S.S Mehta & Sons Limited v Gachira & another (Civil Appeal 46 of 2022) [2023] KEHC 2160 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2160 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 46 OF 2022

FR OLEL, J

MARCH 23, 2023

BETWEEN

S.S MEHTA & SONS LIMITED ..... APPELLANT

AND

FRANCIS MURAYA GACHIRA ..... 1ST RESPONDENT

PATRICK MWANGI KURIA ..... 2ND RESPONDENT

(An Appeal against the ruling dated 8th June 2022 delivered by Hon. Daffine Nyaboke Sure Senior Principal Magistrate on the application dated 13th April 2022 in Engineer SPMCC No.E046 of 2021 Francis Muraya Gachira versus S.S Mehta and Sons Company Ltd)

JUDGMENT

Introduction

1. This appeal arises from the Ruling and order dated June 8, 2022 delivered by Hon Daffine Nyaboka Sure where she dismissed the appellant's application to set aside expert judgement dated February 2, 2022. Prior to the said application, the 1st Respondent had filed a claim for damages arising from a Road traffic accident which occurred on November 9, 2020.

2. The defendant having 'been served' did not enter appearance nor did they file any defence. The Respondent requested for interlocutory judgment which was entered against the defendant on September 6, 2021. The matter proceeded for formal proof of damages on January 12, 2022 and judgment delivered on February 2, 2022. It is this judgment which the appellant sought to set aside and the trial magistrate refused vide her considered ruling dated June 8, 2022 that has given rise to this appeal.

3. The appellant filed their memorandum of appeal on June 9, 2022 raising the following grounds.

a. That the learned trial magistrate erred in law and in fact by finding that the appellant had been effectively served with summons to enter appearance in the suit.

b. That the learned trial magistrate erred in law and in fact by failing to give due regard to the evidence produced by the appellant in its supporting affidavit.

c. That the learned trial magistrate erred in law and in fact by finding that service of summons on a stranger to the appellant was acceptable.

d. That the learned trial magistrate erred in law and in fact by dismissing the content of CR12 search citing it to be a document not privy to the process server yet anyone can conduct a CR12 search. The magistrate thereby endorsed the process server's failure to conduct the most basic of due diligence in relation to a company.

e. That the learned trial magistrate erred in law and in fact by finding that the appellants draft defence was mere denial yet paragraph 6 thereof attributed particulars of negligence against the Respondent.

f. That the learned trial magistrate erred in law and in fact by finding that the appellant intentionally failed to enter appearance and defence the suit.

g. That the learned trial magistrate erred in law and in fact by intimating she would not have changed her award on quantum should the appellant had been allowed to defend the suit.

Appellant's Submissions

4. The appellant submitted that the magistrate court erred in finding that the appellant was properly served. That pursuant to provision of order 5 Rule 3 of the *civil procedure rules*, it was necessary to serve the secretary, director or other principal officers of the corporation. The appellant stated that the person allegedly served one Timmy Lylod was a person unknown to them and was not amongst the directors of the company. This averment was supported by the CR 12 which clearly shows that the person served was not one of the directors or company secretary of the said company and thus service was improper.

5. The appellant further submitted that the judgment entered was irregular since proper service was not properly affected. They relied on the case of *James Kanyiita Nderitu and another versus Marios Philotes Ghikas and another* (2016) eKLR where the court of appeal upheld a decision of the high court to set aside an *ex parte* judgment on the basis that service was not properly effected. The same issue was also discussed in *Gulf Fabricators verses county government of Siaya* (2020)eKLR.

6. The third issue raised by the appellant is that they did annex their draft defence which according to them indeed raised triable issues, but unfortunately the trial magistrate failed to consider the same and even went further ahead in the said ruling to state that even if judgment was set aside, she would still have seen no reason to vary terms of the said judgment. The appellant submitted that the annexed defence contained triable issues which a trial court should be able to address especially on liability. The appellant relied on the case of *Tree shade Motors Ltd versus DT Dobie and Company (K) Limited and another* (1998) eKLR.

7. They further submitted that by dismissing the said application the appellant was locked out from adduce any evidence with regard to liability and this violated the appellants right of 'not being condemned unheard'. It also violated provision of *fair administrative Action Act*, in particular Section 3(b) thereof which provides that a person ought to be heard and be allowed to make representation in that regard.

8. Finally the appellant stated that they had not intentionally failed to defend the suit and/or intended to obstruct and delay dispensation of the same and thus it would not be prejudiced to the Respondent if the orders sought were allowed as they had already deposited the decretal sum in court as ordered by the trial court. They prayed that this appeal be allowed.

Respondents Submissions

9. The Respondents filed their submission on 18/12/22 opposing this appeal. They stated that the appellants were properly served and the affidavit of service dated July 26, 2021 sworn by George Rasugu a licensed process server was filed to prove service. The appellant did not cross examine the said process server on the content of his Affidavit and that was a clear demonstration that they were served with the pleadings. Further the Respondent stated that the appellant were served with a mention notice for purposes of taking a hearing date and this fact was acknowledged by the trial court which went ahead and fixed a hearing date for formal proof. Having been served with summons to enter appearance and mention notice, the appellant was negligent and indolent thus did not deserve sympathy.

10. Upon being served with the proclamation the appellant woke up from his slumber and had come to equity with unclean hands and thus undeserving in equity. The court should thus not be powerless to refuse to grant relief's sought when the end of justice and equity so demand. They relied on a citation by Lord Cairas in Rogor versus Comptoir D' Escopmts Dc Paris Where he stated that "one of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors."

11. The Respondent while relying on Shah versus Mbogo and Ongom versus Owota further submitted that the appellant needed to show that either they were not properly served with summons or that the defendant failed to appear at the hearing due to sufficient cause. They stated that sufficient cause are circumstances for which the appellant could not be blamed for his absence. They submitted that the appellant has not shown sufficient cause or advance any cogent or sufficient reason explaining the delay thereof and thus should not be accommodated. They relied on *Gideon Mose Onchwati versus Kenya Oil co Ltd and another* Nairobi HCC No 140/2008 and *Shailesh Patel T/A Energy Company of Africa versus Kessels Engineering Works Put Ltd and 2 others* (2015)eKLR which held that the default judgment against the defendant was regular and proper.

12. The Respondent finally submitted that they will be greatly prejudiced if the orders sought are granted as justice delayed is justice denied. They prayed that the appeal be dismissed with costs.

Analysis and Determination

13. The only issue in this appeal is whether the trial court ought to have set aside the *exparte* judgement or not and I will merge all the grounds of appeal and analyse them jointly.

14. I have considered the application as filed, the supporting affidavit and submission filed both before parties at the trial court and those filed in this appeal and will consider the whole matter to fresh scrutiny and arrive at my own conclusions.

15. As held in *Selle and another versus Associated Motor Boat Co Ltd and others* (1968) EA 123 where it was held that;

> "I accept counsel for the Respondent, preposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from and enabled by the high court is by way of retrial and the principles upon which this court acts in such in appeal are well settled. Briefly puts they are that this court must reconsider the evidence, evaluate it, itself and draw its own conclusion though it should already bear in mind that

it has neither seen nor heard the witnesses and should make dire allowances in this respect. In particular, this court is not bound necessarily to follow the trial judge's finding of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances of probabilities materially to estimate the evidence or if the impression based on the demean or of a witness is consistent with the evidence in the case generally (*Abdul Hemmed Self versus Ali Mohammed Sholan* 1955, 22 EACA 270).

16. Also it was held by the court of Appeal in *Ephantus Mwangi & Another Vs Duncan Mwangi* Civil Appeal No 77 of 1982 (1982-1988) 1KAR 278 that;

> " A member of the appellant court is not bound to accept the learned judge's finding of fact if it appears either that(a) he has clearly failed to consider some point to take account of particular circumstance's or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

17. The courts are guided by the provisions of Article 159(2)(d) of the *Constitution* and Section 1A and 1B of the *Civil Procedure Act* in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases. Order 10, of the *Civil Procedure Rules*, 2010, addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. Order 10, rule 9 gives the Plaintiff the leeway to set down a suit for hearing where no appearance is entered for other suits not provided for by this Order. Order 10, rule 10 provides that in cases where a defendant has failed to file a defence, rules 4 to 9 shall apply with any necessary modification. While Rule 11 empowers the court to set a side or vary a judgment that has been entered under Order 10.

18. Courts have the discretionary power to set aside ex parte judgment with the main aim being that justice should prevail. The Courts are not required to consider the merits of a defence in an application of this nature, but only to see as to whether the applicant's defence raises triable issues. In *Patel v EA. Handling Services Ltd* (1974) EZ 75 and *Tree Shade Motor Ltd v DT Dobie Co Ltd* CA 38 of 1998 and *Maina v Muriuki* (1984) KLR 407 the courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error. In the case *Mohamed & Another v Shoka* (1990) KLR 463 the Court set out the tenets a court should consider in entering interlocutory judgment to include:

    i) Whether there is a regular judgment;

    ii) Whether there is a defence on merit;

    iii) Whether there is a reasonable explanation for any delay;

    iv) Whether there would be any prejudice.

19. The issue of regular judgment was addressed in the case *Mwala v Kenya Bureau of Standards* EA LR (2001) 1 EA 148, where the court stated;

> " to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance

or defence on record but the same was in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but *ex debito* justice for a court should never countenance an irregular judgment on its record."

20. In the case of, *Kimani v MC Conmell* (1966) EA 545, the Court held that where a regular judgment has been entered the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues. Further in *Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal* (2014) e KLR, the Court stated that the purpose of clothing the court with discretion to set aside ex-parte judgment is:

> " To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice..."

21. In the case of *Patel v EA Cargo Handling Services Ltd* (1974) EA, the Court stated that the main concern of the court is to do justice to the parties, and it will not impose conditions on itself to fetter the wide discretion given to it by the Rules.

Whether there is a regular judgment

22. Order 5 rule 3 of the *civil procedure Rules* provides that;

> 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 officer's of the corporation mentioned in 3{a}
>
> i. By leaving it at the registered office of the corporation
>
> ii. By sending it by prepaid registered post or by a licenced courier service provider approved by the court to the registered postal address of the corporation; or
>
> iii. If there are no registered office and no physical address of the corporation, by leaving it at the place where the corporation carries on business; or
>
> iv. By sending it by registered post to the last known postal address of the corporation.

23. The respondent did send a process server one Mr George Rasugu who deponed in his affidavit of service that on July 21, 2021 he travelled to Nairobi and went to the appellant's office along road C off Enterprise road, industrial area, where he met one of their director's Timmy Lloyd, he explained the purpose of the visit and the said Timmy Lloyd said he was aware of the accident and called the 1st Defendant in the primary suit. He further deponed that the said Timmy Lloyd did sign the summons, while Patrick declined to sign, which summons he duly returned to court as served and filed his affidavit of service dated July 26, 2021. On the basis of this affidavit interlocutory judgment was entered as against the defendants on September 6, 2021 and the matter proceeded for hearing and final judgment entered on February 2, 2022.

24. The appellant did file their application to set aside experte judgement, where they denied being served and stated that they do not know the said Timmy Lloyd and he was a stranger to the 2nd defendant. Secondly as a matter of practise the company would stamp the documents acknowledging receipt, which was not done in this instance and finally that as per provisions of order 5 rule 3 of the civil

procedure rules, it was incumbent upon the respondent to serve the company secretary or a director of the company. Evidently the said Timmy Lloyd was not a director and thus service was irregular and ought to be set aside exdibito justice. The appellant also filed CR 12 form to indeed show that Timmy Lloyd was not a director of the said company.

25. Having analysed the evidence as presented, it is clear that the said Timmy Lloyd is not a director of the appellant company nor is he the company secretary of the said company and thus the said service cannot be deemed to be regular. As stated in the case of *James Kanyiita Nderitu & Ano Vs Marios Philotas Ghikas & Ano* (2016) eKLR;

> "In an irregular judgment, on the other hand judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside exdibito justicea, as a matter of right. The court does not even have to be moved by party once it comes to his notice that the judgment is irregular, it can set aside the default judgment on its own motion.in addition, the court will not venture into consideration of whether the intended defence raises a triable issue, or whether there has been an inordinate delay in applying to set aside the irregular judgment. The reason why such a judgment is set aside as of right, and not a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegation against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.(see *onyango oloo vs Attorney General* (1986-1989) EA 456, The supreme court of india also forcefully underline the importance of the right to be heard as follows in *Sangram Singh V Election Tribunal Kotch AIR* 1955 SC664.
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> "There must be never present to the mind the fact that owners of procedure are grounded on a principal of natural justice which requires that men should not be condemned unheard, that decision should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not precluded from participating in them."

26. This position was confirmed in *Kabutha V Mucheru* HCC No 82 of 2022 Nakuru (Musinga J) (as he was then) had expressed the principal thus

> "(with) respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an exparte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process."

27. Perhaps the said Timmy Lloyd is an employee of the appellant or not, but the simple fact remains that it has been sufficiently proved that he is not the company secretary and/or director of the appellant company and having so established, it follows that service effected was not proper as envisaged under provisions of Order 5 rule 3 of the *Civil procedure rules*. The interlocutory judgment entered was irregular and so were the subsequent proceedings. The same has to be set aside exdibito justicea. Having so found, it is therefore not necessary to consider the other limbs of whether there is a good defence which raises triable issues, reasonable explanation for delay and whether the respondent will be prejudiced.

28. The other matter to consider is if setting aside should be done on terms. There is no doubt that the appellants were served with a mention notice on September 16, 2021 by the said George Rasugu and this subsequent service is not disputed. This however does not affect the courts finding on the issue of primary service which was used to enter interlocutory judgment. Even after this proper service of the mention notice, the appellant did not enter appearance and subsequently judgment was entered on February 2, 2022. The respondent had to pay further court fee of Ksh 47,480/= to enable them get warrants of execution. It is obvious they will be prejudiced to that extent and also by having to prosecute the primary suit again.

29. In the case of *Rayat Trading Co Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR the Court held that:

> " If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant's costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim."
>
> In deciding whether to impose such a condition, the court will consider factors such as whether there was any delay in applying to set aside, doubts about the strength of the defence on the merits, and conduct of the defendant indicating a risk of dissipation of assets see, *Creasey v Breachwood Motors Ltd* [1993] BCLC 480). As to the amount, this is in the court's discretion, which should be exercised by applying the overriding objective. However, a condition requiring payment into Court of a sum that the defendant will find impossible to pay ought not to be ordered, as that would be tantamount to refusing to set aside see, MV Yorke Motors v Edwards [1982] 1 WLR 444 and *Training in Compliance Ltd v Dewse* (2000) LTL 2/10/2000).

30. In the instant case, there is no dispute that the Applicants were properly served with the mention notice on September 16, 2022, when their human resource manager, one John signed in acknowledgment. The appellants did not enter appearance until after judgment was delivered on February 2, 2022, and they filed their application to set aside judgment on April 20, 2022. This period from when judgment was entered and filing of the said application is about two months. The respondent has incurred cost to execute and defend its judgment in the lower court and in this appeal and thus it will be only be just and fair to penalize the appellant to pay all costs attendant to the said execution.

Conclusion

1. For the reasons stated above I do therefore find that this appeal is merited. The interlocutory judgment and all subsequent proceedings in Engineer CMCC NO E48 OF 2021 is set aside *exdibito justicea*.

2. The appellant is grant leave to file its statement of defence within 14 days from the date of this judgment.

3. The appellant to pay the respondent all execution costs, which include further court fee, auctioneers costs and costs of defending the application in the lower court assessed at 25,000/= within 30 days from the date of this judgment failure of which the respondent will be at liberty to execute for the same.

4. Engineer CMCC E048 of 2021 to proceed afresh before a different magistrate with jurisdiction to handle the same.

5. Each party to bear their costs in this Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF MARCH 2023.

FRANCIS RAYOLA

JUDGE

In the presence of;

Kimechil for Appellant

Mr. Mugo for Respondent