



REPUBLIC OF KENYA



KENYA LAW
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**Kitale Hauliers v Maruti & 2 others (Civil Appeal 98 of 2019)
[2023] KEHC 2114 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 98 OF 2019
GMA DULU, J
MARCH 21, 2023**

BETWEEN

KITALE HAULIERS APPELLANT

AND

EVANS SIMIYU MARUTI 1ST RESPONDENT

PETER MICHUKI 2ND RESPONDENT

SHARRIF FATIYA 3RD RESPONDENT

(Originating from a judgment delivered in Makindu PMCC 184 of 2016 on January 4, 2018)

JUDGMENT

1. In a judgment delivered in Makindu PMCC 184 of 2016 on January 4, 2018 in a case wherein the plaintiff was Evans Simiyu Maruti and defendants were Peter Michuki and Sharrif Fatiya the learned Magistrate entered judgment in favour of the 1st respondent herein (who was plaintiff) against Peter Michuki and Sharrif Fatiya. Because Peter Michuki had filed an application to join a third party, Kitale Hauliers, the judgment was also entered against the third party. Liability was assessed by the trial court to be 80:20 in favour of the plaintiff Evans Simiyu Maruti herein who was a turn boy in a goods carrying trailer.
2. In the judgment, in particular, the trial court concluded as follows:-
‘In the upshot I will enter judgment in favour of the plaintiff against the defendant and third party as follows:
 - (a) General damages and loss of amenities Kshs 2,500,000/=
 - (b) Special damages Kshs 15,100/=
 - (c) Loss of earning capacity Kshs 2,376,000/=



(d) Future medical expenses Kshs 1,500,000/=

TOTAL Kshs 6,391,100/=

Costs and interest of suit.

3. Subsequent to the entry of the above judgment, the third party Kitale Hauliers filed a notice of motion dated April 29, 2019 to which the trial court delivered a ruling on December 11, 2019 in which the trial court concluded that the third party (Kitale Hauliers) was properly served with the third party notice before the case was heard and judgment delivered. Aggrieved by the ruling, Kitale Hauliers has now come to this court on appeal through Counsel AA Mazrui & Company on the following grounds:-
1. That the learned Magistrate erred in law and fact in holding that there was proper service upon the appellant of the third party notice.
 2. The learned Magistrate erred in law and fact in holding that the respondent had a choice between personal service upon the officials of the appellant and registered post.
 3. The learned Magistrate erred in law and fact in failing to set aside interlocutory judgment despite the same being irregular by virtue of the nature of service.
 4. The learned Magistrate erred in law and fact in holding the return of service with respect to the third party notice amounted to sufficient service.
 5. The learned Magistrate erred in law and fact by failing to consider draft defence included in the appellant's notice of motion application.
 6. The learned Magistrate erred in law and fact by failing to consider whether the draft defence raised triable issues.
 7. The learned Magistrate erred in law and fact in failing to exercise his discretion judiciously by denying the appellant a chance to be heard before a court of law.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by AA Mazrui & Company Advocates for the appellant and submissions filed by Arati & Company for the 1st respondent. This being a first appeal, I am required to review and analyze the evidence on record and come to my own conclusions. See *Selle Versus Associated Motor Boat Company Ltd & Others* (1968) EA 123. This appeal hinges on two main issues firstly service of third party notice and secondly whether the defence of the appellant should have been given a chance to be considered by the trial court. The 1st respondent has also raised an issue of the dismissed application being defective.
5. I will start with the issue of a defective application. The alleged defect in the application is that the appellant attempted to enjoin Eshikhoni Auctioneers as a defendant and omitted the 1st and 2nd respondent Peter Michuki and Sharrif Fatiya as parties in the application. I note that in the ruling delivered on December 11, 2019 by the Magistrate's court, which is the subject of the present appeal, the main issues were whether an *ex parte* judgment should be set aside and the adequacy of service. The parties involved in the application and ruling were Evans Simiyu Maruti as plaintiff/respondent and Kitale Hauliers and Eshikhoni Auctioneers as 1st and 2nd defendants/applicants.
6. In my view, the allegation of a defective application has no merit and is for dismissal. The first reason is that the persons who are said not to have been joined as parties have not complained. In any case, there is no evidence that any parties will suffer or are likely to suffer prejudice by such non-joinder of



- Peter Michuki and Shariff Fatiya. As for Eshikoni Auctioneers, they have also not complained in this appeal about their joinder as parties.
7. Secondly, the provisions of article 159(2)(d) of the Constitution are clear that courts are called upon to administer substantive justice and not unduly determine matters before them on technicalities. I thus hold that the dismissed application was not defective. In any case a court has discretion to join or decline to join any party to proceedings. In doing so, the court is not bound to go by the request of the applicant.
 8. I now turn to the main issue, that is whether the appellant Kitale Hauliers were properly served with the third party notice. It is not in dispute that Kitale Hauliers is a corporate entity. It is described in documents filed as Kitale Hauliers Limited. As correctly submitted by Counsel on both sides, service of court process on such corporate entities is governed by order 5 rule 3 of the Civil Procedure Rules which states as follows:-
 - (3) Subject to any other written law, where the suit is against a corporation the summons may be served:-
 - (a) On the Secretary, Director or other Principal Officer of the Corporation; or
 - (b) If the process server is unable to find any of the officers of the corporation mentioned in rule 3(a) –
 - (c) By leaving it at the registered office of the corporation;
 - (d) By sending it by prepaid registered post or by licenced courier service provider approved by the court to the registered postal address of the corporation.
 - (e) If there is no registered office and no registered postal address of the corporation by leaving it at the place where the corporation carried on business; or
 - (f) By sending it by registered post to the last known postal address of the corporation.
 9. In my view, the third party notice herein is in the form of summons to be served on a party sought to be joined as a third party.
 10. I note that in opposing the appeal herein, the 1st respondent's Counsel has relied on information received by him that the Kitale Hauliers were served by registered post, and maintained that such service was legally sufficient. In my view, from the facts disclosed before me, the appellant Kitale Hauliers was not properly and sufficiently served with the third party notice.
 11. It is clear to me that postal service under the rules above is an alternative mode of service and the first mode of service which is physical service has to be attempted first before service by registered post can be resorted to. The process server herein in my view, should have first resorted to physical service, as there is no indication anywhere that the registered offices of Kitale Hauliers were unknown. If the process server went to the said offices and was not able to find any of the designated officers, he should have either left the process (third party notice) at the same registered office of the corporation, or come to the court for appropriate orders before either effecting service by prepaid registered post or by licenced courier service provider.
 12. That legal process not having been complied with, I find that the service of the third party notice on Kitale Hauliers herein in this matter, was not proper and legally sufficient. In holding so, I am guided by the reasoning in the case of Agigreen Consulting Corporation Ltd v National Irrigation Board [2020] eKLR wherein the court stated as follows:-



‘From the aforementioned provisions, the summons must in the first instance, be served on the Secretary, Director or other principal officer of the corporation before resorting to other modes of service.....it must be recalled that default judgment is entered on the basis of an affidavit of service which must on its face show that service has been effected in accordance with the applicable rules.’

13. I thus find that, there was no proper and effective service of the third party notice which would justify entry of interlocutory judgment against the appellant herein Kitale Hauliers.
14. The next issue is whether the ruling of the learned Magistrate should be set aside. In my view from the finding and decisions of this court above, the ruling of the learned Magistrate dismissing the application of Kitale Hauliers cannot stand and is for setting aside. Consequently, I set aside the ruling of the Magistrate delivered on December 11, 2019 dismissing the application of the appellant dated April 29, 2019.
15. In line with the prayers in that application, I order as follows:-
 - i. The interlocutory judgment entered by the trial magistrate against Kitale Hauliers be and is hereby set aside together with all consequential orders thereto.
 - ii. The appellant Kitale Hauliers is granted liberty to file its defence in the matter to the third party notice within 21 days from today.
 - iii. The Kitale Hauliers is granted the costs of the appeal.
 - iv. For clarity, judgment entered against any party by the trial court other than Kitale Hauliers herein, still stands.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF MARCH, 2023.

HON. GEORGE DULU

JUDGE

Nusura – Court Assistant

Mr. Salim for appellant

Mr. Arati for respondent

