



REPUBLIC OF KENYA



**Mombasa Maize Millers Limited & another v Kanyingi (Civil Appeal
751 of 2019) [2023] KEHC 21126 (KLR) (Civ) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 21126 (KLR)

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

CIVIL

CIVIL APPEAL 751 OF 2019

DO CHEPKWONY, J

MAY 3, 2023

BETWEEN

MOMBASA MAIZE MILLERS LIMITED 1ST APPELLANT

BONIFACE MBALUKE MUTUNE 2ND APPELLANT

AND

JOSEPH MUGO KANYINGI RESPONDENT

*(Being an Appeal arising from the Ruling and Order of Hon. D. O. Meja
in Milimani CMCC no.8804 of 2017 delivered on 17th December, 2019)*

JUDGMENT

1. The respondent instituted a suit before the trial court by way of a plaint dated November 17, 2017, against the appellants which was heard *ex-parte* and judgment delivered on September 27, 2019 in favour of the respondent for ksh 1,300,000/= as general damages for pain and suffering and an award of special damages of ksh 3,550/=.
2. Being aggrieved by the Judgment, the appellants filed a notice of motion application dated November 7, 2019 seeking among other prayers, to set aside the *ex-parte* judgment together with all consequential orders and the appellants be granted leave to file defence within reasonable time from the date of leave sought.
3. The application was supported by the grounds on its face and supported by the affidavit of Oliver Shango, which will be considered in the main judgment.
4. In response to the application, the respondent filed a replying affidavit by Joseph Mugo Kanyingi sworn on December 5, 2019.



5. Upon the hearing and consideration of the application, the trial court delivered its ruling on December 17, 2019 dismissing the application with costs.

Appeal

6. It is that ruling which the Appellants now seek to challenge before this court. In their appeal dated December 19, 2019, the appellants have proffered several grounds of appeal as follows:-
 - a. That the learned trial magistrate erred in law and in fact by failing to take into consideration the grounds cited in the notice of motion dated November 7, 2019, the dispositions made in the supporting affidavit and the appellants' submissions.
 - b. That the learned trial magistrate erred in law and in fact by refusing to set aside the *ex-parte* judgment when the appellants had demonstrated beyond peradventure that the respondent did not serve the appellants with the summons to enter appearance.
 - c. That in refusing to set aside the *ex-parte* judgment, the learned trial magistrate failed to appreciate the principles governing the exercise of judicial discretion in setting aside the *ex-parte* judgment.
 - d. That the learned trial magistrate erred in law and in fact by holding that the appellants had not attached a draft defence to the notice of motion contrary to the documents filed in court.
 - e. That the learned trial magistrate erred in law and fact by refusing to set aside the *ex-parte* judgment without considering the appellant's right to be heard as enshrined in the [Constitution](#).
 - f. That the learned trial magistrate erred in law and in fact by failing to direct his mind properly on the principles governing the setting aside of *ex-parte* Judgments and as a result arrived at a wrong decision in law.
7. The appellants are seeking the following reliefs from this court:-
 - a. That the appellants' appeal be allowed and the order disposing the appellants' notice of motion dated November 7, 2019, be set aside and substituted with an order allowing the Notice of Motion.
 - b. That an order be issued that the hearing and determination in Milimani Chief Magistrate's Court Case no 8804 of 2017 be heard and determined by any Judicial Officer other than Hon D O Mbeja.
 - c. That costs of this appeal be awarded to the Appellants.
8. The appeal was prosecuted by way of written submissions. The appellants' submissions are dated March 20, 2022 whereas those of the respondent are dated April 26, 2022.
9. I have read through the grounds of appeal, the submissions in support and in opposition alongside the authorities relied upon which I find will be considered in the final analysis and determination of the suit herein.

Analysis and Determination

10. As a first appeal, this court has a duty to re-evaluate, analyse the evidence that was adduced before the trial court so as to arrive at its own independent decision, while bearing in mind that it did not see, hear or witness the witnesses testify before the trial court.



11. I have carefully considered the grounds of appeal and the submissions filed by both parties and find the primary issue emerging for determination being whether the trial court erred in refusing to set aside the *ex-parte* Judgment delivered on April 12, 2019.
12. To determine this issue, this court seeks refuge in the provision under article 50(1) of the Constitution which provides for the right to fair hearing, which is a fundamental right which every litigant who comes before court is entitled to. It provides as follow:-

“ 50[1] Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
13. This court is alive to the trite law that the jurisdiction of a court in either allowing or rejecting an application to set aside its decision is discretionary but which must be exercised judiciously based on the material placed before it. On discretion, the Court of Appeal of East Africa in the case of *Shah v Mbogo & another* [1967] EA 116, held that:-

“This discretion to set aside *ex-parte* proceedings or decision 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. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit”.
14. The principles were further elaborated in the case of *Patriotic Guards Ltd v James Kipchirchir Sambu*, Nairobi CA no 20 of 2016, [2018]KLR, where the court stated that:-

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously.... Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do read and substantial justice to the parties in the suit”.
15. It is also important to note that an appellate court will not necessarily interfere with a decision of a trial Court unless it is demonstrated that such a finding or decision is founded on wrong principles or wrong interpretation of the law because in making or arriving at any decision, it is believed a court does so in exercise of its inherent jurisdiction as provided for under section 34 of the Civil Procedure Rules (See *Ephantus Mwangi & another v Duncan Mwangi Wambugu* [1982-1988] 1KAR).
16. Upon perusal of the record of appeal and the submissions, this court finds that there are two main questions which it needs to answer in determination of this matter. The issue of; (a) whether the appellants were served with summons to enter appearance; and (b) whether the trial court failed to consider the annexed draft defence to the application.
17. In regard to the question of service, there is an affidavit disguised as a supporting affidavit by Richard Wachira dated March 18, 2019. He deposed that he received copies of Summons date February 13, 2019 from the respondent’s advocates and proceeded to the 1st appellant’s offices at Industrial area, Lunga Lunga along Nanyuki road to effect service. He went on to state that he met a man who



identified himself as the Human Resource Manager and that he was authorised to receive the said summons, and though service of Summons was acknowledged, he refused to sign on the service copy. This argument was denied by the appellants who urged that the 1st appellant's offices are located at Runyenjes road, off Nanyuki road and not Lunga Lunga along Nanyuki road as stated by the respondent.

18. I have read through the affidavit and indeed find the averments therein are questionable and really required cross-examination by the deponent. The deponent avers that service was acknowledged by the Human Resource Manager who refused to stamp on the service copy and also failed to disclose his identity. Further, the location of the office where the process server alleged to have served the summons is disputed by the appellants.
19. The question then becomes, it is possible that the appellants could have been served with the summons to enter appearance and just decide to ignore the same? In this court's considered view, and based on the contents of the affidavit, there was no proper service effected on the appellants.
20. The appellants contended that the learned trial magistrate erred in holding that the appellants had not annexed a copy of draft defence in their application for setting aside yet the same was on record. In the case of *Tree Shade Motors Limited v D T Dobie & Company (K) Limited & another* [1998] eKLR, the Court of Appeal held as follows:-

“The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff's claim. Where a draft defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does, the defendant should be given leave to enter and defend”.
21. Having perused the record and this court notes that there is a draft statement of defence marked as annexure “OS-5” on the supporting affidavit to the application. In his ruling he states as follows:-

“The applicants have not annexed to the application before court a draft defence that raises triable issues”.
22. In considering an application to set aside an *ex-parte* Judgment, the court is obliged to consider inter alia the statement of defence by the Applicants to establish if it raises any triable issues to warrant the setting aside. In the instant appeal, the trial Magistrate could not have been able to determine if the defence raises any triable issues if he did not see it yet it is on record. This Court is of the view that he could have arrived at a different outcome had he seen the draft defence.
23. Having considered this appeal, the Court finds that at least the Appellants ought to have been given an opportunity to defend this claim. The trial Court failed to consider the draft statement of defence the Appellants attached to the application. Secondly, the trial Court ought to have given the Appellants an opportunity to cross-examine the Process Server on the contents of his affidavit. For that reason, the Court is persuaded that this appeal is merited.
24. Accordingly, the appeal be and is hereby allowed in the following terms:-
 - a. The order disposing the Notice of Motion application dated 7th November, 2019 be and is hereby set aside and substituted with an order allowing the same.
 - b. The matter be and is hereby remitted back to the CM's Court for hearing and determination by another Magistrate of competent jurisdiction.



- c. Mention on 31st May, 2023 before CM's Milimani Court for directions/reallocation of the case before another Magistrate of competent jurisdiction.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3RD DAY OF MAY , 2023.

D. O. CHEPKWONY

JUDGE

