defendant should be allowed to defend the claim



18. The Defendant/Applicant stated that they were never notified of the proceedings as there was no service of summons upon it and/or any of its directors. That they did not have access to their premises since January 2019 as a result of the legal battles with Kenya Revenue Authority (KRA), who with other investigative agencies chased away staff and took up sole control of the Defendant's premises from January 2019 to December 2022. That no effort was made to serve the Defendant save for service via registered post, which substituted service was effected without leave of the court.
19. The Plaintiff/Respondent disputed this position and that the mode of service was proper and known in law. That substituted service is set out under Order 5 Rule 17 and is only applicable where service cannot be effected under Order 5 Rule 3. The Plaintiff/Respondent further argued that the default judgment was regular and could only be set aside if the Defendant had a defence that raises triable issues. That the Plaintiff has partially executed the decree issued pursuant to the default judgment sought to be set aside herein against the Defendant, and as such this application has been overtaken by events and is incapable of being granted.
20. There is no dispute that the Applicants were properly served and by the time the interlocutory judgment was entered, the Defendant/Applicant had neither entered appearance nor filed a statement of defence. Therefore, the interlocutory judgment decree issued on 27<sup>th</sup> February 2020 was valid and regular. The reason advanced by the Defendant/Applicant that Kenya Revenue Authority (KRA), who with other investigative agencies chased away staff and took up sole control of the Defendant's premises from January 2019 to December 2022, in the considered opinion of this court valid. This court has also had the benefit of perusing the draft defence and established that it raises triable issues.
21. The upshot is that the Defendant's Notice of Motion application dated 4<sup>th</sup> April 2024 is allowed in the following terms: -
  - a. The interlocutory judgment and decree issued on 27<sup>th</sup> February 2020 and all consequential orders arising therefrom be and are hereby set aside.
  - b. The Defendant is hereby granted leave to file and serve statement of defence and all requisite documentation within 30 days from the date herein.
  - c. The Defendant/Applicant shall pay to the Plaintiff/Respondent thrown away costs of Ksh. 150,000 within 21 days from the date herein.
  - d. In default of compliance with order (a), (b) and (c) above, the order vacating the interlocutory judgment shall automatically lapse without further reference to this court.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 2<sup>ND</sup> DAY OF OCTOBER, 2024.**

.....

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

**In the presence of: -**

Gisende Advocate for the Plaintiff/Respondent

No appearance Advocate for the Defendant/Applicant

Court Assistant – Mr. Samuel Shitemi

