



**Singh v One Africa Capital Limited (Civil Appeal 46 of 2018)
[2023] KEHC 1131 (KLR) (Civ) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1131 (KLR)

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

CIVIL

CIVIL APPEAL 46 OF 2018

CW MEOLI, J

FEBRUARY 16, 2023

BETWEEN

SAGOO INDERJIT SINGH APPELLANT

AND

ONE AFRICA CAPITAL LIMITED RESPONDENT

*(Being an appeal from the ruling of Ocharo, SRM) delivered on
29th January 2018 in Nairobi Milimani CMCC No. 5081 of 2017)*

JUDGMENT

1. This appeal emanates from the ruling delivered on January 29, 2018 in Nairobi Milimani CMCC No 5081 of 2017. On July 17, 2017, One Africa Capital Limited, the plaintiff in the lower court (hereafter the Respondent) sued the National Transport and Safety Authority and Sagoo Inderjit Singh (hereafter the Appellant) as the 1st and 2nd Defendants respectively, in the lower. Accompanying the plaint was a motion seeking inter alia that pending the hearing and determination of the suit honorable court be pleased to issue a temporary injunction against the Defendants in the lower court, their representatives from further using, transferring, selling and or in any manner interfering with motor vehicle registration number KBJ 665X; and that the vehicle be preserved at and orders sought be enforced by the officer Industrial Area Police Station.
2. The motion was set to proceed for hearing inter partes on July 27, 2017 and the lower court, having satisfied itself that service had been duly effected, allowed the motion unopposed thereby issuing a temporary injunction against the Defendants in the lower court, their agents, servants and or representatives from further using, transferring, selling and or in any manner interfering with motor vehicle registration number KBJ 665X pending hearing and determination of the suit and that the subject motor vehicle be preserved at Industrial Area Police Station.



3. On August 17, 2017 the Respondent moved the court by another motion under certificate of urgency seeking that the court be pleased to review its orders issued on July 27, 2017, so that the subject motor vehicle KBJ 665X would be preserved at Leakey's Storage Limited Yard in Nairobi pending hearing of the suit. The said motion equally proceeded *ex parte* on September 25, 2017 and was allowed.
4. The Appellant thereafter moved the court vide a motion dated October 02, 2017 seeking *inter alia* to temporarily stay execution of the orders of September 25, 2017; a temporary order to restrain the Respondent and its agents from denying the Appellant possession of motor vehicle registration number KBJ 665X; that the orders issued on September 26, 2017 be set aside unconditionally; that the court declare to be illegal, null and void the Appellant's dispossession of motor vehicle registration number KBJ 665X and storage at Leakey's Storage Yard; and that the Appellant be granted leave to file a defence.
5. The grounds on the face of the motion were amplified in the supporting affidavit of the Appellant who swore that on September 28, 2017 a representative of the Respondent and DCI officers from Gigiri entered his premises at Industrial Area and ordered him drive the suit motor vehicle to Spring Valley Police Station, upon being served with the court order dated September 26, 2017 for the very first time. That not having been aware of the suit he thereafter instructed counsel to peruse the court file, as he had not been served with the plaint or the summons to enter appearance. He contended that he was the lawful bona fide owner of the suit motor vehicle having purchased it from Dharambir J S H Singh Bhullar on October 29, 2014 who earlier acquired it in a public auction after which ownership vested in him pursuant to a court order. He further contended that sale by auction is complete at the fall of the hammer and title acquired in respect of the suit motor vehicle was lawful. That he had a defence which raised triable and would be prejudicial and unfair if he is condemned unheard.
6. The Respondent opposed the motion through a replying affidavit dated October 16, 2017. Parties thereafter argued the motion by way of written submissions. By a ruling delivered on January 29, 2018 the lower court dismissed the Appellant's motion, thus provoking the instant appeal which is based on the following grounds: -
 1. The learned magistrate erred in law and in fact when he failed as he did to find that there were proper grounds in law or otherwise to allow the application dated October 2, 2017.
 2. The learned magistrate erred in law and in fact when he failed, as he did to find that there was proper service to warrant the dismissal of the Appellant's application dated October 2, 2017 and shut the Appellant from being heard in a full trial.
 3. The learned magistrate erred in law and in fact when he found, as he did that there was no merit in the application dated October 2, 2017.
 4. The learned magistrate erred in law and in fact when he only chose to address himself to the issue of service and failed and or refused to address himself to the draft defence filed with the application dated October 2, 2017 and which defence raised triable issues which should go to trial for adjudication.
 5. The learned magistrate erred in law and in fact when he failed to consider the reasonable explanation given by the Appellant as to why he did not file his defence and respond to the Respondent's application in Civil Suit No 5081 of 2017 dated July 17, 2017.
 6. The learned magistrate erred in law and in fact when he did not exercise his discretion in favour of the Appellant and thereby resulting to great injustice to the Appellant in the circumstances.



7. The learned magistrate erred in law and in fact when he failed to consider the merited submissions by the Appellant in making his ruling on the said application dated October 2, 2017 albeit the Respondents did not even file submissions as directed by the court.
 8. The learned magistrate erred in law and in fact by failing to consider the nature of the action and whether as the last resort the Respondent could have been compensated by way of costs for any delay occasioned by the Appellant not filing a response to the Respondents application dated July 17, 2017 and filing a defence thereof.
 9. The learned magistrate erred in law and in fact by failing to appreciate that the Appellant had met the requisite test for setting aside any court order obtained *ex parte*” (sic)
7. The appeal was canvassed by way of written submissions. Counsel for the Appellant condensed his grounds of appeal into two key issues. Addressing the disputed service of summons to enter appearance, counsel anchored his submissions on the provisions Order 5 Rule 1, Order 10 Rule 11 of the *Civil Procedure Rules*, the decisions in *Misnak International (UK) Limited v 4 MB Mining Limited, Juba Republic of South Sudan & 3 Others* [2019] eKLR, *James Kanyiita Nderitu & Another v Marios Philoas Ghikas & Another* [2016] eKLR and *Kabutha v Mucheru* HCC No 82 of 2002.
 8. He contended that the orders issued on September 26, 2017 were irregular, unlawful, and illegal for the reason that the Appellant was never served with summons to enter appearance and as a lawful purchaser of motor vehicle registration number KBJ 665X ought to have been given an opportunity to defend the Respondent’s claim. That in light of the non-service of process, the lower court lacked discretion to grant the orders. Moreover, that despite obtaining the initial interim orders on July 27, 2017, the Respondent failed to serve them upon the Appellant and that it was only upon obtaining on the review motion that the Respondent served the Appellant, thereby giving the first notice to the Appellant of the existence of the suit. Counsel further asserted that in facilitating the Appellant’s right not to be condemned unheard, the lower court ought to have summoned the process server for cross examination and that the Appellant’s failure in that regard was not fatal.
 9. Submitting on the proposed defence, counsel asserted that it raised triable issues, and the Appellant was therefore entitled to defend the claim. Counsel called to aid the decisions in *Moi University v Vishva Builders Limited* [2010] eKLR as cited with approval in *Issac Awuondo v Surgiphram Limited & Another* [2011] eKLR and *Continental Butchery Limited v Nthiwa* [1978] eKLR and pointed out that the trial court did not address the Appellant’s prayer for leave to file its defence. Citing *Edward Sargent v Chotabha JH Averbhart Patel* [1949] 16 EACA 63 and *Mbogo & Another v Shah* [1968] EA 93 counsel argued that the lower court failed to exercise its discretion judiciously in denying the Appellant an opportunity to defend. The court was urged to allow the appeal with costs.
 10. The Respondent’s counsel on his part reiterated that the Appellant was duly served with the process as evidenced by the return of service on record but elected not to respond, as observed in the ruling of the lower court. Submitting on the Appellant’s draft defence, and relying on *David Kiptanui Yego & 134 Others v Benjamin Rono & 3 Others* [2021] eKLR counsel reiterating material before the subordinate court contended that the Respondent was the owner of the subject motor vehicle prior to its asserted acquisition by the Appellant from a third party, which he described as fraudulent. Hence, in his view, the Appellant did not have a reasonable defence to the Respondent’s claim. He finally asserted that the appeal was without merit and ought to be dismissed.
 11. The court has perused the original record, the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not



have the opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2EA 212, *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.

12. The Court of Appeal stated in *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

13. From the record of the lower court, the Appellant’s motion was expressed to be brought under Section 1A & 1B of the *Civil Procedure Act*, Order 10 Rule 11 and Orders 22 Rule 22 (1) & (2) of the *Civil Procedure Rules*, inter alia. In disallowing the motion, the lower court sated *inter alia* that:

“.....I have read both (rival) affidavits. I am not persuaded that this application is merited. There is evidence that the application dated 17th July 2017 which was allowed as unopposed on 27th July 2017 was served on the Respondent’s/Applicant’s herein. This is the order that the Applicant seeks to be reviewed. He has not sought to cross-examine the process server so as to show that service was either not done or was irregular....

I have considered all the matters before me, and I am satisfied that the Applicant was served. He cannot now turn back and ask the court to review a lawfully obtained order because of his inaction. I am not persuaded to exercise my discretion in favour of the Applicant. I consequently dismiss the application with costs to the Plaintiff/Respondent” (sic)

14. The grant or refusal to set aside or vary a judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, it must be emphasized that like all judicial discretion it must be exercised judicially. The Court of Appeal in *Mashreq Bank P S C v Kuguru Food Complex Limited* [2018] eKLR stated:

“This Court ought not to interfere with the exercise of a Judges’ discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Mbogo v Shah*, (*supra*):

“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice”.

See; *United India Insurance Co Ltd v East African Underwriters (K) Ltd* [1985] E A 898: -

15. The court is doubtful of the application of the provisions of Order 10 Rule 11 of the Civil Procedure Rules to the present matter, as the provision envisages the setting aside of *ex parte* judgments. This matter appears to fall under the provisions of Order 51 Rule 15 and Order 12 Rule 7 of the *Civil Procedure Rules*. Be that as it may, the commonality in the provisions is the discretion donated to the



court to set aside *ex parte* orders. The object of the discretion conferred on the court to set aside was enunciated in the case of *Shah vs Mbogo and Another* [1967] E A 116:

“The discretion to set aside an *ex-parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

16. Distinguishing regular and irregular *ex parte* orders or judgments, Platt JA (as he then was) stated in *Bouchard International (Services) Ltd vs M'Mwereria* [1987] KLR 193 (as cited with approval in *Miarage Co Ltd v Mwichuiru Co Ltd* [2016] eKLR) that:

“The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside *ex debito justitiae*. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure.It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an *inter partes* hearing, than the judge who acts *ex parte*... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction”.

17. To be determined on this appeal is the key question whether the lower court correctly exercised its discretion based on the facts before it. The record of the lower court reveals that the Appellant through his affidavit material vehemently denied service of any court process in respect of the Respondent's earlier motions and accompanying suit. At paragraphs 3, 5, 6 & 7 of the of his affidavit the Appellant swore that:-

“3. That on the 28th Day of September 2017 a representative from the Plaintiff company one (George) and CID officers from Gigiri entered my work premises



at industrial area and ordered me to drive my motor vehicle registration number KBJ 665X to Spring Valley Police Station and that was the very first time I was served with a court order.(Annexed hereto and marked “SIS-1” is a copy of the said order dated 26th September 2017)

5. That I am informed by my said advocates which information I verily believe to be true, that as per the court order, a suit had been filed by the Plaintiff herein and an order had been issued against my motor vehicle registration number KBJ 665X that it be preserved at Leakey’s Storage Limited Yard. Nairobi.
 6. That since I was not aware of any suit against me, I instructed my advocates to carry out the necessary search at the Chief Magistrate’s Registry – Nairobi courts to establish whether in fact any suit had been filed against me as the 2nd Defendant.
 7. That I was not aware of this suit as neither the Plaint nor summons to enter appearance had been served on the Defendant.” (sic)
18. It appears that in both instances when the Respondent’s motions came up for hearing, the lower court was satisfied based on the respective return of service that there had been due service upon the Appellant. In respect of the Respondent’s first motion dated July 17, 2017, the affidavit of service dated July 25, 2017 was sworn by one Paul K Mwanja. He swore at paragraphs 1 and 3 therein that;-
- “ 1. I received copies of notice of motion dated July 17, 2017 and coming up for hearing on July 27, 2017 from the firm of J T Nzioki & Company Advocates with instruction with instructions to serve the same upon the two defendants’ herein.
 3. That on the same day I proceeded to Industrial area Athiriver Road off Addis Ababa Road at Any Mech Engineering Limited where the 2nd Defendant herein is a director and on arrival I found the said Defendant who is well known to me and whom I introduced myself to and purpose of visit and served him the said copies which he acknowledged service but declined to sign my copy claiming that he will forward the same to his advocates, time of service was 11.00 a.m.” (sic)
19. In respect of the Respondent’s second motion dated August 17, 2017, the same process server, Paul K Mwanja swore an affidavit of service dated September 20, 2017. Similarly, he deposed at paragraph 1 and 3 therein that;-
- “ 1. I received copies of notices of motion dated August 17, 2017 and coming up for hearing notice for September 25, 2017 from the firm of J T Nzioki & Company Advocates with instruction with instructions to serve the same upon the two defendants’ herein.
 3. That on the same day I proceeded to Industrial Area Athiriver Road off Addis Ababa Road at Any Mech Engineering Limited company. Where the 2nd Defendant herein is a director and on arrival I found the said Defendant who is well known to me and whom I introduced myself to and purpose of visit and served him the said copies which he acknowledged service but declined to



sign my copy claiming that he will forward the same to his advocates, time of service was 3.45pm.” (sic)

20. The procedure of effecting service of summons is provided in Order 5 Rule 8 of the *Civil Procedure Rules* (CPR) and the contents of the affidavit of service stipulated in Order 5 Rule 15 of the *Civil Procedure Rules* (CPR). These provisions apply mutatis mutandis to service of other court processes. See Order 48 Rule 2 of the *Civil Procedure Rules* (CPR). Order 5 Rule 8 of the (CPR) provides that:-

- “ 1 Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
- 2 A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.”

21. Order 5 Rule 15 of the same rules provides that:-

- 1 The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.
- 2 Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month’s imprisonment or both. (Emphasis Added)

22. The Appellant’s argument is that the orders issued on September 26, 2017 were irregular and unlawful, as he was not served with any court processes relating to the suit, the motions, or the initial interim orders of July 27, 17. The Respondent takes a contrary view. This court having reviewed the material on record is not persuaded that there was proper service of the motion dated July 17, 2017.

23. For reasons firstly, that the first affidavit of service in respect of the motion dated July 17, 2017 did not have annexed to it the hearing notice served on the Appellant in that regard. All that was annexed thereto was a copy of the certificate of urgency accompanying the motion and not the motion itself. Thus, it is difficult to tell whether the motion purportedly served on the Appellant bore the hearing date on its face. Moreover, there is no dispute that Appellant was not served with the first order made in respect of the motion dated July 17, 2017. However, to the affidavit of service in respect of the motion dated July 27, 2017, only the hearing notice was attached. Surprisingly, in both affidavits of service which appear similar, the deponent at paragraph 1 did not indicate the date when he received the two motions for service upon the Appellant.

24. Equally, it is undisputed that the Appellant had not been served with the plaint and summons to enter appearance as of September 2017 although the suit was filed in July 2017. The service of the plaint and summons to enter appearance represents a critical step in giving notice to a defendant. In that regard, the Court of Appeal stated in *Giro Commercial Bank Ltd v Ali Swaleh Mwangula* [2016] eKLR that: -

“Summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to, first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle



that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence. Entry of appearance by a party therefore signifies the party's intention to defend. Under order 10 Rules 4, 5, 6 & 7, where a party fails to enter appearance after being served with summons, an interlocutory judgment may be entered against the party, provided the claim is for pecuniary damages or for detention of goods. In all other instances, where there is default of appearance, the plaintiff, is under Order 10 Rule 9 required to set the suit down for hearing by formal proof of the plaintiff's claim."

See also *Gemstaviv Limited v Kamakei Ole Karia & 5 others* [2015] eKLR.

25. The lower court in satisfying itself on the adequacy of notice given ought to have given due attention to the contents of the two affidavits of service and relevant surrounding circumstances. It appears that the lower court made a cursory examination of the initial affidavit of service and therefore failed to note the anomalies therein. While it is true that the Appellant did not call the process server in the lower court for cross-examination in canvassing his motion to set aside the orders against him, in dealing with the subsequent motion by the Appellant for setting aside, the lower court ought to have carefully scrutinized all the material before it purporting service upon the Appellant. Indeed, the glaring anomalies relating to alleged service in respect of the first motion and orders therein ought to have created doubt in the court's mind concerning the asserted service of the second motion. The Appellant's complaints in this regard are not idle.
26. Equally valid is the Appellant's complaint concerning the trial court's failure to address his prayer for leave to file defence. The trial court did not address the matter, yet no judgment had been entered against the Appellant at the time the Appellant's motion was heard. A draft statement of defence was filed alongside the said Appellant's motion for setting aside. The Respondent argued before the lower court and on this appeal that the draft defence does not raise any triable issue. The dispute herein relates to the ownership of the vehicle registration number KBJ 665X claimed by the Respondent in his suit. The draft statement of defence by the Appellant challenges the asserted ownership of the motor vehicle in question by the Respondent, the Appellant averring at paragraph 6 that:-
- “6. In response to paragraph 5 and 6, the Defendant vehemently denies the contents of the said paragraphs of the Plaintiff he is a stranger to the averments therein and puts the Plaintiff to strict proof. He bought the said motor vehicle through a lawful process at a public auction.”
27. The draft defence appears to raise at least one key triable issue. The Court of Appeal in *Daniel Lago Okomo v Safari Park Hotel Ltd & Another* [2017] eKLR in defining a “triable issue” cited its decision in *Kenya Trade Combine Ltd v Shah*, Civil Appeal No 193 of 1999, where it stated:
- “In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”
28. In conclusion therefore, this court finds that the trial court erred in the exercise of its discretion when it failed to consider all the pertinent questions on the asserted service upon the Appellant and the Appellant's prayer for leave to file a defence. The orders obtained by the Respondent, especially in respect of the first and principal motion before the lower court were irregular for want of service. This appeal must therefore be allowed.
29. The ruling of the lower court is hereby set aside and the court substitutes therefor an order allowing the Appellant's motion in the lower court dated October 02, 2017 in terms that the orders emanating



from the two motions in the lower court dated July 17, 2017 and July 27, 2017 are hereby set aside, and leave granted to the Appellant to file his response thereto, as well as his defence, within 21 days from the date when the lower court file is received in that court.

30. The two motions dated July 17, 2017 and July 27, 2017 are to be heard *denovo* and *inter partes* before a magistrate other than Ocharo, SRM and the Deputy Registrar of this court shall facilitate the expeditious return of the lower court file for this purpose. This court further directs that until the two motions are heard and determined, the current *status quo* obtaining in respect of motor vehicle registration number KBJ 665X shall be maintained, that is, the motor vehicle shall remain at Leakey's Garage at the Respondent's cost. The costs of the appeal are awarded to the Appellant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF FEBRUARY 2023

C MEOLI

JUDGE

In the presence of:

Ms Kangara h/b for Mr Kibet for the Appellant

Respondent: N/A

C/A: Carol

