



**Multiple Hauliers Limited v Wafula & another (Civil Appeal
E023 of 2022) [2023] KEHC 952 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 952 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E023 OF 2022
PJO OTIENO, J
FEBRUARY 16, 2023**

BETWEEN

MULTIPLE HAULIERS LIMITED APPELLANT

AND

BRANICE NEKESA WAFULA 1ST RESPONDENT

**JACKLINE NYONGESA (SUING AS LEGAL REPRESENTATIVE OF THE
ESTATE OF BENARD JUMA MASILO) 2ND RESPONDENT**

*(Being an appeal from the Proceedings and Judgment of Hon. W. Cheruiyot (SPM)
in Mumias SPM's Civil Case No. 200 of 2018 delivered on 25th August 2021)*

JUDGMENT

1. This appeal challenges the decision of the trial court by which it dismissed an application by the Appellant seeking to set aside a default *ex parte* Judgment entered against the Appellant for failure to enter appearance and file defence. The reasons put forth for failure to enter appearance and file defence were given to include lack of service, extracting summons without a formal application and order by the Court, and when the suit no longer existed and serving the insurer with only a page of the summons dated February 9, 2020 but without plaint or indeed the documents filed with the plaint yet the defendant was never served at all. The Affidavit of service filed is itself faulted for being deficient in material particulars and that the exhibited draft defence revealed arguable points.
2. The Affidavit sworn by one Samuel Odera in support of the application reiterated the grounds of the application with an emphasis that the suit having been filed in 2018, the summons were never served within 12 months hence the same expired and there was no compliance with the statutory requirement on renewal of summons as no affidavit was filed and therefore there was no suit to pursue as at the date the hearing proceeded and Judgment entered. That no service was effected upon the Appellant in



person was reiterated and the service effected upon the insurer was faulted for being deficient and non-compliant with the law on service upon corporates.

3. The application was opposed by grounds of opposition dated wherein the Respondent contended that there was due service upon the Appellant. No affidavit was however filed in opposition to the factual and legal issues raised in the Appellant's Affidavit in Support.
4. The trial Court directed that the application be argued by way of written submissions and both parties did comply with the said directions. The Court has perused the submissions and given same due consideration in this determination.
5. In the decision now appeal from, the trial court did dismiss the application and at pertinent section of the Judgment delivered herself as follows:-

“The rules on a verifying affidavit apply mutatis mutandis to any affidavit by a limited liability company. The affidavit in support of the application is therefore not sworn by an authorized officer and is incurably defective hence the application is unsupported by an affidavit.

Does the Applicant have a defence that raises triable issues? The Applicant herein did not attach any draft defence to his application. I am therefore not in a position to tell whether he has any defence or not, let alone a defence that raises triable issues.

My finding is that there was proper service of summons, the Applicant has not given any reasons for failure to enter appearance and file defence, the applicant has also not demonstrated that he has any defence that raises triable issues.

I am being asked by the Applicant to exercise discretion and grant the application. I agree that discretion ought to be exercised in such an application but it must be exercised judiciously. I am also alive to the rules of natural justice, specifically that one should not be condemned unheard. In as much as is reasonably possible, no party should be denied a chance to be heard on merits. However, the Applicant has not persuaded this court to exercise discretion in his favour. I do not find any reason to interfere with the Judgment on record.”

6. From the excerpts of the Judgment above, it becomes clear that while the trial Court did consider the issues of service of summons and whether there was a defence disclosing an arguable point, the ruling totality failed to address the other important point whether the suit before it was properly before the Court. I consider that point to have been more important and should have preceded the other procedural ones concerning service because one can only interrogate happenings in a suit that is properly before it a valid suit
7. The record of the trial Court show that the suit was filed on December 31, 2018 and summons were issues on January 9, 2019. No steps appear to have been taken till the December 14, 2020 when a Notice to Show Cause pursuant to Order 17 Rule 2 [Civil Procedure Rules](#) was issued and served upon the Plaintiff.
8. Counsel attended court on the 8/2/2021 and pleaded with the Court not to dismiss the suit, admitted the failure to prosecute the same and sought to be afforded an opportunity to send (sic serve) the summons afresh upon the defendant. It was equally submitted on that day that parties were attempting out of court settlement.
9. The court reads the attendance and address to court by the Respondents' Counsel on the 8/2/2022 to be a clear concession that summons had not been served. As at that date, the summons issued on the



9.01.2019 had long expired. Having so expired and the Court having restrained itself from dismissing the suit for want of prosecution, the Plaintiff had the only option of reviving the suit by invoking the provisions of Order 5 Rule 2 and have validity of the summons extended.

10. I have perused the proceedings in the Record of Appeal and the original court file and it is clear that the first time the matter was ever listed before the Court was the February 8, 2021 and the next time was on April 12, 2021 when it was reported that Summons had been served but the Defendant had not filed appearance nor defence. The Respondent then requested for time to make a request for Judgment. There is no indication that any application was made for extension of the validity of summons as demanded by Rule 2 of Order 5. The question then is whether there were summons validly issued for service evidence in the Affidavit of Daniel Kombo Omukoko sworn on the 9.4.2021.
11. The plain meaning of Order 5 Rule 2 is that the decision to extend the validity of the Summons to enter appearance is the duty of the Court upon consideration of the matter deponed in an affidavit sworn and filed in pursuant to Rule 2 (5) of Order 5. It is basic that an application to Court for any order attract consideration and a determination. To what effect the record of the trial Court file does not reveal that any application was ever made, that the file was ever placed before the court for consideration or that the Court ever granted any order extending the validity of the summons dated 9.1.20219.
12. It is therefore plain that no order was issued and thus if the summons issued on February 9, 2021 were ever an extended summons then the same were issued contrary to the law. When issued contrary to the law then it carried with it no validity and therefore any process taken pursuant thereto were equally contrary to law and it is trite that a court process effected and pursued contrary to law is itself null, void and devoid of legal force.
13. The Court of Appeal in *Nagendra Saxena -vs- Miwani Sugar Mills Ltd* [2011] eKLR when faced with similar question did hold:-

“... We must consider the issue on the basis that any court is entitled to ensure that its processes are not abused in the sense that those who seek the assistance of the court must do so in conformity with the existing law..

For our part we agree with the learned Judge that the purported extension of the validity of the summons by the Deputy Registrar was done without any jurisdiction and was therefore void *ab initio*. The exparte Judgment was entered on the basis that a valid summons had been served upon the 1st or 2nd Respondent or on both of them. There was no valid summons which would have been served upon anybody and purported service was itself, void *ab initio* and the Judge was entitled to set it aside *ex debito justitiae*.”

14. Put in the context of this appeal, the application to set aside the default Judgment was explicit at ground 4 and 5 of the Notice of Motion and paragraphs 5, 6 & 7 of the Supporting Affidavit, that the summons allegedly served were not valid summons. The record I have perused show that no application was ever made to extend the validity of the Summons or just to re-issue fresh Summons.
15. When so raised, it was a challenge to the validity of the suit before the Court. It was a matter of law that the Court could even raise with the parties *su moto* and ought to have been resolved first before the merits of the application was delved into.
16. However, the trial Court appear not to have given that issue any attention. In failing to give it the deserved attention the trial court erred. The effect of the error is that an impropriety in the manner the summons were extended or re-issued was left standing and used to found a Judgment. That to



this Court was a grave error that this Court has to correct by setting aside the order dismissing the application raising that germane issue.

17. I would, on that point alone set aside the decision by the Court dated August 25, 2021 dismissing the application for setting aside and upholding the default Judgment.
18. Granted that the matter was before the trial Court and not the High Court where the Deputy Registrar, does administrative and ministerial functions in the file, even then, the position regarding extension of summons or re-issue of Summons must be done by the Court by way of an application lodge as dictated by the law and the Court exercising its judicial discretion and determining to extend the validity of Summons or ordering re-issue. Where in the Magistrate's Court, Summons are extended or re-issued without an order by the Court, such act is void *ab initio* and the Court when approached with such an issue is bound to set aside *ex debito justitiae*. The *exparte* Judgment is therefore set aside on the basis that the Summons upon which it was grounded were invalid *ab initio*.
19. Having set aside the *exparte* Judgment, the Court is hesitant to make a pronouncement on the validity of the suit. It however sets the stage open for the Respondent to move the Court as appropriate to have the Summons re-issued or the validity extended as the trial Court in its sole discretion shall determine.
20. The costs of the appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 16TH DAY OF FEBRUARY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for Masinde for the Appellant

No appearance for Wambani for the Respondents

Court Assistant: Polycap

